

The Barroso Drama

Campidoglio, Rome – 29 October 2004: How the Form Was Brought to Matter

W.T. Eijsbouts*

Papa, don Calogero is coming up the stairs. He is in evening dress!
Tomasi di Lampedusa, *Il gattopardo*¹

‘... yet, owing to friction between the plebs and the senate, so many [good] things happened that chance effected what had not been provided by a lawgiver. So that, if Rome did not get Fortune’s first gift, it got her second. For her early institutions, though defective, were not on the wrong lines and so might pave the way to perfection.’

Niccolò Machiavelli, *Discorsi*²

Meeting of constitutional form and matter. Matter in the sense of Machiavelli’s ‘political life’, clashes between the establishment and the people. EU investiture struggle and its outcomes. Structural elements of the EU Constitution: authority, representation, political federalism.

In the bag of presents, courtesy of the Dutch presidency, routinely offered reporters covering the signature of the European Constitution, there was a small book.

* The author is presently a fellow at the European University Institute. He obtained a press card for the signature ceremony as the editor of this Review, thanks to the Dutch ministry of Foreign Affairs.

¹ Don Calogero is the nouveau riche in Lampedusa’s delightful classic about Italy’s and Sicily’s surrender to unity and modernity in the 1860’s. He is the combination of shrewd calculation and bad taste pomp, characteristic of transitional periods in which form and substance are out of touch.

² *Discorsi*, 1.2, translation Father Leslie Walker, as in Penguin classic (many editions) with introduction by Bernard Crick. The *first* favour of Fortune for a state is to chance on a good lawgiver, such as Solon for Athens, Lycurgus for Sparta.

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It was entitled: *Una costituzione per l'Europa. Roma 29 Ottobre 2004*. Had this book contained, as one might expect (and as this reporter did), the new Constitution's text in fine print and on fine paper, it would have been a marvel to cherish for years to come. To their astonishment the thousands of press people found, each in turn, that the book's pages were blank; it was a dummy. Thus it came well to symbolise the signature's mere ceremonial character, stressed to the point of vacuity by host Silvio Berlusconi, Italy's Prime Minister.³

The day's styling of events had been entrusted to Berlusconi's favourite, Mario Catalano. Franco Zeffirelli, the nation's leading director, did the television show, never missing a moment's picture of his master's speeches but amputating many of the others. *Il cavaliere*, who personally inspected up to the flowers in the Conservatori palace, had seen to the Campidoglio [Capitol Hill] slope's rebuilding in cardboard structures, in the best of Italian city masquerading traditions. The *Via di san Giovanni decollato* was turned into a press lounge with terraces, cut off from the neighbourhood by high walls of painted board. From the *Piazza della Consolazione* a street leading down was built into three consecutive immense restaurants. Not to mention the immense halls and tens of studios created for the written and visual press.⁴

The somewhat hollow character of this event would, however, be fully redeemed by its timing on 29 October. It was a moment as perfect as it was coincidental. In a gesture to Commission president Prodi, who was to step down two days later (and maybe out of some *pique* with Berlusconi), the Dutch had advanced the signature date from Berlusconi's proposed date in November to 29 October. In this way Prodi could shine among the dignitaries in Rome as Commission president, before taking up his Italian political infighting with Berlusconi.

And so it happened that the European Parliament's arousal over Berlusconi's Commission candidate Buttiglione, having just come to a head on 27 October, needed to be resolved back stage on Capitol Hill and could give political

³ Berlusconi knows to use paper for ceremony. On 18 July 2003 Convention president Giscard d'Estaing came to offer him, as EU chairman, the Convention's final draft. When in the press conference Giscard set out to defend the document in the face of euro scepticism, a fly started bothering him. Berlusconi picked up the weighty document just officially handed him and smashed the fly with it in one strike, thus providing comic relief and allowing Giscard to retort: 'There's the Constitution's first victim'. J. Ziller, *La nuova Costituzione europea*, 2nd edn. (Bologna 2004), p. 13.

⁴ Luigi Barzini writes about one such earlier event: 'Rome was made to appear more modern, wealthy, and powerful with the addition of whole cardboard buildings, built like film sets, on the occasion of Hitler's visit, in 1938, in the fashion of Potemkin's villages. (Trilussa, the dialect poet, wrote a famous epigram on the occasion: Roma de travertino, rifatta de cartone, saluta l'imbianchino, su prossimo padrone, or Rome of travertine, re-made with cardboard, greets the house painter who will be her next master.)' *The Italians*, p. 101. That day, of course, was 8 May 1938, the *Giornata Particolare* eternalized by Ettore Scola, Sophia Loren and Marcello Mastroianni.

substance to the signature ceremony, breathing life into the new paper Constitution while, in turn, the day's grand ceremony lent its moment to the political tumult. What is a constitutional instrument without a political life to inspire it? What is, on the other hand, a political clash without an instrument of government into which to infuse its enduring significance? One is hard put to imagine a more powerful meeting, at a better place, between two more clearly separate lines of events, between paper and reality, between constitutional form and matter, than that meeting of 29 October 2004 in Rome. And a closer reading of the events will only make them gain in brilliance.

UNO VIVERE POLITICO⁵

That the surprise meeting of constitutional form and matter, of text and fact, should be somewhat at the expense of the overconfident host (forced to withdraw his candidate), is a matter of anecdote. What counts is the birth of a political life for the Union. There is no denial that the European Parliament in those days in October was the theatre of a full-blown and highly qualified political stand-off, in which a crisis was nurtured from the smallest beginnings into a maximum outcome. It did involve an improbable amount of coincidence and an equally improbable number of blunders from leading participants, but that is part of politics and in no way discounts the event's value.

