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#### SPECIAL ISSUE

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Constitutional Law of the European Union  
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#### The Unity of the European Constitution

*Guest Editors:*

Philipp Dann (MPI, Heidelberg)  
Michał Rynkowski (University of Wrocław)

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## Supremacy - Lost? – *Comment on Roman Kwiecień*

By Franz C. Mayer\*

### A. Introduction

The relationship between European Union law and national law is one of the most debated issues of European constitutional law.

The Treaty establishing a Constitution for Europe (Constitutional Treaty) introduces an article that, for the first time, explicitly states the primacy of European law over national law.<sup>2</sup> A declaration annexed to the final act of the IGC states that this provision reflects existing Court of Justice case law.

Thus, it is no surprise that most commentators agree that the Constitutional Treaty does not change much concerning the relationship between European law and national law.

However, the new provision does not only raise the question of what happened to supremacy (as opposed to primacy), it also offers the opportunity to recall the different aspects of the principle (B.) and to reflect on the role and the function not only of the principle, but also of legal scholarship in shaping the principle (C.).

### B. Some Facts on Primacy

#### I. *The Cases*

A standard account on primacy has to start out from the 1963 *Van Gend en Loos*-decision of the European Court of Justice.<sup>3</sup> In emphasizing that European law is to

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<sup>2</sup> Treaty Establishing a Constitution for Europe, Art. I-5, 10 July, 2003, O.J. (C310): “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”

<sup>3</sup> Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1 (English special edition).

be distinguished from regular public international law and in according direct effect to European law, the ECJ made a direct conflict between European law and national law possible, without answering the question which law shall prevail. The 1964 *Costa v. ENEL*-decision<sup>4</sup> answered this question, stating that in case of conflict between European law and national law, European law prevails.

The ECJ's core justifications for the primacy of European law are independence, uniformity and efficacy of Community law. In this perspective, Community law is "an integral part of [...] the legal order applicable in the territory of each of the Member States," and provisions of Community law "by their entry into force render automatically inapplicable any conflicting provision of current national law."<sup>5</sup> This concept of primacy in application, *Anwendungsvorrang* (as opposed to primacy in validity, *Geltungsvorrang*), also applies to the Member States' constitutional law provisions. The Court has been extremely reluctant, though, to state this openly. The decision in the case of *Internationale Handelsgesellschaft* decided in 1970 stands out as the case where the ECJ uses the strongest language with respect to primacy over the national constitution:<sup>6</sup> "The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure."<sup>7</sup>

## II. The Wording – Supremacy or Primacy?

The fact that European law prevails over national law in case of conflict may be conceptualized as "supremacy" or as "primacy." The term "supremacy," frequently used in textbooks, has appeared only once in the text of an ECJ judgment so far. It is a judgment from before the 1973 accession of English speaking countries which was translated later.<sup>8</sup> "Supremacy" occasionally appears in Advocate General opinions, but sometimes, the Advocate General plays it safe: "...by virtue of the primacy or supremacy of Community law, they prevail over any conflicting national law."<sup>9</sup>

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<sup>4</sup> Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585 (English special edition).

<sup>5</sup> Case 106/77, *Simmenthal*, 1978 E.C.R. 629, paras. 3 and 21 *et seq.*; See also Case C-213/89, *Factortame*, 1990 E.C.R. I-2433, paras. 20 *et seq.*

<sup>6</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, para. 3.

<sup>7</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, para. 3; Case C-473/93, *Commission v Luxembourg*, 1996 E.C.R. I-3207, para. 38. See also Case C-285/98, *Kreil v. Germany*, 2000 E.C.R. I-69.

<sup>8</sup> Case 14/68, *Walt Wilhelm*, 1969 E.C.R. 1, para. 5 (English special edition). It appears as a keyword in a 1972 decision, Case 93/71, *Leonesio*, 1972 E.C.R. 287 (English special edition).

<sup>9</sup> AG Jacobs in Case C-112/00, *Schmidberger*, 2003 E.C.R. I-5659, para. 5.

“Primacy” can be found much more frequently in ECJ decisions, albeit often enough the Court just refers to the terminology used by parties or the national court. Sometimes the Court uses “precedence.”<sup>10</sup>

Now, the Constitutional Treaty uses “primacy” (Art. I-6). The difference between primacy and supremacy may be related to British versus American English, but it also appears that the term supremacy implies more an idea of hierarchy in the way the German concept of *Geltungsvorrang* does. If that is correct, primacy is indeed the better word, as the Court has never touched the validity of national law and has never pointed to any kind of hierarchy or ranking of norms between European law and national law.

### III. Reactions and Critics

Multiple treaty revisions have taken place since the Court first came up with the concept of primacy, and the Member States have had numerous possibilities to repeal *Costa v. ENEL* by modifying the treaties. They have never done that. Thus, primacy – the way the Court conceptualized it – has to be considered part of the *acquis communautaire*. These are legal obligations flowing from the treaties which must be observed. Thus, unilaterally reshaping primacy from a Member State position is not admissible; as such unilateral action undermines the very basis of the functioning of European law: trust into the reciprocal obedience to European law. This is a simple issue of legal obligations, thus it has nothing to do with sovereignty of the Member States. The decision to join the EU is the sovereign decision of the Member States, but of course it is not possible to escape from the legal obligations that come with membership by claiming sovereignty.

This is not well understood in recent decisions of the Polish Constitutional Tribunal and of the German Constitutional Court. The Polish Court reveals a quite stunning understanding of the nature of European law and of primacy in its 2005 decision on the constitutionality of the Accession Treaty.<sup>11</sup> Parts of this decision even look less compatible with European law than the German Constitutional Court’s infamous 1974 *Solange I*-decision<sup>12</sup> – 30 years later.

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<sup>10</sup> Case C-256/01, Allonby, 2004 E.C.R. I-873, para. 77 (13 Jan., 2004).

<sup>11</sup> Decision K 18/04, 11 May 2005, in particular para. 11 and 13.

