Editorial

In search of the Union Method

Just five years ago, on 2 November 2010, Chancellor Angela Merkel gave a speech under the gathering clouds of the euro storm at the Collège d'Europe in Bruges to launch a new notion: *the Union Method*. In her speech, Merkel accused the Brussels institutions of conceiving themselves as the sole guardians of the Treaties under the banner of the *Community method*:

> As a representative of a member state I may say today that it sometimes seems to me that the representatives in the European Parliament and in the European Commission understand themselves to be the sole true champions of the Community method. They see themselves sometimes in contradiction to the supporters of the intergovernmental method, that is to say the purely interstate method of cooperation. These comprise for them the Council, the European Council and the member states. Those are so to speak the intergovernmentalists, while on the other side you have the guardians and keepers of the Community method.[1]

To overcome the antagonism she suggested a new method:

> We must overcome this conception of opposing camps [*Lagerdenken*] […] we must set common objectives and establish common strategies. Maybe we can agree to describe this as follows: coordinated solidary action – each actor with its own competence, all for the same objective. That is, for me, the new 'Union method'.

She found the promise of this new Union method in an analogy with the revolution in her home discipline, physics, upon the arrival of quantum mechanics:

[1] 'Rede von Bundeskanzlerin Merkel anlässlich der Eröffnung des 61. Akademischen Jahres des Europakollegs Brügge', Bruges, 2 November 2010, <www.coleurope.eu/speeches>, visited 17 October 2015, translation by authors of this editorial.

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> When one is then able to act and research in this new space, everything suddenly seems so simple; one can no longer even understand how it could possibly have been inaccessible to previous generations.

In the following lines, we shall attempt to follow up on Mrs Merkel's notion, as supplemented in subsequent practice by frequent recourse to treaties adjacent to formal EU law, by beginning to think through her Union method in a constitutional perspective and not as a mere expedient undermining EU institutions and instruments.

Antagonisms

Antagonisms are stubborn but exciting and also very helpful. They bring intelligibility to complex situations and have a strong attraction on spectators, whom those antagonisms tend to divide into opposing camps. Thus the antagonism between the champions of the Community method and those of the intergovernmental method has taken a certain hold on scholarship and teaching.[2] The claim of both models is to seek method and system in the Union's structure and functioning, be it in the actual or in the desired situation. That is basically a good thing in view of the Union's proverbial complexity and intricacy for the public. The downside, however, is that the two views each hold that the other cannot be correct, now or in the future. Thus, they have tended to divide scholarship, with no agreement in view between adherents to either side, and to confuse the public.

As new ways of pursuing integration were introduced in the EU fifteen years or so ago under the term 'new governance', the antagonism between the two methods gradually lost some of its edge. These techniques include 'soft law', the 'open method of coordination', the 'social dialogue', the pursuit of legitimacy through participation and the involvement of stakeholders through deliberation. They are initiated from the Commission, but they reach out to member states' departments, to expert groups and to interested parties.

[2] There is no agreed definition of either orientation. Intergovernmentalism centres upon the Council and the European Council and their infrastructure of committees. The Community method centres upon the Commission as the heart of the institutional set-up, including of old the Council, later also the European Parliament and the Court of Justice. Dating back to the 1950s, it is now often called the 'classic Community method'. Intergovernmentalism's long time leader is Andrew Moravcsik. A relative newcomer is Uwe Puetter, *The New Intergovernmentalism* (Oxford University Press 2014); from the concluding chapter: 'The findings of this book have implications for research on important issues in contemporary European integration. […] deliberative intergovernmentalism offers lessons for integration theory. Notably, it shows that post-Maastricht integration can be conceptualized as integration *outside* the framework of the classic community method.' Emphasis added.

In the process of diversification of the Union's action, the idea of a single model lost its force in practice and scholarship often turned away from it.[3]

These days, 'new governance' has lost much of its appeal. The open method of coordination has not always been a success, to put it diplomatically. More importantly, new governance has proven too soft a practice in the face of great events, fears and vested interests such as appeared in the euro crisis and, currently, the refugee crisis. When things come to a head, old oppositions resurface. No surprise, then, that Angela Merkel five years ago returned to the old antagonism:

> Herman Van Rompuy, our Council President, recently stated: 'Often the choice is not between the community method and the intergovernmental method, but between a coordinated European position and nothing at all.' In other words, a coordinated European position can be arrived at not just by applying the Community method; sometimes a coordinated European position can be arrived at by applying the intergovernmental method. The crucial thing is that on important issues we have common positions (...) I therefore believe: we must overcome this entrenched thinking...