The mark of politics is in turnabouts. June's elections had brought a clean victory for the European Parliament's Conservative bloc EPP-ED, with 268 seats over the PES Socialist bloc's only 200. The liberal Centre group ALDE, with its 80 seats the third-largest force in the 732 member Parliament, seemed happy to help the Right most of the way to a steady majority. When it came to cashing in, however, the rightist bloc managed to turn its victory into a defeat, had its triumphant event trumped, just avoided a losing vote, had to dump its fresh champion Buttiglione and finally had estranged the Liberal camp. And to top it all, the European Left, in a new combination of socialists, greens and liberals, came out of the showdown victorious under the banner of a single message in the name of its electorate, which could be read: '*no conservative revolution for us here in Europe!*'⁶

⁵ Uno vivere politico is the term Machiavelli uses for constitution or constitutional politics, as opposed to autocracy, e.g., in *Discorsi* I, 25, which is generally enlightening for the Union evolution. Witness the motif rendered by the title: 'He who proposes to change an Old-established Form of Government in a Free City should retain at least the Shadow of its Ancient Custom'. Penguin edn. The notion is derived from Aristotle.

⁶ It may be recalled that president Bush's election one week later sent the opposite message from the US.

For the European constitution this episode equals and complements that of the European Convention in importance, including the Intergovernmental Conference. It is the slap from which the new European Constitution may start breathing. This is why the story needs to be told and its lessons drawn.

The first mistake was made by president Chirac and Chancellor Schröder. Following the election for the Parliament, they proposed Belgian PM Guy Verhofstadt for Commission chairman. A liberal, Verhofstadt would, if appointed, represent both a living denial of the Conservative electoral victory and a conceptual denial of this high appointment as an electoral sanction. It would be squarely against the grain of time. There is presently no legal obligation to pick the Commission chairman from the winning ranks and it has not been felt as a necessity in the past. But Article I-27 of the new Constitution starts, clearly: '*Taking into account the elections to the European Parliament and having held the appropriate consultations, the European Council ... shall propose to the European Parliament a candidate for President of the Commission*'.⁷

Both the taking into account of the elections and the consultations are new; they remind of procedures in parliamentary systems and make the appointment an expression of the electoral verdict. The Conservatives were right to react and put forward their own candidate, Chris Patten, just before the European Council meeting of 18 June. This sufficed to finish off Verhofstadt, without however securing Patten's nomination. In fact Patten was downed in retaliation, as is standard practice. To prevent such children's play in the future, the EC Treaty since Nice already has the Council decide by majority (Article 214.2 EC), but for this procedure to be applied is something else. In vital questions among governments, the name of the game is consensus. In fact, Council chairman Bertie Ahern was sent on a search with the only (implied) message that the candidate should be from the Conservative ranks. And so he came up with José Manuel Barroso, former conservative Portuguese PM, and got him accepted by the fresh European Parliament on 22 July by a wide margin (413-251, 44 abstentions). So far so good for the Conservatives.

The Commission-president elect is expected to make up a team from the persons sent him by the national governments. He has no say on the persons nor on their political orientation. His main right, which can be put to some effect in dealing with the national governments, is the distribution of functions in the Commission. For the rest, even if he always has a point in avoiding casualty-prone cases and getting a maximum number of women, he is at the mercy of the member states. The Convention Draft of the Constitution had suggested strengthen-

⁷ The facts and backgrounds of Chirac's and Schröder's tactic are given in the contributions by Mariatte and Thym.

ing his hand by forcing the member states to propose not one but three persons, but this was refused by the large member states in the IGC stage and dropped from the Constitution.⁸

When Barroso came to Rome to get Berlusconi's candidate, the person put forward was Rocco Buttiglione. The background of this surprise move is well written down in Lorenzo Zucca's contribution to this issue of *EuConst*. And here is where Barroso's trouble started. Had he just avoided giving Buttiglione the most sensitive portfolio of liberty and justice, most probably nothing would have happened. In fact the portfolio was proposed first to France's Jacques Barrot. Probably for reasons that would only come to light afterwards, Barrot declined.⁹ Once Buttiglione was given the portfolio, however, there was an immediate catch between the person and the post, only to be reinforced in the succeeding stages both by Buttiglione and his supporters in and outside of Parliament *and* by his opponents, in the typical battle pitching process.

B u i t e n w e g (V e r t s / A L E). Mister Buttiglione, some of your ideas are in outright conflict with European policy. According to the Charter, discrimination on the basis of sexual orientation is prohibited. That provision you have actively tried to remove from the draft in the Convention of 2000. You have said that homosexuality is a sin and should be seen as an index of moral disorder. Will you explain to me why you should now ask us to make you responsible for actively combating discrimination of homos, lesbians and bi-sexuals? I am very interested in your answer. And can you mention one concrete measure by which you intend to accomplish this?

B u t t i g l i o n e, *Commissioner-designate*. I shall remind you of an old and perhaps not completely unknown philosopher, a certain Immanuel Kant from Königsberg, who made a clear-cut distinction between morality and law. Many things may be considered to be immoral that should not be prohibited. In politics we do not renounce the right to have moral convictions. I may think that homosexuality is a sin but this has no effect on politics unless I say that homosexuality is a crime. In the same way, you are free to think that I am a sinner in most areas of life and this does not have any effect on our relations as citizens. I would regard it as an inadequate consideration of the problem to pretend that everybody agrees

⁸ In the debate of 17 November preceding the vote on the second Barroso team, Jean-Luc Dehaene (one of the Convention vice presidents) suggested to slip this idea back into the (practical) constitution by way of an agreement between the institutions. Another possibility is for the small countries, champions of a strong Commission, to propose three candidates of their own motion.

