INTRODUCTION

The Treaty establishing a European Constitution (respectively, “the Treaty” and “the European Constitution” or “the Constitution”) has been the subject of considerable discussion, at an academic level, by politicians and in the media, both while it was being drafted and now, in the period between its signature and ratification by the Member States. In some Member States, the Constitution is regarded as being sufficiently novel as to merit its approval by referendum before it can be ratified; other Member States do not consider that that is necessary. The views expressed about the Constitution and, more particularly, about the degree of its desirability and its legal effects differ widely. Publicly expressed opinions about the Constitution, in particular by political leaders, some of whom have been closely involved in the elaboration of the Constitution or in the decision to adopt it, are so different as to raise the question whether or not their comments can possibly relate to the same document.

The focus of this contribution to the debate is the question whether or not the European Constitution is genuinely something new or merely a recycling, perhaps in a

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2 The first referendum took place in Spain in February 2005 and produced a majority in favour of the Constitution. Referenda have been envisaged or provided for in France, Luxembourg and the Netherlands (early to mid-2005), Denmark, Ireland, Poland and Portugal (late 2005 to 2006), the Czech Republic and the United Kingdom (2006).
different form, of something that is already in existence. To embark upon the exercise is not easy because the European Constitution is a large document; but it is hoped that, by at least focusing on some salient aspects of the Constitution, it may be possible to reach a conclusion as to the real changes that it may make.

I will approach the question from two viewpoints: first, that of a lawyer, rather than that of a politician or political scientist; and, secondly, from what can be described as the “internal” perspective of the European Union, that is to say, the perspective of most relevance to citizens of the Union and its Member States. The “external” aspect of the Union is also of some interest\(^4\). However, the position of the European Union in public international law and its relationship with States (other than its Member States) and international organisations do not have a significant practical impact on the lives of persons within the Union\(^5\).

I will begin with some remarks of a structural, rather than substantive, nature before moving on to consider what appear to be some of the key aspects of the Constitution.

DOES THE TREATY ESTABLISH A “CONSTITUTION”?

As a matter of ordinary language, the word “constitution” has a number of meanings of which the most relevant, in the present context, is that of the way in which something is made up. The way a natural person is “made up” can be described as his or her “constitution”; but the term is of greater relevance when it is used, as in the present context, to refer to the way in which an organisation is “made up”. All kinds of organisations have “constitutions” even if what determines their “make up” is not described by that word: a limited liability company, charity, trust, or golf club, has a “constitution”, although, in the case of a limited liability company (for example), its “constitution” may comprise a document entitled “memorandum and articles of

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3 As William Rees-Mogg put it in an article published in the Times on 28 February 2005, “Who’s got it right? The German Minister for Europe, Hans Martin Bury, or the Foreign Secretary of the United Kingdom, Jack Straw?”


5 I do not consider that much real significance can be attached to Article 1-7 of the Constitution, under which the European Union shall have “legal personality”, since the Treaties establishing the European Economic Community and the European Atomic Energy Community provided likewise (see Articles 281 (ex 210) and 184, respectively).
association” and may also rest upon legislative provisions that provide generally for the creation and operation of limited liability companies.

For lawyers, the word “constitution” has special significance, particularly when it bears a capital “c”: it refers to a scheme by which individuals are “governed” in a “state”. It should, however, be noted that, in the preceding sentence, the word “state” is a loaded term. It means, in essence, a body of people occupying a defined territory and organised under what is usually required to be (for the purpose of definition) a sovereign government. The “constitution” is the instrument of government of the “state”, in that sense of the word. That meaning of “state” is indicated by the use of the word “in” in the phrase “governed in a state” which, in order to give sense to the complete phrase, indicates a relationship of place. Had that phrase been expressed as follows, “governed by a state”, the meaning of the last word of the phrase would have changed. It would then have referred to a different meaning of the word “state”: an organisation of government (or “polity”) not necessarily linked to a territory. Whatever the meaning given to the word “state”, however, the type of constitution that we are talking about here can be described as a “political” constitution.

Thus far, the use of the word “constitution” as meaning an instrument of government cannot be taken to presuppose anything about the nature or form of the political entity to which the constitution in question relates.

More recently, the word “constitution” has come to be used, in the phrase “economic constitution”, as meaning a body of law that orders the economic process and, in particular, provides the basic principles to be followed by legislation that affects that process (often referred to as “economic law”)

6. Used in that context, the word “constitution” certainly refers to the outcome of a political (or policy) choice concerning the principles to be adopted in the elaboration of economic law; and it presupposes the existence of some form of government, in the sense of entities responsible for the promulgation and enforcement of economic law and the resolution of disputes. However, an “economic” constitution is not the same as a political constitution: it is concerned not with political actors as such but with economic actors.

(even though, through the force of circumstances, some political actors may find themselves to be economic actors at certain times and in certain respects).

Whether the word “constitution” is used to refer to a political or an economic constitution, it is often understood (particularly by lawyers in civil law jurisdictions) as referring to a body of law that is fundamental. In the case of economic constitutions, the degree to which they can be said to be fundamental is relative: they are fundamental in relation to economic law but rarely fundamental in a “state”, in the conventional sense, since they often derive ultimately from the political constitution of the state. The position is different where the political constitution of a “state” opts to include principles affecting economic law or where the economic constitution relates to a new form of organisation, such as a grouping of “states”. In those circumstances, the economic (part of the) constitution may have the same fundamental status as the political (part of the) constitution. By way of contrast, a political constitution is always fundamental in an absolute and not relative sense.