<sup>12</sup> The Polish court claims, *inter alia*, the unconditional authority to examine European law, para. 23 of the decision. The German Court in 1974 also claimed such an authority – but under the condition of insufficient fundamental rights protection at the European level.



The German court, albeit having made some progress since 1974, takes a position in its 2005 decision on the European arrest warrant which one of the dissenting judges in this case described in the following words: "I deeply regret that the Court refuses to participate in a constructive way to establish European solutions."<sup>13</sup> The Court simply ignores in this decision on the implementation of the European arrest warrant that after this decision, pending new legislation, Germany is in breach of European law obligations.<sup>14</sup>

These decisions cannot be discussed here in detail, but the Commission has indicated recently that it is not prepared to simply accept court obstruction to the European project.<sup>15</sup>

Back to primacy. What can be considered a settled issue today is primacy over national statutory law. What is unclear is the question of primacy over EU law as opposed to EC law. What is still contested to some extent is primacy over national constitutional law, and this is where the critics of the Court's primacy concept have been most visible.<sup>16</sup> Among other things, they have pointed out a structural parallel between supreme European law and the law of (military) occupation<sup>17</sup> (!) and have criticized the "rigorous simplicity" of the concept of primacy.<sup>18</sup> The absoluteness of the ECJ's vision of European law primacy over each and every norm of municipal law – including any provision of the municipal constitutions – has raised the question of whether the ECJ might have overstepped its competencies by establishing such an absolute concept of primacy. According to this view, the ECJ's role is to interpret European law; but the question of how the Member States' legal

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<sup>13</sup> Judge Gerhardt, Decision 2 BvR 2236/04, 18 July 2005, at para. 189.

<sup>14</sup> Here, it is the Polish Constitutional Tribunal that has been more conscious of European law obligations, deciding to delay the date of the loss of binding force of the unconstitutional implementation of the European arrest warrant in Poland for 18 months. Decision P 1/05, 27 April 2005.

<sup>15</sup> See the preliminary procedure 2003/2161 for a treaty infringement case against Sweden.

<sup>16</sup> See, e.g., Hans-Heinrich Rupp, *Die Grundrechte und das Europäische Gemeinschaftsrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 953 (1970). See also, KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW. THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE, 88 *et seq.* (2001); for an account of how this article may have triggered subsequent developments such as the ECJ decision in Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR 1125, which openly claimed primacy of European law over national constitutions; and the *BVerfG's* fierce reaction to that in *BVERFGE* 37, 271 (*Solange I*).

<sup>17</sup> See the references in Peter Perenthaler, *Die Herrschaft der Richter im Recht ohne Staat*, JURISTISCHE BLÄTTER 691, 700 (2000).

<sup>18</sup> RONNY ABRAHAM, L'APPLICATION DES NORMES INTERNATIONALES EN DROIT INTERNE 155 (1986).

orders handle conflicts between the Member States' legal orders and European law, so the critics say, goes beyond a mere question of interpretation.<sup>19</sup>

Some national courts, notably the German Constitutional Court, have not only appeared to be reluctant to accept unconditional primacy of European law (see *supra*); they also have contested the authority of the ECJ.<sup>20</sup> Here, the obligations for national courts flowing from the treaties are quite clear and they do not allow this kind of national reluctance: According to Art. 220 EC, it is the ECJ who is in charge of controlling the legality of European law. The Member States have promised to settle disputes only by means established in the Treaty (Art. 292 EC). Thus, there is neither need nor room for any kind of an additional 'more neutral' court in charge of solving conflicts around the primacy issue.<sup>21</sup>

#### IV. Recent Developments

There is at least one point where the Constitutional Treaty does make a difference, no matter whether it will finally be ratified by all Member States or not: In cases brought before them to examine the constitutionality of the new Treaty, the Spanish *Tribunal Constitucional* and the French *Conseil constitutionnel* had to take a position on primacy and could not duck the issue anymore.<sup>22</sup> The same may apply to the German *Bundesverfassungsgericht* which will also decide on the compatibility of the Constitutional Treaty with the national constitution.<sup>23</sup> With these discussions, academia also engages into a new round of debate on the primacy issue.

What emerges from the Spanish and the French decisions is a positive attitude towards primacy and a conceptual distinction between supremacy on the one side and primacy on the other side, with supremacy being the concept attributed to the

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<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., BVerfGE 89, 155 (*Maastricht Treaty Constitutionality*).

<sup>21</sup> See, Franz C. Mayer, *Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, 3 THE JOURNAL OF INTERNATIONAL CONSTITUTIONAL LAW 493, 494 (2005); for a comparative view with the US in that respect see FRANZ C. MAYER, *KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG* (2000).

<sup>22</sup> Tribunal Constitucional, Case 6603/2004, Declaration 1/2004; Conseil constitutionnel, Decision 2004/505 DC, *Traité établissant une Constitution pour l'Europe*, 2004 JOURNAL OFFICIEL No. 273 (24 november 2004), 19885. On the French decision, see, Franz C. Mayer, *Europarecht als französisches Verfassungsrecht*, EUROPARECHT 925 (2004); on the Spanish decision, see, Anne C. Becker, *Vorrang versus Vorherrschaft, Anmerkung zum Urteil des spanischen Tribunal Constitucional DTC 1/2004*, EUROPARECHT 353 (2005).

<sup>23</sup> BVerfG 2 BvR 839/05 and 2 BvE 2/05 – *Gauweiler*, filed 27 May 2005, pending.

national constitution as the supreme law of the land within a hierarchy of norms, whereas primacy simply describes the fact that European law takes precedence over national law, without the necessary implication of a hierarchy between European law and national law. This is a view that in particular the Spanish tribunal adopted and it is regrettable that the Polish tribunal (see *supra*) did not turn to a similar solution to reconcile the national constitution's claim of supremacy and European law primacy.

### C. The Debate on Primacy

#### I. *The Positions*

Let me first briefly define three core positions in the debate, which helps to structure the debate.

The first one could be called the unconditional pro-position: primacy of European law without any exception. This is the position which seems to underlie the case law of the ECJ and which is also defended by a certain number of scholars.<sup>24</sup> The second one could be coined the unconditional contra-position: no primacy at all for European law. The third position is a position somewhere in between. It is the position adopted by most observers.