⁹ In a later stage, Barrot was known to have been convicted in France for embezzlement and, even though later amnestied, would not be the person fittest for a justice job.

on moral matters. We can build a community of citizens even if we have different opinions on some moral issues ...¹⁰

The germinal moment of polarisation, nailing Buttiglione to his portfolio and inviting a showdown, is on parliamentary record. Buttiglione was the only candidate to go before two parliamentary committees, disputing each other about his hearing. While the Legal Affairs Committee, having heard him on 6 October, approved Buttiglione, the Civil Liberties Committee, having heard him on 5 October, voted by the slimmest of majorities, 27 to 26, against his appointment. It then expressed the frustration and the confusion of the losing camp, intelligently supported by some of their opponents, into a 28 to 25 vote *against* Mr Buttiglione's reshuffle to any other post within the Commission, locking him into place. This was 11 October.

C O N F I D E N T I A L¹¹
Mr Josep BORRELL FONTELLES

President

European Parliament

Brussels, 11 October 2004

Dear Mr President,

Following the hearing with Mr Rocco Buttiglione, Mr Barroso's nominee as Vice-President and Commissioner in charge of the freedom, security and justice portfolio, the coordinators for the political groups represented on my committee were unable to agree on a joint text assessing Mr Buttiglione.

With the coordinators' agreement, I therefore referred the decision to the committee itself.

Acting on my proposal, the coordinators agreed on a procedure to put two proposals to the vote, in camera, by secret ballot:

- (1) endorsement of Mr Buttiglione's nomination as Vice-President in charge of the freedom, security and justice portfolio;
- (2) endorsement of Mr Buttiglione's nomination as Vice-President on condition that he be given a different remit.

A note dated 6 October 2004 on the procedure, and agreed to by all the coordinators, stated that, should the first proposal be adopted, the second would fall and that rejection of proposals 1 and 2 would mean that Mr Buttiglione's nomination had been rejected.

¹⁰ For official audiorecording of the hearings: <http://www.europarl.eu.int/press/audicom2004/index_en.htm>; Buttiglione's hearing: <[http://www.europarl.eu.int/press/audicom2004/summary/041005_BUTTIGLIONE_EN.pdf](http://www.europarl.eu.int/press/audicom2004/resume/041005_BUTTIGLIONE_EN.pdf)>; for the unofficial transcript from which this passage is taken: <<http://www.acton.org/press/special/transcript1.pdf>: 2-018, 2-019>; translation of Buitenweg's intervention: EuConst.

¹¹ LT\543567EN.doc PE 349.302/BUR/17, <http://www.europarl.eu.int/hearings/commission/2004_comm/pdf/lt_buttiglione_en.pdf>.

As the first step in the procedure, I asked members whether they endorsed Mr Buttiglione's nomination as Commission Vice-President in charge of the freedom, security and justice portfolio. The result of the vote by secret ballot was: 26 for, 27 against.

I therefore then asked members whether they endorsed Mr Buttiglione's nomination as Vice-President on condition that he be given a different remit. The result of the second vote was: 25 for, 28 against.

Please take account, during your further deliberations, of the position adopted by the Committee on Civil Liberties, Justice and Home Affairs.

Yours sincerely,

Jean-Louis Bourlanges

At that point few people understood how parties had dug in on both sides to make Buttiglione into the single real bone of contention.¹² We do not need to go into their arguments about the candidate's right or sense to vent his conscience on homosexuality as a sin or on the etymological origin of the word marriage. Surely he had every right to say as he pleased and surely the Parliament then had every political right to vote on what he said.¹³ Originally Buttiglione may have been simply naive; once the catch was made, he was bound to seek refuge in principle and to increase polarisation.

How it took two weeks of further polarisation to turn the hesitant socialists and the even more hesitant Liberals at large into convinced opponents of Buttiglione's appointment and even put Barroso's position on the line can be read well from Peter Ludlow's 'Briefing note' on the subject and from the accounts in this issue of *EuConst*.¹⁴

Many of the details are unknown but the picture is clear. Barroso first hoped to line up the MEPs behind his team in the tested way, using the domestic political machines to do the whipping for the government leaders. He also put his trust in the Parliament's establishment, its group chairmen (Pöttering, Schulz and Watson). Both lines failed, for the first time, against the groundswell from the Parliament's backbench. Only on 26 October, the eve of the vote, did their predicament dawn

¹² Towards the end of the showdown, two weeks later, when all leaders including the EP Conservatives president Pöttering were ready to withdraw Buttiglione, the original frustration resurfaced in the Parliament, blocking the perspective of a positive vote for Barroso even without Buttiglione.

¹³ The appeals to freedom of speech, etc., are beside the point, as is Buttiglione's appeal to his freedom of conscience. A conscience is no guide to normal action, let alone to political action, save in situations of emergency or public dilemma and will be kept to the inner forum in other situations. As to the distinction between morality and law: Kant has devised a number of such distinctions, but these are not established wisdom for philosophers in general nor for legal philosophers in particular, let alone for political life.

¹⁴ Peter Ludlow, *The Barroso Commission. A Tale of Lost Innocence*. Briefing note No. 3.4, Brussels, Dec. 2004 (EuroComment).

on all government leaders involved and even on Barroso. It then took a European flurry of high-level telephone calls between the capitals and even from airplanes on that evening for everyone to realise the impasse and for Barroso to limit the damage by withdrawing his proposed Commission team the next morning. And it took the signing ceremony of 29 October for the European Council to bow to the European Parliament. This it did by forcing Berlusconi to withdraw his protagonist without securing, as he had insisted, a balancing set of other changes in return for his *sacrificio* and to take the weight of the crisis off his (Italy's) lone shoulders. In fact, over dinner with Barroso in Rome on the eve of the summit, the Dutch PM squarely refused to withdraw his own candidate, the most contentious Neelie Kroes.¹⁵ The socialists could then complete their triumph by not having to drop any of their candidates. Kovács was only moved to another post. This is why Berlusconi went on sulking to the last moment and irritating everyone before giving in and coming up with Frattini to replace Buttiglione late Friday in the European Council meeting of 4-5 November. The rest is routine, more or less.