Singularity

In a trying time, it is natural for a leading European politician to want the Union to get its *act* together. Following this, it is fitting for scholarship to want to get its *picture of the action* together. This is why we now commend the Union method, not only as a coordinated *method of action* between the Union institutions, but as a single *model for understanding* the Union's present institutions and use of instruments in crucial political action.

This model will not focus on the EU 'infraworld' of regulatory instruments and institutions, which will always remain complex. It will have to be developed from looking at the top of the EU institutional structure, from the needs and the facts of its political and legislative leadership.

Over time the Union has become more complex, but it also has grown up to reach a measure of political authority. Even if this evolution towards political authority is far from complete, to say the least, it is undeniable and it will continue. For a politician, to wield authority requires subordinating institutional antagonisms. For scholarship, seeing the Union's political authority in action is

[3] For the practice: *see* Commission, 'European Governance – A White Paper' COM(2001) 428 final. For its reception in scholarship, *see* e.g. J. Scott and D.M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' 8 *ELJ* (2002) p. 1-18; in this introductory paper to the special issue of *ELJ,* the 'Classic Community Method' is the 'basis of comparison', against which innovations both within the *Method* and outside of the *Method* are set off.

what allows and justifies its being considered a political entity and, intellectually, to subordinate its institutional and instrumental diversities to singularity. Just as we do in the case of the state, it is considered to be a singular acting entity, in spite of its many diversities, on the basis of its visible authority.

If we look at the Union not from its infraworld but from the top, where the political action is, the picture becomes, indeed, quite intelligible. Currently the European Council *leads* the Union; while the Commission and the different Council formations and presidents *run* it. All this executive business, of course, brings with it some sterile *institutional* contention between the many executive bodies involved, including all their different chairs, just as it does in the executive branches of most governments. But this contention is kept in check, as it is in a state or in a natural person (normally). This is visible in the action of legislation, where the European Parliament and the Council act upon the drive and the initiative of the European Council and the Commission to adopt secondary legislation (regulations and directives), and where the member states act upon the drive of the European Council to create primary legislation (EU treaties).

The category of primary legislation

Let us examine this latter category – primary legislation – which is mostly absent from consideration in current institutional scholarship, be it Community-oriented, intergovernmentalist or of new governance.

In the Union method, primary legislation must be a central category. Why? Because primary legislation simply provides the most enduring and powerful basis of authority for the Union. Primary legislation involves the EU member states directly and in full. Treaty-making has become current in the Union's life as it developed from the Maastricht Treaty, which included treaties and conventions and the like between member states as part of the Union legislative panoply or toolkit. Under Mrs Merkel's actual drive since her introduction of the notion of a Union method, this toolkit has come to include treaties which are not technically EU treaties, such as the ESM Treaty and the Fiscal Compact, but which are part of EU law in a wider sense.

Bruno de Witte, who coined the above term of 'legal toolkit' for the Union, has detailed in several publications the way instruments of international law are used in EU legislation next to the instruments of secondary law. The phenomenon also features in his very fine piece in the present issue of *EuConst*.

Now can this new reality be understood as a *method?* That is another question. De Witte, for one, even if perfectly aware of the continuity and mix between community and intergovernmental instruments, institutions and actions, and not alarmed at it as some colleagues are, considers it to be a matter of the increasing institutional variety in the Union's institutional outlay and instruments.

We propose to take the acknowledgement of the normalcy of these treaties a few steps further, first by extending the notion of 'primary legislation' to EU treaties in the wide sense; and second, by conceiving this 'primary legislation' as the constitutional centrepiece of the Union, which may channel its seemingly increasing diversity into constitutional coherence and reveal a clear pattern.

Madness to method

'Though this be madness, there's method to it', said Polonius in 'Hamlet'. To see the *method* in this increasing jumble, as does Merkel, it may help to be not a lawyer, but a politician. Still, scholarship is able to go further in finding logic and system. It is by definition more explicit and less intuitive than politics and the politician, however intelligent and authoritative she may be.

Let us consider what it takes to make a method out of the seeming (if benign) madness of the EU panoply of: EU institutions; EU legislative instruments; EU decision-making procedures.

Institutions: add the member states, in full and in concert

Remember Merkel's first intuition, that it is necessary to bring the *member states* (not just the governments) into the picture. Merkel said (in German): 'If all the major stakeholders – the Union institutions, *the member states* and their parliaments – complement each other by acting in a coordinated manner in the areas for which they are responsible, the immense challenges facing Europe can be tackled successfully' (emphasis added).

That intuition deserves translation into constitutional thinking. How to conceive of the member states? It is fashionable to see these member states embodied fully in the Council and the European Council. That, however, is a fundamental mistake: these bodies emanate from the executives and are only part of the states. A member state as a whole is much more than its executive. And the member states together are much more than their executives, when they act together in their primary capacity.