This means that it is all about giving a nuanced answer to the primacy question. It includes making a distinction between national constitutional and infra-constitutional (statutory) law, a distinction between core constitutional law – which enshrines the fundamental choices of a constitutional order – and ‘regular’ constitutional law and, as the Constitutional Treaty suggests, a distinction between primacy and supremacy.

#### II. *Why Primacy and What Kind of Primacy?*

In order to get closer to a nuanced answer to the primacy question, it is helpful to ask why we need primacy in the first place. I suggest a distinction between reasons and justifications for primacy.

Justifications are the legal constructs established to explain the position taken, which is motivated by reasons. Reasons are the deeper, “real” motivations for primacy. Two of these reasons are part of the standard account on primacy: One is uniform application of European law everywhere in the EU, the other one is

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<sup>24</sup> See, e.g., Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW 205, 220 (1990): “There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.”

effectiveness of European law. A third reason is closely linked to the first two, but is generally less openly spelled out: The role of the ECJ, which is obviously much more important if European law – as interpreted by the ECJ – takes precedence over national law.

As a general rule, the position adopted on primacy – the reason for this position – seems to depend to a large extent on institutional self-interest. Clearly, the Member States, and their courts, have different interests when it comes to the reach of a primacy principle than the European Court of Justice.

But what about legal scholarship? Where should academics stand? The position of academics is unlikely to be motivated by some kind of institutional self-interest, and it should not be motivated by national interest. It may be motivated by a specific view on European integration. There is some evidence that it is more fruitful to explain European integration in constitutional law terms,<sup>25</sup> and not in public international law terms,<sup>26</sup> but I suggest to start out from the question of what serves the European legal order best. The answer to this is: Assure uniform application and effectiveness of European law and protect the role of the ECJ. Obviously, looking at the issue in this way is motivated by the *Rechtsgemeinschaft*-view on European integration, which is quite distinct from a public international law approach or a sovereignty-driven approach.<sup>27</sup>

What follows from this view are the following three tasks for the European law scholar:

No. 1: Respect the treaties (because it is the law), No. 2: Protect the ECJ (because there has to be the authority of the court in a system which is based on law), No. 3: Accommodate Member States' concerns (because multiplicity lies at the heart of European integration).

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<sup>25</sup> In that context, *see*, the *Verfassungsverbund* approach (multilevel constitutionalism) established by Ingolf Pernice, *e.g.* in *Multilevel Constitutionalism in the European Union*, 5 EUROPEAN LAW REVIEW 511 (2002); for a French version, *see*, Ingolf Pernice and Franz C. Mayer, *De la constitution composée de l'Europe*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 623 (2000).

<sup>26</sup> *See, e.g.*, Case K 18/04, 2005 (11 May, 2005), for the public international law of European integration view adopted by the Polish Constitutional Tribunal in its decision on Polish EU membership, to put it mildly, it is not very convincing.

<sup>27</sup> *See*, Franz C. Mayer, *Europa als Rechtsgemeinschaft*, EUROPAWISSENSCHAFT 429 (Gunnar Folke Schuppert et al. eds., 2005).

III. *Primacy: Re-Conceptualized*<sup>28</sup>

What may “accommodating Member State concerns” mean? For sure, it does not mean that Member States can pick and chose obligations under European law as they seem fit. The “Irish solution” offers an example of how the European legal order accommodates concerns: The Irish solution of a protocol at the level of European primary law to explicitly preserve the sacrosanctity of Irish national constitutional provisions on abortion could be regarded as a revocation of European law’s claim to primacy in respect of specific Member State interests, which are of particular importance in a given case.

Consideration for Member State matters is not such an unusual concept. Indeed, it may be found in the original treaties. Examples include the public service (Art. 39(4) EC) and official authority exceptions (Art. 45 EC) and the exceptions from the fundamental freedoms in Arts. 30, 46 and 55 EC,<sup>29</sup> all of which are uniform concepts of Community law.

Art. 6(3) EU goes beyond mere Union-wide exceptions to European law. According to this provision, the European Union shall respect the national identities of the Member States. This provision clearly refers back to the Member States. As national identity arguably includes constitutional identity, Art. 6(3) EU could be seen as a starting point on the European level to revoke the claim of primacy of European law over the Member States’ constitutional identity. The provision in the Constitutional Treaty that is supposed to replace Art. 6(3) EU – Art. I-5(1) of the Constitutional Treaty – makes the link between national identities and national constitutions even more visible, stating that the EU shall respect “national identities, inherent in their fundamental structures, political and constitutional.”

If Art. 6(3) EU includes national constitutional identities, this is where the uniform application of European law finds its limits – note: at the European level, and not

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<sup>28</sup> The following paragraph is elaborated in more detail in Franz C. Mayer, *Europäische Verfassungsgerichtsbarkeit. Gerichtliche Letztentscheidung im europäischen Mehrebenensystem*, in EUROPÄISCHES VERFASSUNGSRECHT 229 (ARMIN VON BOGDANDY ED., 2003); for an English version see Franz C. Mayer, *The European Constitution and the Courts. Adjudicating Constitutional Law in a Multilevel System*, in EUROPEAN INTEGRATION – THE NEW GERMAN SCHOLARSHIP, JEAN MONNET WORKING PAPER 9/03 (ARMIN VON BOGDANDY/JOSEPH H.H. WEILER EDS., 2003), <<http://www.jeanmonnetprogram.org/papers/03/030901.html>>; see also Franz C. Mayer, *The European Constitution and the Courts. Adjudicating constitutional law in a multilevel system*, in EUROPEAN CONSTITUTIONAL LAW (ARMIN VON BOGDANDY/JÜRGEN BAST EDS., forthcoming).

