THE NETHERLANDS / PAYS-BAS

ALLARD KNOOK*

A Constitutional Union?

BARENTS, R., *The autonomy of Community Law*, The Hague 2004[1]

EIJSBOUTS, W.T. / JANS, J.H. / VOGELAAR, F.O.W., *Europees Recht; Algemeen Deel (European Law; General Part)*, Groningen 2004

WILL the Treaty Establishing a Constitution for Europe truly establish a Constitution for Europe? Or will it be nothing more than a new Treaty replacing the previous ones? This question, which is currently being discussed in numerous conferences throughout Europe, is of course part of the wider constitutionalisation debate, which, as is well known, has been raging in Europe for quite some time[2]. Over the years, the evolution of the Union's legal order has certainly witnessed the materialization of some important constitutional principles, a process in which the Court of Justice has played a vital role, not in the least by articulating the doctrines of supremacy and direct effect and subsequently adding to the Union's legal system an unwritten Bill of Rights[3]. The Charter of Fundamental Rights and the European Constitution have in the last couple of years, of course,

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[1] This book is a revised version of BARENTS' *De communautaire rechtsorde*, Deventer 2000.

[2] For the sake of brevity, I only mention two early, influential articles: STEIN, E., Lawyers, Judges and the Making of a Transnational Constitution, [1981], *American Journal of International Law*, 75, 1; MANCINI, F., The making of a Constitution for Europe, [1989] *Common Market Law Review* 26, 595. In addition, see the references in the subsequent footnotes.

[3] See KNOOK, A.D.L., The Court, the Charter, and the Vertical Division of Power in the European Union, [2005] *Common Market Law Review* 42:2.

significantly enlivened the constitutionalism debate[4], to which both BARENTS' and EIJSBOUTS' books are invaluable contributions.

BARENTS' main hypothesis is that Community[5] law is an indivisible, autonomous system of law. In the first part of his book, he argues that developments taking place in the European Union can accordingly only be explained in terms of autonomy. Community law cannot be analysed using doctrines of national constitutional law, as these doctrines 'are ultimately founded on the sovereignty of the state'[6]. This would be different if there existed a European 'People' or 'nation' serving as *pouvoir constituant*, in which case:

> 'the EU could be regarded as a 'new' political and legal entity, founded on a 'first', albeit rudimentary constitution in the form of the European treaties. In that case, the birth of a European '*demos*' would imply a European '*telos*', thus providing an objective argument to describe Community law in constitutional terms and to interpret it from a federal perspective'[7].

BARENTS, however, rejects the existence of a European 'People' or 'nation', *inter alia* because the Treaties do not refer to a specific European territory, there is no common state concept nor a European 'identity' or 'awareness'. The fact that the citizens of the Member States are also European citizens, endowed with various rights - such as those of the Charter of Fundamental Rights - is insufficient for BARENTS to presuppose the existence of a European *demos* or an emerging European statehood. Consequently, because of the absence of a European *demos*, the European Union, according to BARENTS, 'is, and will continue to be regarded as an essentially undemocratic structure'[8]. In sum, as the European Union cannot be regarded as having a constitutional structure aiming to protect the general interests of its people, national constitutional doctrines cannot be adequately used to analyse Community law.

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[4] See *e.g.* CRAIG, P. Constitutions, Constitutionalism and the European Union, [2001] *European Law Journal* 7:2, 126; BIRKINSHAW, P. Constitutions, Constitutionalism and the State [2005] *European Public Law*, 11:1.

[5] Except for in Chapter 11, BARENTS' focus is on Community law only.

[6] p. 191.

[7] p. 119-120.

[8] p. 124-125.

These arguments are somewhat reminiscent of the famous *Maastricht* judgment of the *Bundesverfassungsgericht* (hereafter: *BVerfG*)[9]. In this judgment the *BVerfG* argued that all power exercised over German citizens - whether national or European - must be legitimised by the German Parliament as the direct emanation of the German People. The theory to support this argument, commonly referred to as the no-*Demos* theory, rests on the assumption that a People (*Volk*) is the basis for the modern nation-state and therefore a condition for democracy within that state. Thus, the nation-state of Germany emerged because there was a German *Volk*, the nation-state is the political expression of the pre-existing *Volk*. Furthermore, the *Bundestag* is, as the bearer of legislative powers, a representation not of the inhabitants of the State of Germany but of the German *Volk*. According to the *BVerfG*, as in the European Union's context, no *homogeneous*[10] European People exist; and hence, no democratic European state.