What is the upshot in terms of the European constitution (the small c referring to the *substantive* constitution)? This will be the subject of what follows. To begin, let us count the nicks adding up to make this showdown into a first picture of full blown *political life* in Brussels.

- a) a fully carried political conflict developing straight from a popular election;
- b) a full reversal of theatre, between the result of the election and its outcome in terms of appointments;
- c) a clear development from practical and personal to principled considerations;
- d) a gradually stronger expression of the outcome in terms of political division, i.e., a clear strengthening of the majoritarian element in parliamentary process;¹⁶
- e) the fight for expression of the mood of the European public, roughly a test between the mood for a new moral impulsion and the mood to refuse this;
- f) the EP's back bench rising up successfully against its establishment;
- g) the utterly public nature of the clash, with the press both heavily represented and having no difficulty to pinpoint the issues. One could see the

¹⁵ She was saved also by the fact that the liberal counter sacrifice was easy to make, Latvia's Ingrida Udre having lost her protectors in the government there.

¹⁶ *Majoritarian* here understood as the opposite of *consensual*, to wit: decision involving an ultimate choice between contrasting positions on the basis of simple majority v. minority. This is not exclusive to two-party systems. Coalition governments also operate on a majority system in their parliaments.

press people from different countries competing for scoops on the same European political topic: the dawn of a European press.¹⁷

Apart from these shining signs of political life (together making up an act that the European Parliament itself will soon find hard to follow), there are the possible *structural* changes from the clash to be inventoried. None of these is accomplished nor even assured to eventually work out. Many have been laid as eggs, one could say, to hatch in coming years.

It is best to start from the more technical elements involving constitutional *procedure (the investiture)*, then pass on to elements of *authority*, further to those concerning *representation*, to end with elements of *federalism*.

THE INVESTITURE STRUGGLE: LESSONS OF CONSTITUTIONAL EVOLUTION

When Barroso withdrew his proposal on the morning of 27 October, a legal question arose, or better, a legal void fell. The new Commission team was to take office on 1 November 2004.¹⁸ This was impossible. What now? Stopping the clock is, of old, a familiar technique in Union regulatory practice but has not been applied to constitutional procedure. The legal departments of the Commission, Parliament and Council immediately conferred and agreed not to make this into a contentious issue, so that practice could take over and overrule the date of 1 November also for the future (even though it is in the Constitution).

The law departments also conferred on the meaning of the clause that the Commission shall be approved 'as a body'. Article 214(2) EC:

The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority, shall nominate the person it intends to appoint as President of the Commission; the nomination shall be approved by the European Parliament.

The Council, acting by a qualified majority and by common accord with the nominee for President, shall adopt the list of the other persons whom it intends to appoint as Members of the Commission, drawn up in accordance with the proposals made by each Member State.

The President and the other Members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After

¹⁷ It only takes understanding the national press as 'the set of media essentially driven by the competition for scoops in national fields of attention', to conceive in the same terms of a European press. True, this is only nascent, as is its European public sphere. But conceived in this way, at least they both become operational elements for research, to begin with.

¹⁸ The date of 1 Jan., following the EP elections, was codified in the Nice protocol on the enlargement, Art. 4(1), amending Art. 213 EC. This again was amended by the 2003 Accession Treaty, Art. 45.

approval by the European Parliament, the President and the other Members of the Commission shall be appointed by the Council, acting by the Council, acting by a qualified majority.

What about Barroso? He had already received the Parliament's blessing on 22 July. Would the entire Commission's disavowal bring him down also? Here no practice has been established and none will be. Certainly one of the motives for Barroso to withdraw his proposal in the face of probable defeat was avoiding the stigma of a failure, not only for the undisputed nominations but, before all, for himself. He would have gone down with the rest. This is, however, not a matter fit for a formal rule, legal or not.

Questions such as these point to the relevance of practice as a prime source for the Union's constitutional evolution. Investiture has been the first front of practical infighting. Maurice Faure's report of November 1960 called for the right of investiture.¹⁹ Once elected directly (1979) the Parliament indeed resorted to the extralegal remedy of constitutional testing by voting on the confirmation of Gaston Thorn's Commission (1981).²⁰ In their Stuttgart declaration of '83 the member states conceded a limited right of consultation on the Commission President's nomination, but the Parliament continued going further and simply voted the Commission investiture. Commission president Jacques Delors went along with this in 1985 by waiting for the Parliament to express itself before having the Commission take its oath before the Court of Justice. The member states finally gave in at Maastricht, their Union Treaty formalising investiture into a right for the Parliament. Subsequent Treaties have strengthened the Parliament's hand each time and so does the new Constitution.²¹

The procedure now has two elements of quite distinct character, which together express a significant split of the Union's constitutional structure and are therefore best read as wide apart as possible. After the elections for the European Parliament on 10-13 June 2004 and its clear victory for the conservative camp,

¹⁹ Its French origins are no surprise, given the importance of this procedure in the French Fourth Republic, as Jacques Ziller writes in his contribution to this issue of *EuConst*.