<sup>29</sup> For an overview, see, DIRAMUID ROSSA PHELAN, REVOLT OR REVOLUTION 422 (1997).

by a unilateral claim of a national constitutional court. The question of who decides on these limits is crucial, but, in line with the task to protect the integrity of the ECJ: it has to be the ECJ. If conflicts should ever arise, they would have to be solved within the system, which points to the ECJ – these are the obligations flowing from the treaties. If the conflict between national legal order and European legal order cannot be resolved, ultimately the Member State can leave the Union: the Constitutional Treaty now even introduces an explicit withdrawal clause (Art. I-60 Constitutional Treaty).

#### **D. Summary**

The primacy clause suggested by the Constitutional Treaty offers an opportunity to engage in a new round of reflection on the primacy principle. Legal scholarship plays an important role in shaping the principle of primacy. The distinction between supremacy and primacy is a helpful distinction as it points to the non-hierarchical character of the relationship between European law and national law. An intelligent primacy principle takes the concerns of the Member States seriously and accommodates them, but without undermining the integrity of the European legal order and the European Court of Justice.



## The Constitutional Treaty as a Reflexive Constitution

By Jürgen Bast\*

### A. Introduction: Uneasiness over the Constitutional Treaty

The “Treaty establishing a Constitution for Europe” elicits divergent scholarly responses. An apologetic view holds that it is the best of all possible constitutions,<sup>1</sup> given the current constellations of political forces. Such a viewpoint is countered by a mixed choir of critics for whom the document is simply another treaty,<sup>2</sup> a “nostalgic project,”<sup>3</sup> or a merely “semantic constitution.”<sup>4</sup> Some even believe that the recourse to constitutional rhetoric endangers the rational substance of the European status quo;<sup>5</sup> others fear that this very conceptuality could be damaged.<sup>6</sup> The present chapter endeavors to find a third approach. It offers a critical stance as regards the unfortunate, phraseological, sometimes even ideological language of

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<sup>1</sup> Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf: Analyse und Bewertung des Entwurfs eines Vertrags über eine Verfassung für Europa*, EUROPARECHT 535, 569 (2003); Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: the Emperor is Getting Dressed*, 29 EUROPEAN LAW REVIEW 289 (2004).

<sup>2</sup> Juliane Kokott & Alexandra Rüth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MARKET LAW REVIEW 1315, 1320 (2003); Dieter Grimm, *Integration durch Verfassung: Absichten und Aussichten im europäischen Konstitutionalisierungsprozess*, 32 LEVIATHAN 448, 462 (2004).

<sup>3</sup> Nico Krisch, *Die Vielheit der europäischen Verfassung*, Contribution at the “45. Assistententagung Öffentliches Recht”, Bielefeld, 9–12 March 2005.

<sup>4</sup> Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2005, forthcoming), connecting to the typology of KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 203 (1957).

<sup>5</sup> Joseph H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 7 (Joseph H.H. Weiler & Marlene Wind eds., 2003); Joseph H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 JOURNAL OF COMMON MARKET STUDIES 563 (2002); Ulrich Haltern, *On Finality*, in PRINCIPLES, *supra* note 4.

<sup>6</sup> Paul Kirchhof, *The Legal Structure of the European Union as a Union of States*, in PRINCIPLES, *supra* note 4.



the Constitutional Treaty. Simultaneously, the constitutional text is taken seriously in its normative statements. This approach aims to reconstruct the document from a point of view which depicts it, despite its contradictions, as a project with a rightful place in the tradition of Western constitutionalism.

The following thoughts focus on the relationship between the unity of and differentiation within the European constitution. Elements promoting unity are to be understood, here, as those normative structures that contribute to shaping a polity into a formally unified and substantively coherent order. The line of inquiry asks: which normative facts make it possible to speak of a unified constitutional order of the EU? In complement to the concept of unity, this article uses the concepts of differentiation (in the sense of variability) and incoherence (in the sense of fragmentation).<sup>7</sup> This topic should not be confused with that of “uniformity versus diversity”, that is, in the given context, the federal balance between the Union and its Member States.<sup>8</sup> The relationship of the two sets of issues is beyond the scope of the present discourse.<sup>9</sup>

Section B. substantiates the assertion that the Constitutional Treaty’s significance is to be seen in its nature as a motor for increased legal and political unity. In section C., the limits of the new unity are revealed. Section D. undertakes to define these findings more precisely in terms of constitutional theory. In doing so, policy-specific differentiation is depicted as a fundamental characteristic of Union constitutional law. Section E. introduces the category of constitutional standard case and reveals that the Constitutional Treaty defines the so-called “community method” as such a standard case. In section F., an attempt is made to reconcile the partially contradictory findings in a conception by which the relationship between unity and differentiation in the Constitutional Treaty can be understood. The notion of a reflexive constitution—so the author hopes—provides a theoretical place for uneasiness over the Constitutional Treaty by emphasizing its incompleteness. The final section adds some thoughts on the future of reflexive constitutionalism in view of a possible failure of the Constitutional Treaty.

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<sup>7</sup> On coherence in the context of European integration, see Stefano Bertea, *Looking for Coherence within the European Community*, 11 EUROPEAN LAW JOURNAL 154, 170 (2005).

<sup>8</sup> On this issue see, e.g., Stefan Oeter, *Federalism and Democracy*, in PRINCIPLES, *supra* note 4.

<sup>9</sup> The relationship is more complex than generally assumed. Normatively, little speaks for the assumption that diversity is best protected by incoherence. For an opposing tendency, see Krisch, *supra* note 3.

## **B. The Constitutional Treaty as a Motor for Legal and Political Unity**

The Constitutional Treaty brings about a caesura in the process of European constitutionalization—a caesura symbolized by the invocation of the notion of a constitution<sup>10</sup> and the extraordinariness of its origin (that is, the Convention process and the elaborate and highly politicized ratification procedures).<sup>11</sup> The new constitutional text, however, also has considerable innovative potential stemming from its normative content. This potential consists in the strengthening of—partly already long existent—tendencies to promote unity.

### *I. Stabilization of the Unity: Institutional Framework and Membership*

To begin with, the Constitutional Treaty stabilizes two elements that have sustained the—fragile and legally contested<sup>12</sup>—organizational unity of the Union: the identity of the institutions operating under the various founding treaties and the identity of the Member States that bear up the Union.