Although one can agree that a “constitution” is fundamental by reference to that which is created by or arises from the constitution, in my view, some caution needs to be exercised before concluding that a “constitution” is necessarily fundamental in the particular sense often used by civil lawyers. At first sight, that might appear to be a rather odd thing to say. However, civil lawyers often envisage constitutions as being fundamental in the sense that they are the ultimate source of law and, accordingly, possess a higher legal status (indeed, the highest status) in the hierarchy of norms present in a state governed by the rule of law. That can certainly be said (and is said) of states or polities that have emerged or reorganised themselves on the basis of a written constitution because there may be no continuity (in legal and, indeed, political terms) between the state or polity created or organised by the constitution and whatever preceded it. Ordinary laws can be tested for their validity against the provisions of the constitution; but there is nothing against which the provisions of the constitution can be tested. On the other hand, constitutions can be envisaged which do not have a status superior to that of ordinary laws. The classic example is the

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7 As it may do when the “state” or its constitution emerges after a political revolution and it is felt that some basic principles of an economic nature must be included in the constitution in order, for example, to prevent or preclude a reversion to the pre-revolutionary state of affairs.

8 Such as the European Economic Community.
constitution of the United Kingdom, which comprises norms that have the status of ordinary law and norms that actually lack the status of a law.

The relevance of that linguistic and jurisprudential excursion might not at first sight appear to be obvious. There are two points that arise from it.

First, it has been questioned whether or not the European Constitution is a constitution at all. In my view, when we look at the European Constitution, we are looking at something that has the appearance of being an instrument of government. The fact that it contains provisions of economic law as well as organisational provisions indicates that it purports to lay down both a political and an economic instrument of government. The real question is not whether or not the European Constitution is a constitution but of what is it a constitution (or instrument of government)? A “state” or something else? If a “state”, what kind of state? The fact that the Treaty establishes a “constitution” does not provide an answer to those questions. If the organisation, of which the Constitution is a “constitution”, is not a “state”, in some particular sense, that does not mean that the Constitution is not a “constitution”.

Secondly, by its nature, the European Constitution is fundamental law: it takes the form of a treaty between states. That treaty operates within the general context of public international law; but it purports to establish a basic law against which the validity of acts of the institutions created and empowered by the Treaty are to be measured and from which flow rights and obligations that cannot be derived from a prior legal norm. However, when we seek to compare the European Constitution with what precedes it, we need to bear in mind that constitutions do not need to take the form of a fundamental law, from which a hierarchy of legal norms can be derived.

Finally in that connexion, instruments of government can have different purposes. In particular, even within the Western liberal democratic tradition, there is a significant difference between the United Kingdom and other countries in terms of the purpose that is served by an instrument of government. In the English (more generally, the British) constitutional tradition, the individual is generally free and, in principle, derives rights from that basic condition of liberty. The British constitution is, again in

9 See Lever, op. cit.
principle, concerned with organising the organs of government and, more particularly, with controlling the exercise of public powers so that any interference with the individual’s liberty is limited to what is generally acceptable within society. The idea that an instrument of government organises the organs of government and controls the exercise of public powers is not, of course, unique to the United Kingdom: it can be said to be a general feature of instruments of government in the Western liberal democratic tradition. However, it is often pointed out that what distinguishes the British tradition from other constitutional traditions is that, in other countries, the rights enjoyed by individuals are conferred by law and are not derived from an original state of liberty. For countries following such a tradition, an instrument of government necessarily serves purposes in addition to controlling the exercise of public powers: it is also necessary in order to provide the legal basis for the creation of rights in individuals. In the case of the European Constitution, it is natural to find provisions that are concerned with the creation of rights in individuals because the Constitution is concerned with a form of organisation that has not emerged from an original state of liberty.

DOES THE TREATY “ESTABLISH” A CONSTITUTION?

The Treaty’s title indicates that it “establishes” a Constitution for “Europe”. Article I-1(1) of the Treaty states, more specifically: “…the Constitution establishes the European Union”. The “Europe” referred to grandiloquently in the title to the Treaty is, therefore, the Member States of what is now the European Union, which comprise by far the greater number of the states of “Europe”, as a geographical concept, but which do not constitute “Europe” in any sense of the term.

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10 Strictly speaking, the British Constitution (and British constitutional history) is largely concerned with subordinating the monarch to Parliament. The British Constitution has not really resolved the problem of the relationship between Parliament and the modern executive (which has the basis of its power in Parliament and can control both arms of government) and does not recognise limitations on the sovereignty of Parliament.

11 For example, in France, Article 5 of the 1789 Declaration of the Rights of Man provided that anything that is not prohibited by law cannot be prevented. In the course of the French Revolution, all previous laws and customs were swept aside. Legal provision was required (and made) in order to maintain a Rousseauist state of liberty subject to law.

12 In terms of ensuring respect for the rule of law and for individual rights, the British model is defective because it is incapable of preventing a powerful executive from abrogating basic human rights. It has not been “exported” by the United Kingdom to the countries of the former British Empire.
Now, the European Union already exists, as does a “constitution” for “Europe”, meaning the Member States of the European Union.

The European Union was created by what is commonly known as the “Maastricht Treaty”, which was signed in February 1992. The Maastricht Treaty also created a constitution for the European Union. Before the Maastricht Treaty was signed, there was also a “constitution” for “Europe”, meaning the same Member States who later formed the European Union created by the Maastricht Treaty. That “constitution” for “Europe” was to be found (for the most part) in three other treaties: the Treaty establishing the European Coal and Steel Community (“the ECSC Treaty”), the Treaty establishing the European Economic Community (“the EEC Treaty”) and the Treaty establishing the European Atomic Energy Community (“the Euratom Treaty”). Before the creation of the European Union, the regional grouping of European states that formed the European Union was known as “the European Community” or “the European Communities”. Further back in its history, it was known colloquially as “the Common Market”. At all times, it had a “constitution” or, perhaps, a number of “constitutions”.

If we leave on one side the changes in the (formal and informal) name of the regional grouping of states that we are talking about and the fact that the number of states involved in the group has increased over time, the European Constitution that currently exists – and has done for some 50 years – is to be found in part in a number of international treaties, in part in acts of the institutions created by those treaties (collectively, “the Community institutions”), in part in the unwritten law of the grouping declared, initially, by the Court of Justice of the European Communities (“the ECJ”) and now by that Court and the Court of First Instance of the European Communities (“the CFI”), and in part in the custom and practice of the Member States and the Community institutions (in other words, what English lawyers would be accustomed to describe as constitutional conventions).

