The European Constitution, Parts I and III: Some Critical Reflections

Jan Wouters

1. Introduction

A little booklet, like the U.S. Constitution, that could fit into the pockets of European citizens and carried close to their hearts—that was what Valérie Giscard d'Estaing had in mind for the EU Constitution. However, from the outset it was clear that the simplification requested in the Nice Treaty and in the Laeken Declaration with a view to obtaining "a Constitution for European citizens"[1] was not going to result in a "lilliput" type of constitution that would make enjoyable reading for all EU citizens. Nevertheless, even in the preliminary draft Constitutional Treaty, which the Praesidium of the Convention circulated by the end of October 2002, a basic division was proposed between a part one, named "constitutional structure", and a part two (the Charter was not yet inserted in between) called "Union policies and their implementation". The former part would contain provisions "laying down the institutional architecture"[2] (definition, legal nature, values and goals, citizenship, competences, institutions, democratic life of the Union, finances, external action); the latter "would contain the legal bases. For each area it should specify the type of competence […] and the acts and procedures […] to be applied, in line with what is decided for Part I".[3] This treaty architecture was favourably received at the Convention's plenary session.[4]

In the end product of the Convention and in the final "Treaty establishing a Constitution for Europe" ("the Constitution") agreed upon by the Intergovernmental Conference ("IGC") and signed in Rome on 29 October 2004, this basic architecture has been upheld, even though, remarkably enough and unlike the other parts, Part I no longer has a name, whereas Part III is called "the policies and functioning of the Union". Even nameless, it is clear that Part I is conceived to be the most fundamental part of the Constitution. With its 60 articles, starting with the Union's establishment, core values and objectives, to the notorious voluntary withdrawal clause, it does indeed constitute a mini-constitution in its own right—which does not mean that it makes easy reading for Europe's citizens. Part III from its side is most of all about "[t]he scope of and arrangements for exercising the Union's competences".[5]

In this editorial I propose to address two main questions concerning the relationship between Parts I and III of the Constitution: (i) have the Constitution's drafters been

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[1] Laeken Declaration on the future of the European Union (*Bull. EU*, 12-2001, I.27, also available via http://ue.eu.int/en/Info/eurocouncil/index.htm).
[2] CONV 378/02, p. 1.
[3] CONV 369/02, p. 17.
[4] See CONV 378/02, p. 13: *"the structure of the Treaty was deemed good while its essential features, namely its constitutional nature, the fact that it was a single Treaty, the explicit conferral of a single legal personality and the clarity and readability of the 'backbone' of the draft were commended by the members as a bold approach which met the expectations of both the Convention and Union citizens.'*
[5] Quote from Article I-12(6).

consistent in their decisions to put certain matters or aspects in Part I or III rather than the other way around; and (ii) does the place of one or the other provision in Part I rather than Part III (or the reverse) legally make a difference?

2. The choice for having certain provisions in Part I rather than in III or *vice versa*

Although the rationale of the Constitution's structural division between Part I and III may be apparent from the above, it is by no means always crystal clear why, concretely, certain provisions do appear in Part I rather than in Part III or *vice versa.* In its IGC opinion of 17 September 2003, the Commission noted rather critically that "the choice between which provisions have to feature in Part I of the Constitution and those which can be contained in Part III is not always balanced."[6] It offered the following example: in Part I it is stated how many times the European Council is to meet every year, whereas essential rules on the decision-making by the European Parliament and the Commission are laid down in Part III.[7]