Organizational unity currently rests upon the “single institutional framework,” of which Article 3 EU speaks: regardless of the legal personality involved, any action by a Union institution constitutes the exercise of European sovereign power.<sup>13</sup> The Constitutional Treaty notably drops the adjective “single,” since the issue of organizational unity is clarified elsewhere (this will be treated shortly). Nonetheless, the Constitutional Treaty still entrusts its main institutions with the task of preserving the coherence of the Union’s policies (Art. I-19(1) CT).

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<sup>10</sup> Armin von Bogdandy, *Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik*, 60 JURISTENZEITUNG 529, 530 (2005); Armin von Bogdandy, *Europäische Verfassung und europäische Identität*, 59 JURISTENZEITUNG 53, 56 (2004).

<sup>11</sup> Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a “European Constitutional Order”*, 29 EUROPEAN LAW REVIEW 741, 750 (2004); Clemens Ladenburger, *Die Erarbeitung eines Verfassungsentwurfs durch den Konvent*, in DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 397 (Jürgen Schwarze ed., 2004); Andreas Maurer, *Die Methode des Konvents – ein Modell deliberativer Demokratie?*, INTEGRATION 440 (2003).

<sup>12</sup> For one side of the controversy, see Armin von Bogdandy, *The Legal Case for Unity*, 36 COMMON MARKET LAW REVIEW 887 (1999); Manfred Zuleeg, *Die Organisationsstruktur der Europäischen Union*, EUROPARECHT (BEIHEFT 2) 151 (1998); Bruno de Witte, *The Pillar Structure and the Nature of the European Union*, in THE EUROPEAN UNION AFTER AMSTERDAM 51 (Ton Heukels et al. eds., 1998). For the other side, see MATTHIAS PECHSTEIN & CHRISTIAN KOENIG, DIE EUROPÄISCHE UNION, paras. 56 et seq. (3rd edition 2000). For an intermediate position, see, e.g., Werner Schroeder, *European Union and European Communities*, in EUROPEAN INTEGRATION: THE NEW GERMAN SCHOLARSHIP, Jean Monnet Working Papers No. 9/03 (Joseph H.H. Weiler & Armin von Bogdandy eds., 2003).

<sup>13</sup> ECJ, Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, paras. 3/4; Case C-170/96, *Commission v. Council*, 1998 E.C.R. I-2763, para. 16.

Henceforth, the European Council has the status of an institution and accordingly becomes, for the first time, legally responsible (Arts. III-365(1), III-369(b) CT).

Also reaffirmed is the uniformity of membership in the Union, which also indirectly defines its subject of democratic legitimacy, the Union citizens (Art. I-10 CT).<sup>14</sup> The legal concept of enhanced cooperation is not expanded into partial memberships (Art. I-44 CT);<sup>15</sup> on the contrary, the Constitutional Treaty expressly affirms the equality of Member States before the constitution (Art. I-5(1) CT). Membership in the Union is qualified by fundamental constitutional values (Arts. I-2, I-58 CT) and is innovatively converted into a voluntary system (Art. I-60 CT).<sup>16</sup> The latter increases—contrary to skeptical voices<sup>17</sup>—the unity of the Union, as displayed by a recent opinion of the Spanish Constitutional Court. It upheld the Spanish approval of unconditional primacy of Union law, particularly in view of the ultimate possibility of withdrawal.<sup>18</sup>

## *II. Promoting New Unity: the Founding of the New European Union*

Whereas the abovementioned elements focus on continuity, the Constitutional Treaty elsewhere introduces significant novelty for the promotion of unity. These innovations include (1.) the merging of current primary law from the EU and EC Treaties into a single constitutional document, (2.) the formal abandonment of the pillar structure in favor of a reestablishment under a single legal personality, and (3.) the formulation of overarching legal standards and the standardization of types of competence, legal instruments, and law-making procedures.

### *1. A Codified Constitutional Text: One Union, One Treaty*

By presenting its constitutional law in a single document, the Union seeks to connect politically and aesthetically to a postulate as old as the modern concept of

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<sup>14</sup> Ingolf Pernice, in GRUNDGESETZ KOMMENTAR, para. 20 on Art. 23 of the German Basic Law (HORST DREIER ED., 1998).

<sup>15</sup>On the compatibility of enhanced cooperation with the constitutional premises of legal unity, see DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT 374 (2003).

<sup>16</sup> Henri de Waele, *The European Union on the Road to a New Legal Order – the Changing Legality of Member State Withdrawal*, 12 TILBURG FOREIGN LAW REVIEW 169, 178 (2005).

<sup>17</sup> Thomas Bruha & Carsten Nowak, *Recht auf Austritt aus der Europäischen Union?*, 42 ARCHIV DES VÖLKERRECHTS 1, 21 (2004); Schwarze *supra* note 1, at 558.

<sup>18</sup>Declaración del Pleno del Tribunal Constitucional, DTC 1/2004, 13 December 2004, available at <http://www.tribunalconstitucional.es/JC.htm>; English translation in: 1 COMMON MARKET LAW REPORTS 39 (2005); see, in particular, paras. 47 and 58.

constitution itself.<sup>19</sup> Amalgamating constitutional law into a single, written document not only strengthens its normativity and stability,<sup>20</sup> but also allows the constitutional order to be described and perceived as a unity. The existence of a constitutional document advances the abstract idea of a legal order, within which all norms are subject to one paramount body of law.<sup>21</sup> From this point of view, one can appreciate the degree of progress envisioned by the Constitutional Treaty. It would bring a Europe of “bits and pieces”<sup>22</sup>—that is, the loose union of “the Treaties on which the Union is founded” (Arts. 48, 49 EU) and the unmanageable mass of “subsequent Treaties and Acts modifying or supplementing them”—into a formally unified constitutional order. Such an act, as anticipated by the early liberal call for a written constitution, is more than mere compilation of the *leges fundamentales* currently in force.<sup>23</sup>

## 2. A Single Organization: One Union, One Personality

Accordingly, the new Union emerges as a single organization, *vis-à-vis* its citizens as well as in the international community (Arts. I-1, I-7 CT).<sup>24</sup> The re-foundation as a legal successor to the EC and EU puts an end to the absurd situation in which the Union appeared to have a split personality. Indeed, this represents for citizens a significant windfall, in terms of transparency; it bridges a problematic gap between political communication and legal construction. The debate over the old EU as an independent subject of international law becomes obsolete; internally, a rationalization of the procedures for entering into treaties is made possible.