Kirchhoff further elaborated on this point in his extrajudicial writings, by emphasising that if, because of the European integration, a transfer of sovereignty would have occurred or is occurring, this would mean that a European federal state had been or is in the process of being created. This, however, has, according to Kirchhoff, not occurred within the European Union and will not happen as long as no European 'People' exist to which sovereignty can be transferred. He argues that 'the Union … lacks the legitimating basis of a common European state-bearing People.'[11]. In sum, the no-*Demos* theory entails that since a European *Demos* is a prerequisite for European Democracy, until the emergence of a European *Demos*, the Member States will retain their sovereignty as *Herren der Verträge.*

A comparable position is taken by Grimm. He argues that 'the modern notion of a constitution, as influenced by the French and American Revolutions, can be defined as a higher ranking group of norms deriving from the People and directed at the State power.'[12]. However, since the European Community's authority is not one that originated from the People but is mediated through the Member States, to turn the Treaties into a Constitution would mean 'turning the European Union into a State', which would not be possible since this would involve changing the legitimating

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[9] BVerfG 89, 155.

[10] The *BVerfG* emphasised homogeneity as the keystone of a *Volk* (and the lack thereof in the European context), see para. 101.

[11] KIRCHHOFF, P., The Balance of Powers between National and European Institutions, [1999], *European Law Journal*, 5:3, 225, at 229.

[12] GRIMM, D., Does Europe Need a Constitution?, [1995] *European Law Journal* 1:3, 282, at 287.

basis of the European Union. Grimm's argument has been criticised by Frankenberg, who rejects the idea that there is only one archetype of constitution; 'instead of asking 'does the EU have a Constitution?' … it might be more promising to ask, 'what kind of a constitution could and should, that be?''[13]. Frankenberg argues that the constitutionalisation of the European Union does not mean that the European Union is automatically turned into a State.

Probably the most critical opponent of the no-*Demos* theory has been Weiler. He questions, first of all, the assumption that the principle of a People (*Volk*) has historically always been the basis for a nation-state to emerge. Furthermore, he argues that the objective of the European Union's integration process was not to replace the nation-states of its Members with a statal European *Unity* - a United States of Europe - but to create a supranational European *Community*[14]. Weiler asserts that since the *telos* of European integration is 'an ever closer union among the *Peoples* of Europe', there is no such thing as one European *Demos.* He argues that the 'conflating of *Volk* with *demos* and *demos* with State, is clearly unnecessary and undesirable as a model for Europe.' Article 17 EC, which states that '[e]very person holding the nationality of a Member State shall be citizen of the Union', essentially decouples *Volk* and citizenship. The European Union is composed of citizens 'who *by definition* do not share the same nationality'[15]. The decoupling of nationality and citizenship allows for 'co-existing multiple *demoi*'[16]. In this view the European treaties could be regarded not only as an agreement between Member States, but also as a 'social contract' among the nationals of the Member States, accepting the legitimacy and authority of decisions adopted in pursuance of the goals set by the Treaties.

Using national constitutional doctrines to analyse Community law is exactly what EIJSBOUTS *et al* are doing in their book. For EIJSBOUTS *et al*, the debate about the constitutionalisation of the European Union's legal

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[13] FRANKENBERG, G., The Return of the Contract: Problems and Pitfalls of European Constitutionalism, [2000] *ELJ* 6:3, 257, at 267. Frankenberg distinguishes four archetypes of constitutions: (*1*) the Constitutional contract; (*2*) Constitutions as political manifestos, (*3*) Constitutions as a plan or programme; and (*4*) Constitutions as a statute, born out of a constitutional contract.

[14] WEILER, J.H.H., Does Europe Need a Constitution, Demos, Telos and the German Maastricht Decision, [1995], *European Law Journal*, 1:3, 219, at 248-249.

[15] *Ibid.*, at 239 (original emphasis).