One can come up with many more examples of such questionable choices. Let us first consider a number of institutional matters, by comparing Title IV of Part I on "the Union's institutions and bodies" with chapter I ("provisions governing the institutions") in Part III's Title VI on "the functioning of the Union". It makes sense to spell out in Part I the essential features and mission of each institution, but does that mean that all the complexities of the appointment procedure of the Commission (including transitional arrangements)[8] had to be added in that Part, whereas for the composition and designation of members of the Committee of the Regions and the Economic and Social Committee reference is simply made to Part III[9]? Consistency is not the strongest side of the Constitution in this respect: on the one hand, the eligibility criteria for members of the Commission are mentioned in Part I[10]; on the other hand, those for judges and Advocates-General are laid down in Part III.[11] Why is a crucial body like the European Investment Bank not at least mentioned, as far as its key role is concerned, in Part I[12]? Speaking of essential features of the institutions, why does Part I of the Constitution not take over the 'constitutional' elements of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, such as the independence of Members of the European Parliament and the list of incompatibilities (which does not even figure in Part III now), whereas the independence of members of the Commission, judges and

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[6] Commission of the European Communities, *A Constitution for the Union. Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of Representatives of the Member States' governments convened to revise the Treaties*, (COM (2003) 548 fin.), p. 11-12, para. 21.

[7] *Ibid.*, note 8.

[8] See Article I-26.

[9] See Article I-32(5).

[10] Article I-26(4).

[11] Article III-355. Article I-29(2), third para., only mentions the "independence beyond doubt" requirement.

[12] Article I-34(3) only mentions the European Investment Bank in passing, referring to specific cases in which European legislative acts may be adopted at the request of, *inter alia*, the European Investment Bank. The basic provisions on the European Investment Bank can be found in Articles III-393 and III-394.

advocates general and of the ECB are explicitly emphasised in Part I? Why is the independence of Court of Auditors' members only mentioned in Part III?

For substantive issues too, the division of matters between Part I and Part III is not always obvious. Was there a need for the rather detailed provisions on the common foreign and security policy ("CFSP") and the common security and defence policy ("CSDP") in Articles I-40 and (especially) I-41 rather than in the Title on the Union's external action in Part III? Compare this to the concise reference of just one line to the core fundamental freedoms of the internal market in Article I-4 and one sees the lack of balance in this. Of course, the length of the aforementioned provisions indicates that the Convention and the IGC have paid—rightly— particular attention to these areas, but that does not make for a more balanced Part I. Regarding fundamental market freedoms, the question of the relationship between the various parts of the Constitution is still more complicated, as it is not only mentioned in Part I and (in explicit detail, with their traditional provisions) in Part III, but also—as far as EU citizens as beneficiaries are concerned—and with the exception of the free movement of capital—in Article II-75(2), i.e. in Part II in which the Charter of Fundamental Rights has been incorporated.[13]

Overall, both for institutional and substantive matters, it is hard for a user of the Constitution who wants to obtain a full oversight of, and insight in, the manner in which the Constitution deals with a certain point, to avoid a 'ping pong' experience, being thrown from Part I to Part III and back. Although, obviously, more detailed requirements had to be dealt with in Part III, the legibility of Part I suffers needlessly from an overkill of cross-references such as "for the aspects defined in Part III", "in accordance with Part III", "under the conditions laid down in Part III" and "except in the cases referred to in Part III".

Some words should also be said about the legistic quality of Part III. In its IGC opinion the Commission has been roundly very critical of this Part. Apart from the areas rewritten by the Convention (such as, e.g., on the EU's external action and the area of freedom, security and justice), the Commission found that the provisions on policies in Part III were rather unbalanced:

> "In certain areas, the text dates back to the 1957 Treaty of Rome. In others, it has been amended repeatedly, which does not make it any more accessible. The result is that the provisions on policies as featured in Part III of the draft Constitution (apart from the areas rewritten by the Convention) form a lengthy, uneven and complicated whole which is drafted in a variety of styles and, above all, has been superseded by the reality of current policies. The provisions on agriculture thus reflect the ideas of the 1950s on growth and security of supply, and are far removed from the key elements of the CAP reform designed to encourage production of high-quality food whilst respecting environmental imperatives and developing the countryside by means of diversification. The concept of sustainable development—which the Convention highlighted as one of the Union's aims—does not appear in the provisions on environmental policy. By contrast, the draft Constitution contains a number of provisions that are obsolete or irrelevant."[14]

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[13] Much more can be said about the relationship between Parts I and III on the one hand and Part II on the other hand. For instance, the very fact that Part II has kept its own preamble which does not wholly match the Constitution's preamble is rather remarkable.