When EU member states make treaties among themselves, they act in a double aggregation. Individually, they act as full entities, including their executives and their legislative bodies, their courts and even their peoples or electorates. These aggregates are then compounded further, by their action, into a single acting body creating the single act of a treaty. Once recognised as an important part of the Union method beyond the grasp of both the Community method and the intergovernmental method, let alone new governance, the treaty-making by member states can even be given provisional institutional form. The provisional

institution making treaties is the member states acting collectively. In EU institutional law, this body remains hidden from view. In a more encompassing view of EU institutions and institutional law, it appears compellingly, even if only in provisional form. It is the 'elephant in the room' of EU institutional law.

Students of the Union method will need to define and qualify this institution and its place in the whole setup. In studying it, they will need to go beyond the institutions as defined by the Treaties.[4]

Instruments: EU primary and secondary legislation

The reality of EU legislative action in politically acute areas today is far removed from the pure 'Community method' ideal of legislation by the Council and the European Parliament on the Commission's initiative. To be sure, the EU legislative machinery *stricto sensu* functions at full throttle, but it does so supplemented by many forms of acts adopted by the member states amongst themselves, or *'inter se'*. First in importance among these are, of course, the amending and accession Treaties. Then there are the traditional agreements concluded between the member states 'meeting within the Council'. Then there are the several treaties, acts or conventions between member states mandated by the EC and EU Treaties as part of their legislative panoply, such as the well-known Election Act of the European Parliament and the original EU Treaty-mandated Conventions (e.g. the Europol Convention). One may even include the periodic decision on the Union's own resources as a sort of treaty between the member states.

All of these treaties are concluded not only between the member states themselves, *inter se,* but among all: *inter omnes*.

Traditionally, most such agreements between member states are looked upon with suspicion by EU legal doctrine and legal practice. They are seen as (possibly) interfering with the autonomy of the EU legal order and they are hoped gradually to lose significance in terms of number and disturbance. But this hope is now proving unfounded. Instead, an increasing intricacy is appearing between instruments of primary legislation and of secondary legislation.

The agreement on a Unified Patent Court, which was concluded by (not all) member states, in combination with the Regulation on unitary patent protection is a good example. Between the two there are many cross-references. The same is true for the Fiscal Compact Treaty and EU secondary legislation. The new Banking Union features an EU regulation whose adoption was conditional on a prior intergovernmental agreement, and again, between the texts there are

[4] They may go about it as they (sometimes and hesitantly) did with the European Council before this was first mentioned (1986 and 1992) and then sanctified as an EU institution (Lisbon, 2007).

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many cross-references.[5] These legislative compounds are items in a powerful trend, which is here to stay, of layered legislation.

Is this a problem, or is it possible to make sense of this layered legislation and of the treaties involved? A first step is to avoid being too restrictive in qualifying the variety of agreements mentioned above between EU member states as EU law. All of these agreements, even if not concluded *inter omnes* but *inter pleros* (between *most*), are part of the EU legal order in the wide sense, and in this sense create and modify EU law. To acknowledge them is merely a conceptual step, without normative significance: one that has already been taken in doctrine, if hesitantly.

The second step, more brazen but still only conceptual, i.e. playful and without a *normative* claim, is to acknowledge also these *inter pleros* agreements as a form of *legislation* for the Union. This step has been prepared above by titling the EU founding, amending and accession treaties as EU *primary legislation*. These founding treaties are the most obvious form of *inter omnes* treaties. Like all legislation, they have a double function. As legislation in the 'material sense' they create general norms of substance and structure for the body politic concerned. As legislation in the 'formal sense,' they do so on the highest authority available in the Union: that of the member states acting together. That is why 'primary legislation' is so apt a term.

Now most of these things are also true for *inter pleros* treaties. They create general norms of substance and structure for the Union on the highest available authority in the Union, that of the member states (including their parliaments, courts, electorates). It is sometimes forgotten by those opposed to this practice that the main reason for the German and other governments to insist on the treaty form is precisely their superior legal, political and democratic authority.

Now we are well aware that the proposed conceptual upgrade of all *inter omnes* and *inter pleros* treaties from a suspicious variety to an esteemed category of *primary legislation* is a major step to propose. It needs to be well underpinned and doctrinally qualified.

All this we commend for further study. To conclude for now, let us only give some indications as to legislative procedure and, finally, as to what all this may obtain in terms of constitutional coherence and structure.