²⁰ To understand this tactical remedy one only need consider what would happen if the Parliament would vote down an incoming Commission, even lacking the right to do so. If the member states would choose to ignore this refusal, a test of strength must follow, in which the Parliament needs to show its determination to paralyse the Commission. Once the member states give in, in one way or another, a 'constitutional practice' is certain to have been established, conceding the Parliament the power of investiture in the future. Such a practice consists of a norm, as articulate as a legal norm, whose legal status however is uncertain, as is its origin. The origin is the showdown and the resulting understanding. Failing any recorded or articulate understanding between institutions involved, or failing an articulate norm, which may be violated, there is no constitutional practice in this sense of the term.

²¹ Maastricht: Art. 158.2 EC; Amsterdam (after renumbering): Art. 214.2 EC. Santer's Commission was voted in by a minimal majority.

the Commission president was to be nominated, in accordance with Article 214.2 EC. As this nomination follows on the elections and is the only direct political expression, its result is ready to develop into a political gesture, as indeed happened in the succession of events outlined above. It is now probably *acquis*, accomplished, following the events, that the Commission president can and will carry a certain political profile. He is, in a sense, the political element of the team and his appointment is, by itself, the strongest expression of the *parliamentary element* of the Commission.

It is quite different for the other Commissioners in the college. With candidates coming from the capitals as part of national political spoils, the college is denied a political profile. Normally one will not see either a more progressive or a conservative Commission arise from the European elections. The Commission is essentially non-partisan, as a corollary of its statutory independence. The common members' appointment procedure follows this difference. It reeks of the *non-parliamentary*; Duff, in his excellent report drawn up just after the events, calls it even 'alien' to the European tradition: 'Despite being alien to the European tradition, the parliament has borrowed self-consciously the practice of hearings from the US Congress'.²²

This explains both the development and the persistence or even strengthening of the two-stage split of the investiture process, marking the partly parliamentary and non-parliamentary context and nature of the Commission's function, and will prove enlightening in respect of at least one other question. It is this. Does Buttiglione's successful individual rejection mean that the European Parliament has now implicitly won, in the form of established constitutional practice, the so desired right to test and censure individual commissioners, as is being argued? In other words, could Mrs. Cresson, the most obvious candidate for the role of culprit in the previous stand-off (March '99), under present circumstances (rules) be challenged in isolation, without involving the whole Commission? The answer is probably: no. This also follows from the composite basis of the Commission's existence. Individual Commissioners are of a different status and even nature from the one of their chairman. The latter is a member of the European Council and involved in Europe's central political authority; the former are essentially top-level bureaucrats. This is expressed in unambiguous terms by the present Article 217 EC (dating from the Nice Treaty), centring all the Commission's authority on its president, and making a Commissioner's resignation automatic on request of the President, *if he obtains the approval of the college*. To make matters clearer, the Constitution (Article I-27(3)) drops the latter condition.

²² Duff, EP Committee on Constitutional Affairs 24 Nov. 2004 Working Document *How the European Parliament Approves the European Commission*. PE 350.005v03-00, p. 4, with a reference to Rule 99 of the Parliament's rules of procedure. Calling the procedure 'alien' seems to ignore the existing presidential elements in the Union constitution.

On 18 November the Parliament adopted by a wide majority a resolution on, among other things, the removal of individual Commissioners, to be included in the framework agreement existing (and evolving) between the Parliament and the Commission. Article 5(a) of the Resolution calls for inclusion of the following rule:

If Parliament votes to withdraw confidence ... in an individual Member of the Commission, the President of the Commission will consider seriously whether he should request that Member to resign; the President shall either require the resignation of that Member or justify his refusal to do so before Parliament.²³

This new rule, accepted by Barroso in his speech of the same day and made part of the code of conduct for the commissioners a few days later, makes the failures of individual commissioners the responsibility of the Commission president, but does not create individual responsibility for commissioners.²⁴ There are two things making this undesirable. The first and most important is that it might strengthen the individual commissioner, giving him or her a political foothold in the Parliament alone. The second is that it would release the Commission from control by its other parent, the member states/European Council, of which the Commission president is not a member for nothing.

To conclude: the Investiture struggle is extremely informative not only of the Union's constitutional line of development, but also of the Union's inner *constitutional structure*. It consistently opposes the Union's two holders of representative authority, the European Council and the Parliament, in tests of will and of representative capacity. That the former will normally win these tests is no news. The news is that the latter, the Parliament, has the capacity for winning also – which means that it is structurally on par with the member states. And that, in terms of constitutional practice, it wields the power of amendment.²⁵

The matter will be pursued below under the heading of *Representation*. First the element of Union authority needs to be discussed.

²³ PE350.005v03-00, Annex.

²⁴ SEC (2004) 1487/1 of 22 Nov., resp. SEC (2004) 1487/2, 23 Nov. See the Commission website for the text.

²⁵ This solves part of the intellectual puzzle that the European Parliament has no binding involvement in amending the Constitution. Formally this would, combined with the original founders keeping their Treaty masters' status, amount to denying this document constitutional status. Formality does not control the situation, however. Ultimately it makes better sense to solve the puzzle by considering the member states jointly, in this context, as an Union institution. Argued by this author 'The Member States under the Constitution', in *The European Union, an Ongoing process of Integration*, Liber Alfred Kellermann (The Hague 2004).