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<sup>19</sup> Dieter Grimm, *Verfassung II.*, in *GESCHICHTLICHE GRUNDBEGRIFFE* VOL. 6, 863, 866 (Otto Brunner *et al.* eds., 1990); Hermann Heller, *Staatslehre*, in *GESAMMELTE SCHRIFTEN* VOL. 3, 385 (1971).

<sup>20</sup> ULRICH K. PREUß, *REVOLUTION, FORTSCHRITT UND VERFASSUNG* 21 (1994); Möllers, *supra* note 4; Grimm, *supra* note 19, at 880.

<sup>21</sup> Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 *RECHTSHISTORISCHES JOURNAL* 176, 184 (1990).

<sup>22</sup> Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 *COMMON MARKET LAW REVIEW* 17, 22 (1999); SIONAIDH DOUGLAS-SCOTT, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 111 (2002).

<sup>23</sup> See Heinz Mohnhaupt, *Verfassung I.*, in *GESCHICHTLICHE GRUNDBEGRIFFE* VOL. 6, 832, 840 (Otto Brunner *et al.* eds., 1990).

<sup>24</sup> Theo Öhlinger, *Europa auf dem Weg zu einer Verfassung*, in *EUROPARECHT IM ZEITALTER DER GLOBALISIERUNG* 379, 385 (Heribert F. Köck *et al.* eds., 2004); Bardo Fassbender, *Die Völkerrechtssubjektivität der Europäischen Union nach dem Entwurf des Verfassungsvertrages*, 42 *ARCHIV DES VÖLKERRECHTS* 26 (2004).

Presumably, the consolidation into one legal personality will symbolically reaffirm the Union as a player on the international stage.<sup>25</sup>

### 3. *A Unified Legal Regime: One Union, One Method*

Amalgamation and consolidation offer the opportunity to formulate fundamental rules and principles which apply—at least as a general rule—across all of the Union's policies.<sup>26</sup> This is precisely the project the Constitutional Treaty pursues, specifically in its Parts I and II. The unity of substantive constitutional law is realized—again: as a general rule—at the level of Community law, which leads to numerous innovations for the policies formerly of the second and third pillars. For example, the primacy of Union law (Art. I-6 CT) was neither judicially guaranteed nor explicit in the EU Treaty.<sup>27</sup> Furthermore, the prohibition of discrimination in Article I-4(2) CT could previously, under Article 12 EC, only be applied to Community law.<sup>28</sup>

## C. The Incomplete Promotion of Unity

As important as this progress is to the development of a coherent constitutional order, the unity envisioned by the Constitutional Treaty is incomplete and remains precarious. Further analysis shows that the European constitution would continue to exhibit significant incoherence, both formally and substantively.

### I. *Formal Incoherence*

Wading through the complete text—some 474 pages of reading material in the Official Journal—one experiences how far away the Constitutional Treaty is from the ideal of a concise, expressive constitutional document. This is not, or at least not primarily, an editorial deficiency. The structure and length of the constitutional text reflect the unsolved problems involved with fostering unity. Even the comprehensive codification of primary law failed, because the Atomic Energy Community continues to exist as a legal entity with its own treaty basis alongside

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<sup>25</sup> Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASHINGTON & LEE LAW REVIEW 555, 568 (2004).

<sup>26</sup> Patrick Birkinshaw, *Constitutions, Constitutionalism and the State*, 11 EUROPEAN PUBLIC LAW 31, 42 (2005).

<sup>27</sup> Albi & Van Elsuwege, *supra* note 11, at 751; sceptical, however, *Editorial Comments: The CFSP under the EU Constitutional Treaty - Issues of Depillarization*, 42 COMMON MARKET LAW REVIEW 325 (2005).

<sup>28</sup> On the horizontal delimiting function of this concept, see Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk et al.*, 2003 ECR I-4989.

the new Union—with much unclarity about the legal consequences.<sup>29</sup> Weaknesses in codification and poor systematization find their most obvious expression in the fragmentation into four independent, partially redundant parts.<sup>30</sup> Several provisions are formulated repeatedly, and others have no clear logic of allocation.<sup>31</sup> In terminology superficially adapted to the new context, Part III takes on many of the provisions of the EC and EU Treaties without significantly progressing beyond the consolidating efforts of the Amsterdam Treaty. The Constitutional Treaty's length is due, in part, to the appending of thirty-six Protocols, two Annexes, and fifty Declarations. This epilogue delivers an immense supplementary constitutional law with specialized provisions regarding individual Member States and with a plethora of hidden legal bases. To some extent, this incoherence can be explained by the Constitutional Treaty's multiphase history.<sup>32</sup> The Convention discussed the formulation of a constitutional document, without prior clarification of its relation to the so-called technical provisions of existing primary law. The Commission and numerous Convention members favored the project of a basic treaty; it would have primacy over other provisions, which were to have a simplified procedure for amendment.<sup>33</sup> Ultimately, the idea of a basic treaty proved unable to garner political consensus, for reasons discussed below.

## *II. Prolongation of the Pillar Structure*

Formal incoherence corresponds to a substantive incompleteness in terms of promoting unity. The old pillar structure can be recognized in the form of specialized regimes of constitutional law, albeit behind the façade of unity. This is true, to a moderate degree, for the third pillar.<sup>34</sup> There exists a competing right of initiative for a minority of Member States (Arts. I-42(3), III-264 CT), the European Council is involved in the law-making process (Art. III-270, III-271 CT), and certain areas are beyond the reach of legislative acts (*e.g.*, Art. III-263 CT). The prolongation of the pillars is even more pronounced in the Common Foreign and Security Policy,

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<sup>29</sup>Christiane Trüe, *EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz nach dem Verfassungsentwurf*, 59 JURISTENZEITUNG 779, 783 (2004).