Initially, in the history of what is now the European Union, one could speak of a number of constitutions, rather than one only, since the ECSC, EEC and Euratom technically formed distinct “Communities”, each founded upon a different
international treaty. Thus, in Case 294/83 *Les Verts v Parliament*¹³ the ECJ described *the EEC Treaty* as “the basic constitutional charter”. In the period after the Maastricht Treaty, it would be correct to say that there was one constitution because of the incorporation of the ECSC, EEC and Euratom into the constitutional framework established by the Maastricht Treaty. At all events, whether one speaks of one of several constitutions, they all had the complex structure described above: a mixture of international treaty, legislative and other legal measures without any special status, unwritten principles and constitutional practices or conventions.

That situation, which is highly reminiscent of the constitution of the United Kingdom, has come about essentially for three reasons.

The first is that the Member States who formed the European Communities and, later, the European Union found that their common interests went beyond the scope of the European Communities, as defined in the ECSC, EEC and Euratom Treaties, and that the formal machinery for directing the European Communities, as laid down in those treaties, did not make adequate formal provision for the kind of involvement that seemed to be the most effective. In consequence, there developed a way of doing things, and a way of dealing with the relations between the Member States themselves and between them and the Community, that operated informally (in relation to the arrangements specifically envisaged in the ECSC, EEC and Euratom Treaties) and in parallel to the formal structures set out in those Treaties¹⁴.

Secondly, it is not exceptional to find that a “constitution” or “constitutional law” extends beyond the terms of a written constitution. Constitutions have to work within a particular environment and therefore constitutional actors develop ways of producing results – the “natural dialectic” referred to by Advocate General Mancini

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¹⁴ For example, the European Council (which is provided for in Article I-21 of the European Constitution) originated in meetings held periodically by the political leaders of the Member States (for a short history of the European Council, see K.P.E. Lasok, Law and Institutions of the European Union (2001), ch. 6). The provisions concerning a common foreign and security policy that were included in Title V of the Maastricht Treaty, and that built upon the earlier provisions of the Single European Act, formalised cooperation that had developed much earlier.
when discussing the relationship between the European Parliament and the Council of Ministers.\(^\text{15}\)

The third reason why the current European Constitution takes the form that it does lies in the fact that each of the ECSC, EEC and Euratom Treaties provides that the function of the ECJ is to ensure that “the law” is observed without identifying that that law is. The ECJ’s role certainly makes it clear that the European Communities were (and are) subject to the rule of law – and accordingly express provision was made in the Maastricht Treaty to identify those areas of the European Constitution (in its current form) that are essentially political in nature and not subject to the rule of law – but the European Communities had no precursor to provide content to what was meant by “the law” other than the general and particular rules of public international law. The phrase in the Treaties, “the law” could obviously refer to the ECSC, EEC and Euratom Treaties themselves and to the laws introduced by the Community institutions. However, the interpretation of laws requires certain judicial techniques; and the judicial review of acts of public bodies implies criteria of review\(^\text{16}\) and other techniques. Most notoriously, the question of the non-contractual liability of the European Communities was the subject of a so-called “diplomatic clause”, that is to say, a provision in the Treaties that left the elaboration of the criteria for determining liability to the ECJ as a result of a failure on the part of the Member States to agree\(^\text{17}\).

When an existing state creates a constitution for itself, it can take advantage of a pre-existing judicial culture, if it so wishes. When a state comes into existence or, by a revolution or similar event, radically recasts itself, it either uses an existing source of judicial techniques or attempts, as did the states in the Soviet bloc, to innovate or adapt existing techniques. In the case of the European Communities, the ECJ simply took inspiration from the common legal heritage of the Member States and plugged the gaps in the system of law created by the Treaties in that way.

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\(^{16}\) The ECSC, EEC and Euratom Treaties set out general criteria for the review of Community legislation in Articles 33, 230 (ex 173) and 146, respectively. They refer to, for example, “infringement…of any rule of law relating to [the] application” of the Treaty in question, which begs the question.
\(^{17}\) Article 288 (ex 215) of the EEC Treaty; Article 188 of the Euratom Treaty.
The result is that we can at present identify a constitution for “Europe”. However, it is in a bit of an untidy state. The first step towards pulling it together was taken by the Maastricht Treaty. The current proposed European Constitution is the latest significant step. When we compare the existing constitution with what is now proposed, we need to bear in mind that the latter is likely to enunciate what is already in the former but difficult to find because of the former’s untidy state. Further, it cannot be excluded that the new European Constitution formalises in some respects aspects of the existing constitution that are already heading towards the formulation to be found in the proposed Constitution.

ARE THE OBJECTIVES AND COMPETENCES OF THE EUROPEAN UNION ANY DIFFERENT?

Title I of Part I of the Treaty establishing a Constitution for Europe defines the Union and sets out its objectives. The provisions of Title I repeat in part provisions that already exist or, as in the case of Article I-6 (the primacy of EU law over the laws of the Member States), principles that are well-entrenched in EU law as it currently exists. Title I declares what the flag of the EU is, its anthem, motto, currency and the date of “Europe Day”.

Title I also contains one particularly important provision – Article I-5 – that defines relations between the Union and the Member States. Article I-5(2) largely repeats Article 10 of the EC Treaty and the principle of sincere cooperation derived from it as it is found in the case law of the ECJ. Article I-5(1) is a particularly important provision. In addition to declaring the equality of the Member States before the Constitution, it also provides that the Union must respect the national identities, structures and territorial integrity of the States.