AUTHORITY AND RESPONSIBILITY

To study the Union in terms of *government* is quite uncommon, and understandably so. Government is normally associated with developed political communities, states, having advanced forms of organisation and capacity of action. The Union is no state; it lacks a fully established organisational structure and displays only modest political authority. This is why the Union's structure of action is usually discussed in the low-key concept of 'governance'. This concept is, however, constitutionally indistinct and inadequate for the purpose of expressing the central challenge for the Union in this context. The challenge is to provide government in terms of authority, capacity of action, springing from a sense of common responsibility.²⁶ In this sense also, the October crisis actuated the Union's fresh constitutional claim. Duff's report pinpointed it thus:

... the name of the game is to reassure the public that somebody somewhere is responsible for running Europe. Those who brought about this crisis are the heads of national governments who failed to provide Mr Barroso with the best possible raw material with which to build the strong independent executive that the EU needs.²⁷

This passage echoes the notorious concluding lines of the first Experts' report of 1999, the one bringing down the Santer Commission:

It is becoming difficult to find anyone who has even the slightest sense of responsibility. However, that sense of responsibility is essential. It must be demonstrated, first and foremost, by the Commissioners individually and the Commission as a body. The temptation to deprive the concept of responsibility of all substance is a dangerous one. That concept is the ultimate manifestation of democracy.²⁸

Different from the former crisis, in the events of October 2004 responsibility could not be sought with the Commission, which was after all the direct object of the crisis rather than one of its participants, but had to be found with the member

²⁶ In one of its many relevant functional definitions, a constitution is simply about the organisation of public authority and responsibility in a human community.

²⁷ See *supra* n. 22, p. 11.

²⁸ First report of the Committee of Independent Experts, 15 March, 1999: conclusion. (9.4.25). Website European Parliament. One may wonder whether the admonition and its immediate effect have led to a substantial improvement in terms of responsibility. The Commission has understood the diagnosis and addressed the problem mostly in terms of (financial) accountability, to the effect of increasing rather than tempering its bureaucratic predicaments. Lacking the conditions for political responsibility, it could hardly have expected to manage otherwise.

states, presently the locus of ultimate authority in the Union. And different from the Commission, these member states lack the capacity of taking responsibility by stepping down. So they had to come around to accepting it and getting their act together.

Thomas Beukers' piece about the member states' evolving action in the Barroso crisis is eloquent. At the outset the process involved mostly the national capitals and their political imperatives severally. What little collective responsibility the governments felt was invested in the usual calls to MEPs. When this was either done half-heartedly (as by the French and the Germans) or failed (as in the case of Britain), the governments' common action as required by Article 214 EC disintegrated. This came to threaten the system. Had Barroso put his first team, including Buttiglione, to the vote, he would either have lost the vote or, worse, ended up the hostage of the anti-European extreme right in the Parliament.²⁹ The governments who had first stiffened Barroso in his defiance were late to see the abyss opening and hence to allow or even urge Barroso to withdraw his proposed team. Only when they did, the deadlock from which Barroso had been all these weeks unable to find an escape became both the member states' common concern and their responsibility, calling into life their common authority. This is where the Dutch presidency failed and it is one of the turning points making 29 October into the date it is. Only then and there was it decided that Barroso was to be provided with new material and thus allowed to come with a 'better team', even if this involved an unambiguous *camouflet* to the event's host and to the European political Right.³⁰

What is to be learnt? Like many other qualities of life, responsibility speaks most clearly when lacking, when it is not being taken. The Netherlands, holding the Union's chairmanship during the period and therefore the first landing site of common responsibility, gave a show of absence. As appears from Mendeltje van Keulen's account in this issue, next to practical difficulties such as the prime minister's serious illness, there seems to have been a conceptual problem involved. The Dutch government claimed it wanted to remain 'neutral' and not become involved in institutional conflict. It conceived this as a conflict between the European Parliament and the Commission.³¹ The Dutch seemed to forget the Union's presidency was itself involved in the tests of responsibility and representation. Isn't the Council (and its president) an institution central to the Union? Isn't the

²⁹ Had Barroso lost the vote, the blame would have come down on him and he would have had to render his mandate as president-elect. This would have been a blow not only to himself but also to the empowering act of his prior election according to the procedure of Art. 214 EC.

³⁰ The terms 'new material' and 'better team' were used by Barroso in the concluding press conference he gave with Balkenende at Capitol Hill, after the ceremony's conclusion.

³¹ Even if the latter could obviously not be a party to this conflict, being hardly in existence between mandates and having nothing to wager.

European Council? Aren't the member states jointly, chaired by the Union president, involved? Till the very end, the Dutch acted more like negotiators on their own behalf than like bearers of institutional responsibility. Eventually the matter was saved for them in two instances, first on 26 October by some other member states, among which France, pressing Berlusconi to withdraw Buttiglione and, when this failed due to Pöttering's resistance, in Rome on 29 October, by member states taking responsibility together and clearly helping Holland out, pressing Berlusconi to give in even without compensation.³²

This time collective responsibility was taken *in ultimis* by the member states collectively, in their simplest, most primitive and (if operational) most powerful configuration, of some chance states joining to take the lead and others going along. What is up for the next time? Will Barroso or his successor let himself be allowed or forced to accept obvious liabilities such as Buttiglione or Kroes for commissioner in heavy risk portfolios even if cornered by individual governments? The next Commission president will do well to reap from the present developments the authority necessary to speak for the governments collectively when refusing flawed choices proposed to him as part of national spoils, instead of weakening himself and his team by utterances of frustration afterwards, as Barroso did.³³ He or she will be able to do so as a full member of the member states' first representative institution, the European Council, if needed, with the support of the European Council president.

REPRESENTATION

The last full scale political conflict in the Union (the March '99 crisis) already concerned political responsibility, albeit in the weaker version of (the Commission's) *accountability*. The present one was also about the European Parliament's position in the European set up and hence concerned *representation*. One of the weakest spots in the Union structure, if not in its political life, representation is all about speaking for the Union and for its citizens.³⁴ The latter capacity, the Union's

³² It is hard to figure a better illustration of the need for a steady presidency of the European Council (and of other loose configurations of the 'member states jointly', as they may be called) than that provided by the Dutch failure.