<sup>30</sup>Öhlinger, *supra* note 24, at 389.

<sup>31</sup>For examples, see Jan Wouters, *The European Constitution, Parts I and III: Some Critical Reflections*, 12 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 3 (2005).

<sup>32</sup>Franz C. Mayer, *Verfassungsstruktur und Verfassungskohärenz: Merkmale europäischen Verfassungsrechts?*, INTEGRATION 398, 399 (2003).

<sup>33</sup>See Commission Communication: A Basic Treaty for the European Union, COM(2000) 434 final.

<sup>34</sup>See Jörg Monar, *Justice and Home Affairs in the EU Constitutional Treaty: What Added Value for the 'Area of Freedom, Security and Justice'?*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 226 (2005).

which continues to lead a constitutional life of its own.<sup>35</sup> Unanimity in the Council is the general rule (Art. I-40(6) CT), the Commission's role is largely taken over by the Minister for Foreign Affairs (Art. I-40(4) CT), and the Parliament has only a general right to be consulted (Art. I-40(8) CT). With a few narrow exceptions, legal review by the Court of Justice is excluded (Art. III-376 CT).<sup>36</sup> Further deviations concern the legal instruments (Art. I-40(6) CT), the conclusion of international agreements (Art. III-325 CT), and the system of competences (Arts. I-12(4), I-16 CT).<sup>37</sup>

A critical evaluation of these specialized regimes can be based on general principles formulated in Parts I and II of the Constitutional Treaty. The exclusion of legal review in core areas of foreign policy blatantly contradicts a fundamental value, the rule of law (Art. I-2 CT). Further, it seems questionable whether the limited jurisdiction for individual complaints can be reconciled with the right to an effective remedy (Art. II-107 CT). Similar tension exists regarding the principle of democracy (Art. I-2 CT) and the general rules on the "democratic life of the Union" (Arts. I-45 *et seq.* CT).<sup>38</sup> The preclusion of legislative instruments—completely in the CFSP and partially in the Area of Freedom, Security and Justice—prevents the Parliament's effective participation and, thus, representation of Union citizens. This also indirectly renders transparency rules inapplicable where they are exclusively for legislative acts in the technical sense. In particular, the Council deliberates and votes in public only when performing legislative functions (Arts. I-24(6), I-50(2) CT). Likewise, the involvement of national parliaments in a system which is to increase compliance with the principle of subsidiarity only obtains in a "draft European legislative act" (Art. 3 of Protocol No. 2).<sup>39</sup> Especially precarious in this setting is Article I-21(1) CT, which reads in relevant part: "The European Council ... shall not exercise legislative functions." In the face of its powers under the Constitution, one

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<sup>35</sup> An overview in Daniel Thym, *Die neue institutionelle Architektur europäischer Außen- und Sicherheitspolitik*, 42 ARCHIV DES VÖLKERRECHTS 44 (2004).

<sup>36</sup> On the delimitation problems, see Tim Corthaut, *An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution*, 12 TILBURG FOREIGN LAW REVIEW 110 (2005).

<sup>37</sup>As to the latter, see Christiane Trüe, *Das System der EU-Kompetenzen vor und nach dem Entwurf eines europäischen Verfassungsvertrags*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 391, 409 (2004); Armin von Bogdandy & Jürgen Bast & Dietrich Westphal, *Die vertikale Kompetenzordnung im Entwurf des Verfassungsvertrags*, INTEGRATION 414, 422 (2003).

<sup>38</sup> On the notion of dual democratic legitimacy, see Armin von Bogdandy, *Europäische Prinzipienlehre*, in EUROPÄISCHES VERFASSUNGSRECHT 149, 175 (Armin von Bogdandy ed., 2003).

<sup>39</sup> For details, see Armin von Bogdandy & Jürgen Bast, *La loi européenne: Promise and Pretence*, in THE EU CONSTITUTION: THE BEST WAY FORWARD? 171 (Deirdre Curtin *et al.* eds., 2005).

is tempted to dismiss this assertion as simply unfounded, even misleading. Yet it conceals a subtle normative truth: the European Council does not adopt laws, in the Constitutional Treaty's vocabulary, and thus its law-making (or, nominally, decision-making) is not subject to the heightened scrutiny that the Constitutional Treaty envisions for legislative acts.

### *III. Supranational Specialized Regimes*

Policy-specific specialized regimes are not peculiar to what has been taken over from the EU Treaty. The heterogeneity of Part III's constitutional rules and procedures cannot be depicted (solely) as intergovernmentalism versus supranationalism. The monetary policy is exemplary, as it is defined and implemented outside the "institutional framework" and beyond the forms of action in Article I-33 CT.<sup>40</sup> Here, none of the mechanisms for democratic legitimation listed in Articles I-46 *et seq.* CT seem applicable.<sup>41</sup> Another illustration is competition policy. A perusal of the relevant legal bases indicates that in this sector, as well, neither laws nor framework laws can be adopted; instead, the Commission and Council enact regulations and decisions, based directly on the Constitutional Treaty. As a consequence, neither national parliaments nor the European Parliament are involved, whether as law-maker or in a monitoring function.<sup>42</sup> A critical reading of Part III of the Constitutional Treaty exposes—and not only in the area of competition—a rather arbitrary classification of allegedly non-legislative legal bases.<sup>43</sup> It is also noteworthy that the "democratic life" still has to get by in the atomic sector without substantial parliamentary representation of Union citizens.

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<sup>40</sup> On the peculiarities of the "ESCB legal order", see Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MARKET LAW REVIEW 575, 586 (2004).

<sup>41</sup> On this issue, see Fabian Amtenbrink, *On the Legitimacy and Democratic Accountability of the European Central Bank*, in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 147 (Anthony Arnulf & Daniel Wincott eds., 2002).

<sup>42</sup> Regarding the questionable classification as an exclusive competence, see Jörg Ph. Terhechte, *Die Rolle des Wettbewerbsrechts in der europäischen Verfassung*, EUROPARECHT (BEIHEFT 3) 107, 111 (2004).