Primary legislative procedure

To upgrade, conceptually, *inter omnes* treaties to the category of (primary) legislation, one wants to perceive, or postulate, something of a legislative procedure. Is there such a procedure? In the formal and legal sense the procedure

[5] For Banking Union, *see* the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, [2014] Council doc. 8457/14. Most of these treaties could have taken the form of classical primary legislation and part of EU law in the strict sense, had it not been for the refusal of some member states to participate.

for primary EU legislation in the strict sense is found in the Articles 48 and 49 of the Union Treaty, on Treaty revision and accession. These procedures essentially involve the full state membership of the EU as the central actor, with each of these states also bringing in its executive and its legislature (for approval), with some bringing in their electorates and their (constitutional) courts.

The two procedures of Articles 48 and 49 TEU are somewhat different from one another. At accession, the acceding states are also involved, of course. And the European Parliament is involved, though *not* as a matter of course but as a matter of EU constitutional history. So there is no singular procedure for primary legislation as it stands. And with the widening of the category, the diversity of procedures increases.

Is this a conceptual problem? Not really. EU *secondary* legislation also involves different institutional outlays, between what is now called the ordinary and the special legislative procedures. Uniformity of procedure is not essential.

Similarly, it is not even required, in primary nor in formal secondary EU legislation, that all member states be involved. An increasing number of EU secondary legislative acts concern only a part of the member states. This opens the way to conceiving the procedure towards EU treaties *inter omnes sive pleros* as that for EU primary legislation. This goes for the ESM Treaty, the Patent Court Treaty, the Bank Union Treaty, and even the Fiscal Treaty.

What all these procedures essentially have in common in all their diversity, however, is not a legal but a factual element. It is the heavy involvement of the Union political executive (the European Council) in initiating them and seeing them through. This conforms fully to the *actual* (if not always *legal*) legislative procedure in all modern constitutions. Little legislation comes about in modern states without the heavy involvement of political executive bodies in the procedure, whether this is acknowledged legally, as in the UK, France and Germany, or not, as in the US. In modern constitutions, all legislation, primary and secondary,[6] calls for and then enjoys the highest legal and political authority. In the European Union, primary legislation combines the supreme actual authority of the European Council as initiator with the enduring legal authority of the member states as adopter.

Thus, for the *full actual* procedure of EU treaty-making or primary legislation, whether *inter omnes* or *inter pleros* treaties, one always finds the same sequence of steps and the same actors. On the initiating and driving end, you find the European Council in a large sense (including the Eurosummit), assisted by other executive bodies such as the Council, and the Commission. On the receiving and

[6] Conceptual clarity begins with the notions. In the old Union parlance, you often find 'primary legislation' to come from the European Parliament and Council, as part of 'secondary law'. That is utterly confusing. The categories of primary and secondary *legislation* are preferable. In the UK, this twosome of categories is already in common use for EU law, even though in the home constitution, 'primary legislation' is for Acts of parliament, the supreme source of law; secondary legislation is for delegated legislation.

adopting end, like a legislative assembly, you find the collected member states, including their governments, parliaments, courts and electorates.

Is this not forcing things a little merely for the sake of a model? Yes, it is. Please realise, however, the modesty of this exercise. We are trying to bring simplicity and intelligibility into the EU's seeming intractable system of increasing complexity and variety, its *usine à gaz,* as they fittingly say in French, a 'gas production plant'. We are not making normative claims, nor proposals for institutional revision, as so many fellow-lawyers do out of scholarly desperation with the messy reality. Nor do we despair at all: we see great possibilities of rationalisation and clarification in the way things develop by themselves.

Even if the steps we propose seem unheard, they remain, very modestly, matters of mere concepts, involving no change of rules nor of reality.

To conclude: constitutional coherence and structure

While the 'Union method' is sometimes seen merely as an expedient cover for complicating and denaturing the Union's institutions and instruments, if well considered and thought through in a constitutional perspective, it may be quite the opposite. To begin with, it does what its name claims to do: it brings the different groups of Union institutions and instruments under a single conceptual umbrella. Second, it helps to overcome the sterile antagonism between EU institutions, as between the Community method and the intergovernmental method. By including the EU member states fully in the EU constitution and widening the picture from the executive bodies alone to cover the whole array of institutions involved in the EU – both Brussels and national institutions – it allows us to transcend unwieldy institutional antagonism. Instead it will attract attention to those antagonisms that are constitutionally significant and wieldy: those between executive, representative and even judicial bodies.

This is how the Union method, on the basis of a keen understanding of the Union's law and government in practice and supported by innovative constitutional research, will allow us to see coherence in the Union's functioning in practice and eventually one singular intelligible constitutional structure for the EU; perhaps even a politics of the EU that appeals to the press and the public, as politics can and should.

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