³³ After the final vote on 18 November, in an incomprehensible move, Barroso opened his books to the press. He said, as was common knowledge but was never brought on record, that he had offered Justice and Liberties first to Barrot, who had declined; that he had preferred Monti for Competition. After that he disavowed the Dutch government by saying that 'There are governments that have been co-operative and others less'. *Repubblica*, 19 Nov. 2004.

³⁴ As the conflict was not about formal representative powers, as attributed in the Treaties, but about substantive representative capacity, only the latter are the subject of these considerations.

popular representation, has been formally assured but is functioning poorly.³⁵ So far the European Parliament has not managed to capture its electorate's attention, let alone to express their interests and moods, which is what parliamentary representation is about. This time, however, all of a sudden it managed both to pitch a timely battle, which is essential for capturing people's attention, and to bring it to a full and telling conclusion, needed for the sake of *expressing* anything. As this was a surprise development, involving a lot of chance and circumstance and a great number of mistakes, the upshot has not been immediately convincing to everyone. When Socialist party chief Martin Schulz on 18 November made the point that the Union's elected popular representation has now come level with the states' and governments' representative bodies, Peter Ludlow contested this. The Parliament, he affirms, '... is not, and short of collective suicide by the member states, will not be a sovereign Parliament capable of looking the European Council ... straight in the eyes'.³⁶

This is a good debate from which to pick up the analysis. Schulz and Ludlow agree to identify the main power axis in the EU constitutional structure as that between the member states (in their several configurations) and the European Parliament. In a classical constitutional reading this would be understood as the opposition between the *ruling establishment* (in Rome's republic: the Senate) and the *popular* elements (the Plebs and their tribunes). Machiavelli has explained how Rome's republican constitution and its governing structure were the result of repeated clashes between the people's and the establishment's representative bodies.³⁷ In part such open and creative conflicts are normally staked on competing substantive claims of representation. Who of the two speaks best for the people, the republic, in what terms? This time it was the European Parliament.

Parliament's victory over the member states, in terms of representation, was helped by its finding voice, for the occasion, in a crystalline internal battle on a matter of clear principle. The question was: if put before the choice, do we want Buttiglione and what he stands for to be made the figurehead of Europe or not? Had the stand off, whose terms were adopted if not embraced by both sides in the Parliament, resulted in Buttiglione's appointment, the outcome would have spoken for and given substance to the electoral victory of Europe's political Right.

As it happened, the conflict turned into a defeat, i.e., an equally unmistakable refusal of Buttiglione's form of conservatism as a figurehead for Europe. There was no need nor, I suppose, any initial intention to pitch the contest on Buttiglione

³⁵ The new Constitution has strengthened the formula, turning the House from an assembly of representatives of the different peoples (plural, Art. 189 EC Treaty) into the representative institution of (single) body of European citizens (ConsTrEU Art. I-20(2)). Formally this is a great leap, waiting to be followed by substance.

³⁶ See *supra* Ludlow, n. 14, p. 30.

³⁷ See the quote at the opening of this report. It is from *Discorsi* 1.2.

and his ideas. With hindsight it was a tactical mistake of the Right to let this happen. But once it had happened, it allowed the Parliament to form a full majority and make an unmistakable statement on a clear and principled topic. The US elections just a week afterwards, making an almost diametrically opposed statement on a very similar topic, to wit a 'yes' to moral conservatism, added a tone of contrast to the European statement. This victory of the European Parliament over the European establishment was obviously written in terms of representation. Never have Europe's member states managed to speak up for Europe in this way. And, given their consensual character, they probably never will. As noticed above, it will be difficult enough for the European Parliament itself in the coming years to follow its own act, to turn this one time brilliance into something of a standard.³⁸

One thing for the Parliament to overcome is legalisms. In his excellent report Andrew Duff has sought to elaborate and format the procedures and the terms under which Commissioners are to be tested by hearing Committees in the future. Most interesting are the criteria, the tests. The EC-Treaty presently wants commissioners generally competent and independent (Article 213(2)), providing little edge. Duff adds that they should have a 'European commitment', in line with the new Constitution (Article I-25(4)), but goes further than this, asking also for *financial and political* independence, for knowledge of the portfolio and for communication skills.³⁹

This quest for control of Parliamentary process by way of increasingly elaborate formal criteria is revealing. Would Buttiglione have failed any of the tests, existing or proposed? Probably not; even his 'communication' (what a poor criterion!) was very good, in a way. But if he would pass all imaginable tests, was his rejection then on grounds inadmissible? Surely not. He was rejected on account of pure matter, on his political stance. Should any Parliament be kept from, or keep itself from, voting on an appointee's political, religious, ideological position?

To heap up criteria for testing action seems to be a legacy from the European Parliament's existence as a functional part of the Union institutional set up and hence fully subject to the principle of controlled powers. This, however, is increasingly a matter of the past. Unlike a bureaucracy, a parliament is not a subordinate governmental office essentially tied down to its legal powers and other formally controlling standards. To be sure, it need not normally go beyond its powers. But

³⁸ To prevent misunderstanding one needs to distinguish between the representative position of the Parliament as such, which seems to have been strengthened by the conflict structurally, and the expression of a European popular mood in this case. There is no certainty that the internal political configuration in the EP resulting from this conflict is more than occasional. The next conflict may be about other subjects and bring about different majorities.

³⁹ See *supra*, n. 22, p. 14.

a Parliament is empowered not just by rules and criteria but also and more naturally by its justified claim of representation.