[16] WEILER, J.H.H., *The Constitution of Europe*, Cambridge, 2004, at 344-348.

system was, according to their foreword, one of the two reasons for writing their book. In a fascinating way, they analyse and describe the European Union from a constitutional point of view, even though the book was written as a handbook for the bachelor's part of the University of Amsterdam's legal studies, as a first introduction to European law: the second reason for writing the book. EIJSBOUTS *et al* first of all argue that to describe the relationship between European institutions in constitutional terms can help to significantly clarify those relationships[17]. Since the famous speech by Joschka Fischer on the fiftieth anniversary of the Schuman plan[18], and especially after the second Convention started working on a Constitution for Europe, it now seems 'reasonable' to speak of constitutional relationships instead of institutional relationships; and hence to treat European institutional law as having constitutional or state- like characteristics, even though the Union is far from being a state, if it ever becomes one in the first place.

EIJSBOUTS *et al* argue that precisely because of its autonomous character, the institutional perspective is less important for the European Union as it has detached the development of Union law from the Member States. On the other hand, one can increasingly witness an interconnection between the Union and its Member States, both *de facto* as well as on policymaking. This does not imply that studying the traditional institutional law of the Union has lost its value, as one of the most important qualities of the European Union is that it has made some important structural developments without losing its institutional design. In the European Union, constitutionalisation occurs in the exact opposite direction to that taken in, for instance, the United Kingdom or the Netherlands, for in those countries history has shown one central power (the Monarch) whose authority gradually eroded, whereas in the European Union, EIJSBOUTS *et al* predict that either the Council or the Commission will inevitably emerge as *the* one central authority of the Union. They argue that the governmental system of the Union will either evolve towards a parliamentary system with the Commission as its central organ, or towards a more presidential system with the Council and its president as the central authority.

In a similar fashion, EIJSBOUTS *et al* use national constitutional doctrines as a yardstick to analyse the relationship between the Union and its Member States. They argue that only by examining it from a federal perspective

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[17] See especially the last two chapters of the book.

[18] See also: JOERGES, C. / MÉNY, Y. / WEILER, J.H.H., *What kind of constitution for what kind of polity? Responses to J. Fischer*, Badia Fiesolana, European University Institute, 2000.

can one truly understand the evolution of the Union's vertical division of powers[19]. The way in which the Council's power of Article 95 has been used, for instance in such a way that there is hardly any state socio-economic legislation which in one way or another is not able to interfere with the internal market, is similar to the way in which the United States' Congress has used the Commerce Power of Article I of the United States Constitution for all kinds of non-internal-market-related subjects[20]. But EIJSBOUTS *et al* argue that the relationship between the Union and the Member States can best be classified as a form of cooperative federalism, comparable to the German federal system, yet fundamentally different to that of the United States.

It is clear that these kinds of comparative analyses run counter to BARENTS' theory of the autonomy of Community law. But does this mean that the European Union cannot be regarded as a constitutional organisation? To put it succinctly, BARENTS' answer to this question is that Community law is a 'constitutional law without a state'[21]. In the second part of his book, BARENTS develops an interesting theory on how, on the basis of his hypothesis, the Community legal system could be analysed. In short, BARENTS describes Community law as a 'self-referential system of law'[22]; it is a normatively closed system whose functioning can be explained only on the basis of its contents. He continues that because the Community originates from an independent source of law, it has, by definition, a constitutional character. However, its autonomous character explains why the Community legal system is a supranational system of public law which has escaped:

> 'the traditional binary model according to which public law can only be explained in terms of either constitutional law (of a unitary state or federation) or international law (of an international organisation). Both approaches, which have in common what has been called 'a touch of stateness', are inadequate to describe the Community'[23].

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[19] p. 340.

[20] See also KNOOK, A.D.L., Guns and Tobacco. The Effects of Interstate Trade Case Law on the Vertical Division of Powers, (2004) *Maastricht Journal of European and Comparative Law*, 11:4, 347.

[21] p. 315.

[22] pp. 259-265.

[23] p. 314.

However, what about the role of the Court in the constitutionalisation process? Unfortunately, EIJSBOUTS *et al* do not really go into this question[24]. BARENTS, on the other hand, states that the Court of Justice has played a pivotal role in giving the Union its constitutional traits. However, he regards theories that claim that this has been a remarkable act of judicial activism as being 'superfluous', as these theories fail to take into account the autonomous character of Community law[25]. Quite the opposite, it is precisely because of the autonomy of Community law that the constitutional role of the Community courts is so important: 'A constitutional state can exist without a constitutional court; the Community cannot survive without it'[26].

[24] Except perhaps on p. 328.
[25] p. 295.
[26] p. 313.