Title I contains in addition a number of other provisions (Articles I-1 to I-3) that are essentially designed to show that the EU is “a good thing”. Some of those provisions repeat what already exists (for example, Article I-3(2)). The new provisions are anodyne. For example, Article I-3(1) states: “The Union’s aim is to promote peace, its values and the well-being of its peoples”. It is difficult to justify any assertion that the Union should not have that aim. The attempt to say good things about the EU does in
some places go a little too far. Thus, Article I-3(3) provides, *inter alia*, that the EU “shall promote…solidarity between generations”. That indicates one thing that we need to be a little careful about in relation to the Constitution: the propensity of the authors to say things that have little real meaning in order to placate some interest group or vocal individual or give the reader of the Constitution a warm and cosy feeling

Most of those aspects of Title I are difficult to disagree with, particularly bearing in mind that they express aspirations and cannot be regarded as giving rise to legally enforceable rights and obligations. However, some of them are quite important in terms of how they “fix” the role of the EU. For example, Article I-1(1) starts with a classic rhetorical flourish – “Reflecting the will of the citizens and states of Europe to build a common future” – that really says nothing at all about the shape of that future: is the “common future” what is often described as a “federal” union or something else? However, Article I-1(1) then goes on to say something that is quite important (although not new): “the Member States confer competences [on the EU] to attain objectives they have in common. The Union shall coordinate the policies by which the member States aim to achieve these objectives, and shall exercise on a Community basis the competences they [that is, the Member States] confer on it”.

Article I-1(2) sets out a basic entry requirement to the EU: “The Union shall be open to all European States which respect its values and are committed to promoting them together”. That effectively encapsulates what the position currently is and always has been.

I have stated that Title I contains some things that are quite important, some things that repeat other provisions and some things that are frivolous. It also contains some

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18 Another explanation for that propensity is a cultural one: in some political and social cultures in Europe, important documents and important persons must use high-flown language in order to demonstrate their status. From the legal perspective, the appearance of such language in legal texts is nothing short of frivolous.

19 Article I-58 develops Article I-1(2) by setting out the procedure for dealing with applications made by States to accede to the European Union. Article I-59 deals with the position that arises when a Member State fails to respect the values of the Union. That reflects Article 7 of the Maastricht Treaty. Article I-60 of the Constitution is a new provision. It sets out a procedure whereby a Member State may withdraw voluntarily from the European Union. Those who oppose the United Kingdom’s continued membership of the European Union or who consider that the time may come when the
things that may or may not prove troublesome. For example, Article I-3(3) expresses certain economic objectives of the EU. They include working for the sustainable development of Europe (which, in itself, seems indisputably “good” and preferable to any alternative, albeit largely meaningless); but that development is to be based on, among other things, “a highly competitive social market economy”. That phrase, which is not defined in the Treaty, is sufficiently broad to encompass any of the different economic models that have been used in Western liberal democracies in recent times. On the face of it, it excludes the Soviet and corporatist (or fascist) economic models, which (some would say) is no bad thing. The inclusion of the word “social” does not mean that the EU is necessarily to be regarded as embracing “socialism”, such as that of the United Kingdom’s Labour Party in the era before clause 4 was removed from its constitution; nor does it necessarily exclude that possibility (although other provisions of the Constitution would pose certain problems for such a development). The content of the phrase “social market economy” is to a great extent to be seen in terms of the substantive provisions of the Constitution (which set out a model that is capable of accommodating a certain degree of State intervention in the economy, albeit subject to certain controls, or little or no State intervention at all) rather than in some other theory extrinsic to the Constitution. For example, elsewhere, the Constitution refers to “the principle of an open market economy with free competition”\textsuperscript{20}. In principle, the two phrases “social market economy” and “open market economy with free competition” ought to be construed consistently with each other (even though they may not mean precisely the same). Thus far, the phrase “social market economy” does not pose difficulties because it is a flexible phrase that can accommodate a number of different interpretations. Difficulties would arise if it were construed as indicating a commitment, on the part of the European Union, to a particular level of social and economic development: that cannot be ordained by law since it depends upon the economic success of the Union.

Title III of Part I of the Treaty deals with “Union competences”\textsuperscript{21}. It first sets out what is generally understood to be the current position regarding the relationship between

United Kingdom may have to leave it would therefore be in favour of adopting the Constitution because of Article I-60.

\textsuperscript{20} Article III-177.

the European Union and the Member States: the Union acts within the limits of the competences conferred upon it by the Member States to attain the objectives set out (now) in the Constitution and subject to the principles of subsidiarity and proportionality; competences not conferred on the Union remain with the Member States. The Treaty then identifies what can be described as four types of competence assigned to, or involving, the European Union: (i) exclusive competence; (ii) shared competence; (iii) competence to carry out supporting, coordinating or complementary action; and (iv) miscellaneous or ill-defined. The scope of and arrangements for the exercise of the Union’s competences are determined by the provisions of Part III of the Treaty.

In defining the different types of competence that are assigned to, or involve, the European Union, the intention of the authors of the Constitution seems to have been to reflect the position as it currently is, or at least to systematise it and make it clearer. I will deal with each type of competence in turn.

The areas of exclusive competence cover the customs union, the competition rules necessary for the functioning of the internal market, monetary policy for the euro, the conservation of marine biological resources under the common fisheries policy, the common commercial policy and, in certain circumstances, the conclusion of international agreements. Within those areas, only the Union may legislate and adopt legally binding acts. The Member States may do so only if empowered to do so by the Union or if implementing acts of the Union. The areas of exclusive competence set out in the Treaty actually exclude certain areas that have traditionally been regarded as falling within the exclusive competence of the European Community, specifically, agriculture and fisheries. Some time ago, the ECJ held that, in both areas, there had been a total and definitive transfer of powers from the Member States to the Community with the consequence that the Member States did not retain any powers to act unilaterally in those areas. The Member States could, however, intervene in order

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22 Article I-11.
23 Articles I-13 to I-18.
24 Article I-12(6).
25 Articles I-12(1) and I-13.
to fill a *lacuna* left by the Community; when doing so, the Member States were not exercising their own powers but acting under the EC Treaty26.