POLITICAL FEDERALISM: ROOTING EUROPE'S POLITICS IN THE MEMBER STATES

Of the many channels of interaction among government levels caught by the term federalism, the one linking up political processes at the two levels involved, is both essential and elusive. In the Union, party-political federalism is also least developed and least visible among its several federal aspects.⁴⁰ *Judicial* federalism, the intercourse between courts of law and the resulting case-law and doctrine, is the stock of EU law and legal studies. *Legislative or regulatory* federalism, connecting up the national and the Brussels bureaucracies in the Council of ministers, is a well-developed field of European policy and its scholarship. *Executive* federalism, funnelling member states' executive leaders into a single EU authority – the European Council, is of a more recent origin. The Barroso drama is, however, mostly about the growing pains of EU *political federalism*, involving executives, political parties and parliaments. It is, especially, about the meshing of member states' and EU politics.

There can be no European politics abstracted from national politics, and, conversely, national politics and their constitutions increasingly come under the sway of Europe. This is found expressed in the Constitution's key Article I-5(1), *Relations between the Union and the Member States*, if read with an eye to the federal dynamic:

1. The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

The contributions within this set of articles following on the present one deal with the relation between the Union and the member states in the Barroso drama. They have been written by researchers from the six member states most involved

⁴⁰ Generally: Simon Hix's different publications, notably, *The Political System of the European Union* (London, 1999); with Christopher Lord, *Political Parties in the European Union* (London 1997). Up to date: Rudolf Hrbek 'Political Parties in the EU Multi-level System' in R. Hrbek (ed.), *Political Parties and Federalism. An International Comparison*, ECRF publications 22, (Baden Baden 2004) p. 169. In most writings the consensual character of the Parliament's work is noticed and emphasised. See R. Hrbek, at p. 178. Recent events seem to have put this up for revision or at least rethinking.

and depict the beginnings of European federal politics, i.e., a meshing of certain national and European political events, as seen in the Barroso-case.

Now what is there of 'European political life' in the Hungarian nomination of László Kovács or the Italian posting of Rocco Buttiglione? Are these not simply and purely the individual results of domestic political deals and settlements? This common understanding deserves to be tested. Even if it is not wrong, it is far from the full truth and will be so less and less.

At the most basic level, the appointment procedure is one at which substantive national interests in Europe are sought to be secured by way of political action in the European arena, as appears from the British case (Macdonald on Britain). On the other hand, it is a procedure in which moral principles may be staked on Europe (and lost), as follows from the Italian misfortunes (Zucca on Italy). Thym's piece on Germany shows a wealth of both political and constitutional interactions between the domestic and the European planes. The European Constitution may provide legal leverage needed for domestic accountability about appointments, which the home constitution does not supply.

The procedure is an opportunity for the domestic political line on Europe to become better defined. And it may be a theatre for national failure and European political liability (Van Keulen on The Netherlands). In fact, the Dutch managed to turn the events into a demonstration of the need for just that new office for the Union, which they had been contesting as if the nation's life is threatened by it, from its first suggestion: a stable European political presidency.

The Hungarian case (Horváth) is a full account of the interweaving of member states' and European politics. How domestic sensitivities may crucially inform European politics is, finally, one of the features of the Flavien Mariatte's account.

Overriding and often forgotten is how the European Constitution binds all the national candidatures into a single, European, political time frame.⁴¹ Inside this time frame and its pressures, it is the member states jointly that exercise ultimate, actual authority over national candidatures, as was proved by the way Berlusconi was gradually forced to withdraw Buttiglione without securing the so desired flanking *sacrifici*. In all these cases the Union's single time frame for the Commission appointment became superimposed on the rhythms of national political life, converging, for the time, these rhythms and the attention they generate.

There are other European political aspects to the national candidatures of commissioners, as appears from all the pieces put together. Internal party dynamics,

⁴¹ To provide shared time frames, synchronising rhythms for political events and life, is an often ignored but eminent purpose of any constitution. Sometimes the time frames inside a single constitutional system are also purposely de-synchronised. Generally, non-parliamentary systems have more elements of a clockwork, while parliamentary systems cherish some temporal irregularities.

exercised between the national and the European levels, have always been an essential way to discipline (bully) MEPs into accepting Commission candidates. This worked less well this time than at previous occasions, however, creating the opening for the crisis.

All of which goes a long way to explaining the unprecedented interest of the matter in the eyes of the European press.

CONCLUSION

Following the ceremonial lunch, around three in the afternoon of 29 October, with Berlusconi already heading for a meal with his national political allies to reconduct Buttiglione back into his government, the Dutch presidency invited the media up to the *Campidoglio* for a press conference. The wooden and fibreglass structures there were already being dismantled. Most of the press people had gone. None of the goodly hundred of those left and present queried the banner above the stand for the group picture, strangely reading: *Europaeae Rei Publicae Status*. Dutch PM Balkenende stood flanked by Barroso, the latter relieved and in good spirits. His obstacle was out of the way. Barroso said he was going to find a 'better team', with some 'new material'. Among those attending the conference, there were some from *Le Monde*, the paper that had revealed the manoeuvre by French *LePeniste* Martinez to squeeze a deal from Barroso in return for his mustering up the needed support in the European Parliament (see Mariatte's contribution). Intelligently given the floor by the Dutch information officer, the Frenchman asked if it was true that Barroso had talked to Martinez in this context. 'Yes', answered the Portuguese, resuscitated, 'as I would speak with anyone from the Parliament asking me. But never there was a question of my accepting his offer and resting my victory on a small majority supported by forces which don't share the values which are mine'.⁴²

While all the heads of government explicitly entrusted Barroso with making the changes to his team, veiling their own involvement for the sake of the coming Commission president's authority, Balkenende had refused him this favor and Berlusconi was going to do the same. Only in extremis, on the evening of 4 November, *il cavaliere* brought in, personally, his own candidate Frattini to replace Buttiglione, with Barroso as a bystander.



⁴² From author's notes and *Le Monde*, 31 Oct.-1 Nov. 2004.