[14] *Supra* note 6, p. 12-13, para. 22. The Commission gives the example of Article III-141 and Article III-56(2)c (in the final text: Article III-243 and Article III-167(2) c), on the division of Germany, and of Article III-109 (in the final text: Article III-215) which provides that the "Member States shall endeavour to maintain the

The Commission concluded by stating that, failing a complete overhaul, the IGC "should at least clarify some provisions and should make all the Constitution's provisions consistent, particularly by reflecting fully the provisions of Part I, on which the Convention focused a great deal of attention, in Part III, which it did not revise."[15] But even this has not been done in a systematic manner during the IGC. There are many examples of this. Just one: Part I makes in Article I-3(3) "a highly competitive social market economy" an objective of the Union. This notion appears nowhere in Part III, which in Article III-178 still speaks of "the principle of an open market economy with free competition, favouring an efficient allocation of resources" for the conduct of economic policy by the Member States and the Union.[16] In light of this and other cases one may agree with the Commission that

> "[t]his situation constitutes one more important reason for enabling the Constitution to be revised more flexibly […]. If the provisions on policies are not rewritten at this time, the Union should be given the possibility of doing so in coming years. If the rules were too inflexible, much of the Constitution, the Union's flagship text, would carry these defects for many years to come."[17]

3. Does it legally matter whether certain provisions appear in Part I rather than Part III or *vice versa*?

As such, the answer to this question is "no", as far as the hierarchy of norms is concerned. Given the close links between Parts I and III in many instances and the many cross-references between these parts, it seems very hard to draw any overall legal consequences from the fact that one provision of the Constitution carries a Roman figure "I" before it and the other a Roman figure "III" (or II or IV, for that matter). This being said, it is obvious that the European Court of Justice will be inclined to interpret the Constitution's provisions – as it has always done with the EC Treaty – in light of the overall objectives of the EU.

What then about the procedure for the revision of these parts? One would have expected the Convention to develop different methods of amendment for Parts I and III: more difficult for the 'foundational' principles, more flexible for the 'policies' Part III.[18] However, in the end—and to the disappointment of many[19]—the Convention did not propose this, because "some of the provisions of Part III were closely linked to the provisions of Part I and should therefore be subject to the same

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existing equivalence between paid holiday schemes." It should be noted that in the Constitution's final version (not in the Convention's draft, on which the Commission commented), both Articles III-243 and III-167(2) c) contain a last sentence pursuant to which five years after the entry into force of the Constitution, the Council (on a proposal from the Commission) may adopt a European decision repealing this exception.

[15] *Supra* note 6, p. 13, para. 23.

[16] See also Article III-177, first and second paras and Article III-185(1) on the European System of Central Banks.

[17] *Supra* note 6, p. 13, para. 22 *in fine*.

[18] See already the hint in the Laeken Declaration, *supra* note 1: "Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?"

[19] See, for instance, the Commission's IGC opinion, *supra* note 6, p. 8, para. 10: "This state of affairs could lead to total paralysis of the Union and eventually to a loss of interest on the part of the Member States and citizens as regards this form of integration, in favour of less effective models of cooperation or even cooperation between only some Member States."

amendment procedure"; and "laying down different amendment procedures would mean re-opening discussion on the structure of the Constitution and would give rise to requests for certain areas of Part III to be moved to Part I."[20]