Accordingly, in relation to the areas of the European Union’s exclusive competences, the Constitution marks a change in the form of a swing back towards the Member States. In other respects, the Constitution appears to make no material change since the substantive provisions in Part III that cover the areas over which the European Union is to have exclusive competence mirror the existing provisions in the EC Treaty, so far as is relevant.

The areas of *shared competence* are those, outside exclusive competence and areas of supporting, coordinating or complementary action, where the Constitution confers a competence. Thus, shared competence can be stated to be the normal position where a competence is conferred on the Union, subject to provision otherwise. Where competence is shared, both the Union and the Member States may legislate and adopt legally binding acts; however, the Member States exercise their competence “to the extent that the Union has not exercised, or has decided to cease exercising, its competence”. The principal areas of shared competence referred to in the Treaty cover: the internal market; certain aspects of social policy; economic, social and territorial cohesion; agriculture and fisheries (with the exception of conservation of marine biological resources); the environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; and common safety concerns in public health matters. To those may be added: research, technological development and space; and development cooperation and humanitarian aid. In relation to the areas referred to in the preceding sentence, the Constitution introduces a variation on the normal rule regarding the relationship between the Union and the Member States: the exercise of the Union’s competence does not prevent the Member States from exercising theirs27.

It is important to note that, under the definition of shared competence, the competences of the European Union and the Member States exist in parallel but the

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26 See, for example, Case 804/79 *Commission v United Kingdom* [1981] ECR 1045 (fisheries) and Cases 47 and 48/83 *Pluimveeschlachterijen Midden-Nederland and van Miert* [1984] ECR 1721 (agriculture).

27 Articles 1-14 and 1-12(2).
exercise of the latter’s competence cedes to that of the Union. Where, and to the extent that, the Union has legislated, the competence of the Member States does not disappear. Its exercise is, however, frozen for as long as the Union maintains its legislation. Thus, within the areas of shared competence, there may be an ebb and flow between the action of the Union and the Member States.

That relationship is, in reality, nothing new because, outside the areas in which the *European Community* was acknowledged to have exclusive competence, the Member States lay under a general obligation not to undermine the action taken by the Community even in the areas in which the Member States retained competence but the Community also could act\(^\text{28}\).

The third type of competence, the *competence to carry out supporting, coordinating or complementary action*, applies to: the protection and improvement of public health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; and administrative cooperation. Such action does not supersede the competence of the Member States in those areas and any legally binding acts of the Union cannot entail harmonisation of the laws or regulations of the Member States\(^\text{29}\). In my view, that type of competence is not of much interest for present purposes.

The fourth type of competence I have described as *miscellaneous or ill-defined* because it appears to cover areas of competence that fall within none of the preceding types – or at least that are not classified by the Constitution as falling within the preceding types. The first such area comprises economic, employment and social policies. The European Union’s competence in relation to those policies is as follows: to provide “broad guidelines” for the coordination of the economic policies of the Member States; to provide “guidelines” for the coordination of their employment policies; and take initiatives to ensure coordination of their social policies\(^\text{30}\). That reflects the current position\(^\text{31}\). The second area concerns foreign and security policy. The European Union has competence “to define and implement a common foreign

\(^{28}\) See what is now Article 10 of the EC Treaty, referred to above.

\(^{29}\) Articles I-17 and I-12(5).

\(^{30}\) Articles I-12(3) and I-15.

\(^{31}\) See Articles 98 (economic policy), 128(2) (employment policy) and 136-145 (social policy) of the EC Treaty.
and security policy, including the progressive framing of a common defence policy”32. The third area is a residuary competence to act within the framework of the policies defined in Part III of the Constitution in order to attain one of the objectives of the Constitution33. That residuary competence reflects the present situation under Article 308 (ex 235) of the EC Treaty.

In relation to economic policy, it should be noted that Article I-12(3) provides that “the Member States shall coordinate their economic…policies within arrangements as determined in Part III, which the Union shall have competence to provide”. Article I-15(1) refers only to the adoption by the European Union of broad guidelines for the coordination of domestic economic policies. If matters were left there and we simply turned to the section in Part III of the Constitution dealing with economic policy34, we would see nothing new in substantive terms. However, that section is introduced by Article III-177 of the Constitution, which refers back to Article I-3 (not Articles I-12(3) or I-15(1)), and which says, in the first sentence: “…the activities of the Member States and the Union shall include, as provided in the Constitution, the adoption of an economic policy”.

Where does this apparent competence, on the part of the European Union, to adopt an economic policy come from (bearing in mind that it is not mentioned – expressly - in the provisions of the Constitution dealing with the Union’s exclusive competences or in the provisions dealing with the competences shared with the Member States) and what does it mean?

The clue seems to be provided by the remaining part of the first sentence of Article III-177, which refers to “an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives”. Now, the close coordination of the Member States’ economic policies is something for the Member States to do. The European Union’s role is, as has been seen, to provide “broad guidelines”. The internal market has little or nothing

32 Articles I-12(4) and I-16.
33 Article I-18.
34 Articles III-178 to III-184.
to do with economic policy in the conventional sense. The common objectives referred to might encompass general objectives; but nothing sufficiently detailed to amount to an economic policy. It therefore rather looks as though the phrase “economic policy” is being used to dress up the more general and “high level” role of the European Union in assisting the Member States by providing broad guidelines, rather than to indicate a new competence on the part of the European Union to lay down (albeit in conjunction with the Member States) an economic policy in the true sense.

In relation to foreign and security policy, it is interesting to note that Article I-16(2) of the Constitution states: “Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness”. That repeats in expressive language a general obligation binding the Member States under the Constitution and at the present time and an existing specific obligation. Reading it, one is struck with the imperative need for the Member States to toe the European Union’s party line in relation to foreign and security policy. But why is foreign and security policy left out of the list of the European Union’s exclusive competences? Why is it not even listed in the Union’s shared competences, the characteristic of which is that the power of the Member States to act is frozen when, and for as long as, the European Union is exercising its competence?

35 Articles III-130(3) refers to legislation adopted to ensure “balanced progress” in the different sectors of the internal market; but that seems to refer to the development of free movement within the internal market, not matters of economic policy. There is also provision to deal with exceptional situations that may affect economic policy, in Article III-130(4) and III-132. However, such exceptional – and derogatory – provisions would not normally be regarded as instruments of economic policy. It is well established that the derogations provided for in provisions such as that now to be found in Article III-154 (ex Article 30 of the EC Treaty – ex ex Article 36) are not intended to be used for economic purposes.

36 See Article I-5(2), referred to above.

37 Article 11(2) of the Maastricht Treaty, which is also to be found in Article III-294(2) of the Constitution.

38 It is, of course, true that Article I-12(2) appears to freeze the power of the Member States to legislate and adopt legally binding acts only. Textually, it does not prevent the Member States from doing other things.
The inference is that, in relation to foreign and security policy, the European Union’s competence is not exclusive; nor, when activated by the Union, is it such as to exclude the exercise by the Member States of their own competences.

If one turns to the substantive provisions of the Constitution dealing with the common foreign and security policy, those provisions do not mark a substantial departure from the position as it currently stands. For example, where the international situation requires what the Constitution describes as “operational action” by the European Union, the decision is taken by the Council acting unanimously, that is to say, by the Member States. Such decisions commit the Member States; but that was already provided for in the Maastricht Treaty. It has been said, in connexion with the Constitution, that it creates an EU Foreign Minister. That is true. The “Union Minister for Foreign Affairs” would chair meetings of the Foreign Affairs Council and represent the Union for matters relating to the common foreign and security policy.

However, under the Maastricht Treaty, that state of affairs already exists. The difference is that, at present, the EU’s “Foreign Minister” is the head of state or government of the Member State that, at any one time, holds the Presidency of the Council (and who, therefore, in person or through a representative chairs Council meetings). At present, that person changes every six months. The Constitution would produce continuity in the person holding the office; but it is not apparent from the provisions of the Constitution that there would be any material substantive difference in what is currently going on.

The defence aspects of the common foreign and security policy can be divided into two. On the one hand, the common security and defence policy that is intended to be a part of the common foreign and security policy is supposed to equip the European

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40 Articles III-297(1) and III-300(1).
41 Compare Article III-297(2) of the Constitution with Article 14(3) of the Maastricht Treaty (the latter uses the phrase “joint action” to describe what the Constitution calls “operational action”: the two phrases mean the same thing).
42 Article III-296(1) and (2) of the Constitution.
43 Article 18 of the Maastricht Treaty.
44 For example, Article III-328(1) of the Constitution provides: “Union delegations in third countries and at international organisations shall represent the Union”, That reflects the current position (see also Article III-301(2), which repeats Article 20 of the Maastricht Treaty). It cannot be inferred that such delegations are intended to supplant the diplomatic and consular missions of the Member States because both Article III-328(2) and Article III-301(2) envisage cooperation between them.
Union with “an operational capacity drawing on civil and military assets” that the Union may use outside the Union solely for peace-keeping missions, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter\(^{45}\). That is the potentially offensive (meaning aggressive) part of the policy. On the other hand, the arrangements envisaged in the Constitution amount to a mutual defence and assistance pact\(^{46}\). That is the defensive aspect, in the strict sense of the term.

Article I-41(1) provides: “The Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy”. However, no provision is made for the creation of the European Union’s own armed forces; more intensive cooperation between Member States is purely voluntary; and the direction of policy remains in the hands of the Council and, therefore, the Member States, acting unanimously.

The common foreign and security policy can therefore be seen to be a development of something that has been evolving more or less since the European Communities came into existence (albeit that the pace of change has varied over time). The further developments that can be inferred from the relevant provisions of the Treaty have more the hallmarks of a form of international cooperation than anything else.

**DOES THE CONSTITUTION CREATE NEW RIGHTS FOR INDIVIDUALS?**

Title II of Part I of the Treaty deals with fundamental rights (more fully set out in the Charter of Fundamental Rights to be found in Part II of the Treaty) and citizenship of the Union. The latter provisions effectively repeat existing provisions concerning citizenship of the Union and are further elaborated in Part III of the Treaty\(^{47}\). There is also some overlap with Articles I-45 to I-52. For present purposes, it seems to be more useful to focus on fundamental rights\(^{48}\).

\(^{45}\) Article I-41(1) of the Constitution.

\(^{46}\) As noted by Sir Jeremy Lever, *op. cit.* See, for example, Article III-329 of the Constitution.

\(^{47}\) Articles III-123 to III-129.

The Charter of Fundamental Rights, which is to be read in conjunction with a Declaration attached to the Treaty containing “explanations” relating to the Charter, commences with a preamble that in part sets out existing and long standing statements of principle concerning fundamental rights in the EU; and in part it sets out rhetorical statements of little apparent legal significance\(^49\). The substantive parts of the Charter are drawn in part from the European Convention for the Protection of Human Rights and Fundamental Freedoms, in part from the case law of the ECJ, and in part from other sources of rights that, before being incorporated in the Charter, were contained in secondary legislation or international agreements. Thus, for example, Article II-68 refers to the protection of personal data; Article II-84 deals with the rights of the child; Article II-102 gives a right of access to documents of the institutions, bodies, offices and agencies of the Union. Those provisions are derived from pre-existing legal provisions: principally, Article 286 of the EC Treaty and Directive 95/46\(^50\) (data protection), the 1989 New York Convention on the Rights of the Child (rights of the child), Article 255 of the EC Treaty and Regulation No. 1049/2001 (right to see documents)\(^51\).