This has remained so in the final Constitution text adopted by the IGC.[21] However, there is an important nuance: two simplified revision procedures have been provided for, in Article IV-444 and IV-445 respectively, each of which refers to certain provisions of Part III. In spite of its title ("Simplified revision procedure"), the former article contains a number of cases which, *stricto sensu*, do not amount to real treaty changes although they do have their importance in terms of efficient decision-making. For instance[22], Article IV-444(1) makes it possible for the European Council to adopt a European decision authorizing the Council for areas or cases for which Part III provides for unanimous decision-making – with the exception of decisions with military implications or in the defence area – to act by a qualified majority. This is, in essence, a revamped version of the "passerelle" provisions that were a familiar – but never used - technique in the Maastricht and Amsterdam Treaties. There are two caveats, though: the European Council has to act unanimously, and even if a decision is taken, it can be easily neutralized: if a national parliament opposes to such a European Council decision, it "shall not be adopted" – *causa finita*.[23]

The procedure laid down in Article IV-445 is more aptly named a "simplified revision procedure concerning internal Union policies and action". It provides for the possibility for any national government, the European Parliament or the Commission to submit to the European Council proposals for revising "all or part of the provisions of Title III of Part III on the internal policies and action of the Union". This comprises the internal market, economic and monetary union and a whole variety of policies in other areas, from certain shared competences[24] and the area of freedom, security and justice to "areas of supporting, coordinating or complementary action".[25] That is quite substantial. However, the manner in which this simplified revision procedure is

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[20] CONV 728/03, p. 10.

[21] For a discussion of the proposals of the Italian presidency of the IGC in this respect, see K. Lenaerts and D. Gerard, "The structure of the Union according to the Constitution for Europe: the emperor is getting dressed", *European Law Review* (2004), 289, at 305.

[22] I will not dwell on Article IV-444(2), which makes it possible for the European Council to adopt a European decision allowing for European laws or framework laws to be adopted in accordance with the "ordinary legislative procedure" (i.e. codecision) instead of the "special legislative procedure" (i.e. consultation). The same restrictions apply as with regard to Article IV-444(1).

[23] See Article IV-444(3), first para.

[24] This includes, as far as shared competences are concerned: social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy. It also includes two areas which are not, or not strictly, catalogued as areas of shared competence in Article I-14(2), namely employment (categorized as "coordination of economic and employment policies" in Article I-15) and research and technological development and space (mentioned in Article I-14(3), with the specificity that the exercise of Union competence does not result in Member States being prevented from exercising their competences). Note that an area of shared competence mentioned in Article I-14(4), namely development cooperation and humanitarian aid, is not a part of Title III of Part III, but of its Title V ("the Union's external action"), more in particular in Articles III-316-318 and III-321 respectively. For these areas, and more in general for all areas of the Union's external action, the simplified revision procedure is not available.

[25] Thus the title of Article I-17; compare the title of Chapter V of Part III's Title III: "areas where the Union may take coordinating, complementary or supporting action". This includes the areas of public health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; and administrative cooperation for the effective implementation of Union law by the Member States.

regulated, is not extremely flexible, to say the least: it presupposes a unanimous European decision of the European Council; the changes can only enter into force after approval (note: not "ratification") by all Member States according to their constitutional systems and no measure is foreseen in the event of a blockade at this juncture[26]; and, quite importantly, such European decision may not increase the competences conferred on the EU. The fact that this procedure does not cover the titles of Part III on the EU's external action and on the functioning of the Union, including the institutional provisions of Part III, makes it, in the end, limited in scope.

4. Concluding remarks

My conclusion is brief: the relationship between Parts I and III in the Constitution is not what it could have been. On the one hand, Part I provisions are sometimes needlessly long and detailed, and some of them could easily have been inserted in Part III. On the other, Part III of the Constitution is a rather strange compilation of entirely rewritten or new provisions and age-old articles, some of which are, in any event, outdated or even completely obsolete. In that respect, Part III is also a missed opportunity for another kind of constitutional exercise, namely a consolidation and updating of some of the Union's (nowadays: the Community's) core provisions in light of their interpretation by the Court of Justice.

[26] Compare, under the ordinary revision procedure, Article IV-443(4).