Broadly speaking, the Charter contains nothing revelatory and little that is genuinely controversial. Three points should, however, be made about it.

First, some parts of the Charter, such as the provisions concerning data protection and the right to information mentioned above, do make a change in the current legal position by elevating the rights in question from the status of rights derived from provisions of secondary legislation to fundamental constitutional rights.

Secondly, some parts of the Charter do raise questions. The best example is probably Article II-89, which provides: “Everyone has the right of access to a free placement service”. Generally speaking, the Charter skilfully avoids including potentially unrealisable commitments. For example, Article II-95 declares that everyone has the right of access to preventive healthcare and the right to benefit from medical

\(^{49}\) For example: “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities…”.

\(^{50}\) OJ 1995 No. L281.

\(^{51}\) See the Declaration concerning the explanations relating to the Charter of Fundamental Rights, Articles 8, 24 and 42.
treatment: any reasonable person would say that it would be contrary to basic human
rights to withhold healthcare and medical treatment from a person in need. However,
the Constitution does not say that those rights are free and may not have to be paid
for\textsuperscript{52}. The availability of free medical treatment is dependent upon the charitable
activity of individuals or the general prosperity of society; and, so far as the latter is
concerned, there is no such thing as a fundamental right to live in a prosperous
society. The right to a free placement service is not exceptional and not unduly
onerous: it is useful to provide a service for putting the unemployed in touch with
potential employers that is free so far as the unemployed are concerned. However,
some doubt may be entertained as to the truly fundamental nature of such a right. The
presence of such a right in the Charter of Fundamental Rights tends to trivialise the
Charter.

Thirdly, the Charter has a specific legal scope: it is concerned essentially with rights
and obligations that are exercisable vis-à-vis the Union. Article II-111(1) provides:
“The provisions of the Charter are addressed to the institutions, bodies, offices and
agencies of the Union with due regard for the principle of subsidiarity and to the
Member States only when they are implementing Union law”. Article II-111(2) goes
on to states: “This Charter does not extend the field of application of Union law
beyond the powers of the Union or establish any new power or task for the Union, or
modify powers and tasks defined in the other Parts of this Constitution”.

Hence, on the face of it, a provision such as the right to preventive healthcare, found
in Article II-95, applies to the Member States “only when they are implementing
Union law”. It does not itself empower the institutions of the Union to set up, or
require the Member States to set up, a Union-wide healthcare system, far less one that
is free at the point of demand. It certainly requires the institutions of the Union to
ensure that appropriate provision is made for their own employees if none is
otherwise obtainable; and it effectively guides Union secondary legislation, which
could not lawfully be so devised as to prevent access to preventive healthcare in the
Member States and which, where relevant and appropriate, would have to be directed
so as to favour the effective exercise of that right rather than frustrate it.

\textsuperscript{52} By way of contrast, see Article II-74, which established a right to education that “includes the
possibility to receive free compulsory education”.
However, in order to understand the potential impact of the Charter within the Member States, it is necessary to have an idea of how the general principles of EU law and the fundamental rights currently recognised in the EC law apply in the case of the Member States. That is in particular so because, despite its wording, Article III-111 of the Constitution seems to have been intended to encapsulate the existing understanding of how the general principles and fundamental rights recognised by EC law apply to the Member States.

Broadly speaking, the Member States lie under obligations to respect and give effect to the general principles and fundamental rights recognised in EC law when they are implementing a provision of EC law or acting within an area that is covered by EC law. They may also lie under such an obligation in relation to matters that lie wholly within their competence but where the impact of their actions is capable of undermining EC law; although it is more usual to mediate the potential conflict between domestic law and EC law by using the principle of proportionality rather than some other principle.

An example of a situation in which Member States are obliged to respect general principles and fundamental rights because they are acting within an area covered by EC law is the free movement of persons and services. In Case C-260/89 ERT v DEP, the ECJ held that a Member State could not rely on the Treaty rules permitting derogations from the freedom to provide services if to do so would lead to the breach of a fundamental right (there the right to free expression provided for in Article 10 of the European Convention on Human Rights). As Advocate General Jacobs said in Case C-168/91 Konstantinidis v Staadt Altensteig, which concerned domestic rules

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53 See the Declaration concerning the explanations relating to the Charter of Fundamental Rights, Article 51. The reference in Article III-111 to the Member States “implementing” EU law could be regarded as referring to “implementation” in the sense in which the term is generally used in EC law. However, it is clear from the explanation of Article 51 of the Declaration (that is, Article III-111 of the Constitution) that “implementing” was not intended to bear that precise meaning.

54 For an example of a situation in which a Member State may appear to be implementing a provision of EC law but is not in fact doing so, see Case C-36/99 Ideal Tourisme v Belgium [2000] ECR I-6049, paragraph 38 of the judgment (page 6074).

55 See, for example, Cases C-286/94, C-340/95, C-401/95 and C-47/96 Garage Molenheide and others v Belgium [1997] ECR I-7281, paragraphs 45-64 of the judgment (pages 7328-7333) where, it will be observed, the discussion of the operation of the principle of proportionality blended into a discussion of other principles (such as effective protection of EC rights).


about the transliteration of the Greek alphabet into Roman letters that distorted the presentation and apparent sound of a person’s name:

“In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights”.

Membership of the European Union, both now and under the European Constitution, involves a commitment on the part of the Member States to respect the values of the Union, which includes respect for fundamental rights. The very foundations of the European Union would be threatened if, for example, it were possible for one Member State to engage in infringements of fundamental rights: that would act as a serious deterrent to the exercise of the basic freedoms on which the European Union and, before it, the European Community were founded.

By way of contrast, there is nothing, either at present or under the Constitution, to prevent a Member State from ignoring basic rights for purely internal purposes that have no impact on the operation of EC (or EU) law. That explains why nationals of other Member States have a right to equal treatment with Scottish residents in Scotland whereas people from England and Wales can be, and are, discriminated against in Scotland. It may be noted in passing that the European Constitution does not address that state of affairs, which tends to suggest that, if the subject of the Constitution can be described as a “state”, it is not a unitary state, as some people appear to believe, but rather a supranational “state” that exists in parallel with the “states” (in the conventional sense) that form it.

At all events, the legal consequences of the Charter are already present in the European Union as we know it. The true significance of the Charter lies in the

58 Cf. the example given by Advocate General Jacobs in paragraph 45 of his Opinion (page 1211).
59 In the same way, citizenship of the European Union parallels citizenship of the different states forming the European Union.
assemblage of rights that it has elevated into fundamental rights (when they were not fundamental before).

INSTITUTIONAL CHANGES

The Constitution makes a number of changes to the institutions of the European Union. For example, under the Constitution, the European Parliament will comprise a maximum of 750 members. There will be a minimum of 6 members per Member State and a maximum of 96. Within those parameters, the composition of the Parliament will be determined by the European Council (that is, the Member States), acting unanimously and with the consent of the Parliament. The European Council will act by consensus save where the Constitution provides otherwise; and the Council of Ministers will act by qualified majority, save where the Constitution provides otherwise. A qualified majority is defined as a majority of at least 55% of the members of the Council comprising at least 15 of the members and representing Member States that account for at least 65% of the population of the European Union. In some instances, a qualified majority must be of at least 72% (the population figure being the same). A blocking minority is also defined. It does not appear that those changes are likely to have a significant effect in practical terms.

Of far greater interest is the enhanced role given to the national parliaments under the European Constitution. Various provisions of the European Constitution envisage that national parliaments may be involved in evaluating the implementation of Union policies by national bodies and evaluating and monitoring the activities of

61 Article I-20.
62 Articles I-21(4) and I-23(3).
63 Article I-25.
65 Articles I-42(2) and III-260 (see also Article III-261).
66 Articles I-42(2) and III-273(1) (Eurojust, the organisation responsible for supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases).
67 Articles I-42(2) and III-276 (Europol, the organisation responsible for supporting and strengthening action by the national police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime that affect a common interest covered by a Union policy).
organisations set up by the European Union. Probably the most important of those provisions are contained in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which sets out the procedure by which the EU institutions are to apply those principles. The Protocol requires the Commission to consult widely before proposing European legislative acts; and draft acts must be forwarded to the national parliaments, accompanied by a detailed statement showing that they comply with the principles of subsidiarity and proportionality. The national parliaments then have the power to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why they think (if, of course, they do) that the draft does not comply with those principles. Account must be taken of any such opinion that are received; and, if the degree of criticism exceeds a defined level, the draft must be reviewed. The opinions of national parliaments do not bind the EU institutions but, where a draft has to be reviewed, reasons must be given for any decision to maintain, amend or withdraw the draft. It can be anticipated that the EU institutions would take a reasoned opinion from a national parliament seriously, having regard to the quality of its contents, not least because the Constitution envisages that national parliaments may bring actions before the ECJ for the annulment of EU legislation that has been adopted in breach of the principle of subsidiarity.

CONCLUSION

Well, is the European Constitution new wine or old? Apart from the addition of some high-flown language that may not be to everyone’s taste, the Constitution is basically the same old brew. There are obviously some new things in it, such as the new provision setting out a procedure for the voluntary withdrawal of a Member State from the European Union and the powers given to national parliaments, referred to above; but, on balance, the Constitution does not appear to me to be significantly different from the Constitution that exists at present. From a lawyer’s perspective, the

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68 See Article I-11(3) and (4) of the Constitution. See also Articles I-18(2) and III-259.
69 Articles 2, 4 and 5 of the Protocol.
70 Ibid., Articles 6-7.
71 Ibid., Article 8.
72 Article I-60 of the Constitution.
The proposed Constitution is a great improvement on the current Constitution if only because it is easier to use (and whatever else might be said about it).

However, the real question is, what is going to happen if the Treaty establishing the European Constitution is ratified? How will the European Union then develop? Written constitutions are occasionally said to have the virtue of stabilising the shape of government and fixing the balance of power between different arms of government. To some extent, they do so; but that does not necessarily mean that they are always capable of freezing everything and preventing future change. The European Constitution has generated widely divergent views about what it actually means and what it will actually lead to. In one sense, that is unsurprising: it would be extraordinary if a document the length and complexity of the Constitution produced only one, universally held, understanding of what it meant.

On the other hand, the problem is not simply one of different people holding different views. The fact that such radically different views of the European Constitution have been taken by political leaders suggests that they may well seek to use the Constitution in the way that they believe it is intended to work. By permitting room for debate about its meaning (a situation that is in reality unavoidable), a text such as the European Constitution also creates the room for political debate about the future development of the Constitution; and that in turn makes it difficult to predict how the European Union may evolve in the future, at least in the absence of judicial determinations settling the meaning of particular provisions of the Constitution. It might be said that, merely by putting the Constitution of the European Union into a single document, the Treaty establishing a Constitution for Europe creates the possibility of an uncontrollable and unpredictable development of the European Union because that single document can then be used for all sorts of purposes by constitutional actors in order to achieve ends that might not have been in the mind of most or all of the authors of the European Constitution or most or all of the people who may have voted for the Constitution in referenda. However, to a great extent, that situation already exists under the Maastricht Treaty, as amended.

The European Constitution is in its essentials old wine, not new. The fact that, if the Constitution is ratified, the old wine will then have been decanted into a new bottle is
not in itself foundation for the belief that we would then be heading for a new and unpredictable future. The evolution of the European Union, wherever that leads us, is driven by underlying political, economic and, to some extent, socio-cultural dynamics. Legal texts, such as the European Constitution, are capable of confirming a direction that has already been, or may be, taken by those underlying dynamics. Legal texts are not (in my view) capable of generating a development that runs contrary to the underlying dynamics.