<sup>43</sup> Michael Dougan, *The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?*, 28 EUROPEAN LAW REVIEW 763, 784 (2003); Franklin Dehousse & Wouter Coussens, *The Convention's Draft Constitutional Treaty: Old Wine in a New Bottle?* 56 STUDIA DIPLOMATICA 5, 59, No. 1-2 (2003); similarly, Koen Lenaerts, *A Unified Set of Instruments*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 57, 61 (2005); further examples in Jürgen Bast, *Legal Instruments*, in PRINCIPLES, *supra* note 4.



## D. Policy-Specific Differentiation as a Leitmotif of Union Constitutional Law

### I. A Broader Concept of Differentiation

The above findings impel recognition of sectoral differentiation as a theoretical particularity of the Union. In European academic debate, the term “differentiation” is commonly used in connection with the concept of enhanced cooperation (“differentiated integration”).<sup>44</sup> Some authors even view the mechanisms for territorial differentiation, introduced by the Maastricht Treaty, as an expression of a new constitutional principle of flexibility.<sup>45</sup> Yet, the heterogeneity of the constitutional regimes in Part III of the Constitutional Treaty calls for an expanded concept of differentiation, which covers the entirety of substantive, decisional, territorial, and temporal arrangements in a given field.<sup>46</sup>

In this broader understanding, policy-specific differentiation is a phenomenon that has accompanied European integration from the outset. One recalls the founding of the Coal and Steel Community and the Atomic Energy Community. The EEC Treaty, as well, was largely systematized according to “policies” (as the title of what is now its Part Three reads), with specialized regulation for transport, agriculture, *etc.* Subsequent revisions to the Treaty included further policy areas, each with its own regime (*cf.* now Arts. 151–181a EC). In that light, the sectoral provisions in Titles V and VI of the EU Treaty were nothing fundamentally new, but merely expanded the regimes’ variance.

### II. Sectoral Constitutional Compromises

The sector-by-sector differentiation reflects respective sets of interests and varying preferences of constitutional politics among the Member States. One can speak of policy-specific negotiations on constitutional compromises. In constitutional theory, the concept of constitutional compromise describes a constitution’s potential to

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<sup>44</sup> Exemplary, Claus-Dieter Ehlermann, *Increased Differentiation or Stronger Uniformity*, in REFORMING THE TREATY ON EUROPEAN UNION 27 (Jan A. Winter *et al.* eds., 1996); FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999); *see also* the contributions in THE MANY FACES OF DIFFERENTIATION IN EU LAW (Bruno de Witte *et al.* eds., 2001).

<sup>45</sup> Gráinne de Búrca & Joanne Scott, *Introduction*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? 1 (Gráinne de Búrca & Joanne Scott eds., 2000); Jo Shaw, *European Union Legal Studies in Crisis?*, 16 OXFORD JOURNAL OF LEGAL STUDIES 231, 246 (1996); for a critical view, *see* von Bogdandy, *supra* note 38, at 196.

<sup>46</sup> For elements of a theory of differentiation (“variability”) in European constitutional law, *see* AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 193 (2002).

reconcile sociopolitical groups with conflicting interests in the constitution-making process.<sup>47</sup> The category is particularly prominent within a school of thought that traces back to Hermann Heller.<sup>48</sup> If this idea of a constitution as a “peace accord” between conflicting but interdependent parties is applied to the European Union, then the Member States conceptually correspond to the constitution-making groups. Sectoral constitutional compromises in primary law, thus, handle and moderate the structural conflicts of interest between large and small Member States, between industrial and agricultural economies, between Member States with high regulatory standards and those with low, *etc.*

One manifestation of constitutional compromises is what Carl Schmitt derisively called “*dilatorische Formelkompromisse*”<sup>49</sup> (“dilatatory formulaic compromises”), that is, postponing a decision in the given matter by using intentionally vague legal terms. In this case, substantive decisions are passed on to the legislator or a constitutional court. But more often constitutional compromises take on the form of detailed regulation, by which the groups involved hope to ensure their particular interests and spheres of autonomy.<sup>50</sup> The reason is a pronounced distrust of constitutional institutions, whose decision-making processes are seen as insufficiently protective of the interests likely to be affected. The result is so-called anchoring norms, which are provisions included in the text of the constitution not for their substantive “constitutional” content, but merely to benefit from the protection of the constitution’s procedure for amendment.<sup>51</sup> Thus, one should be careful when using state theory to derive a substantive concept of “constitutional norms” without taking into account the concrete conflicts within the respective polity.<sup>52</sup>

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<sup>47</sup> See, e.g., Ernst-Wolfgang Böckenförde, *Geschichtliche Entwicklung und Bedeutungswandel der Verfassung*, in STAAT, VERFASSUNG, DEMOKRATIE 29, 45 (1991); on backgrounds in the history of ideas, see JÜRGEN BAST, TOTALITÄRER PLURALISMUS 52 (1999).

<sup>48</sup> Ilse Staff, *Der soziale Rechtsstaat: Zur Aktualität der Staatslehre Hermann Hellers*, in DER SOZIALE RECHTSSTAAT 25 (Christoph Müller & Ilse Staff eds., 1984); for the Weimar Constitution, Franz L. Neumann, *The Change in the Function of Law in Modern Society*, in THE RULE OF LAW UNDER SIEGE 101, 122 (William E. Scheuerman ed., 1996); for the German Basic Law, Wolfgang Abendroth, *Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland*, in AUSGESCHICHTE UND POLITIK 279, 297 (Alfred Herrmann ed., 1954).

<sup>49</sup> CARL SCHMITT, VERFASSUNGSLEHRE 31 (1928); CARL SCHMITT, DER HÜTER DER VERFASSUNG 44, 48 (1931).

<sup>50</sup> On this relationship, see INGEBORG MAUS, BÜRGERLICHE RECHTSLEHRE UND FASCHISMUS: ZUR SOZIALEN FUNKTION UND AKTUELLEN WIRKUNG DER THEORIE CARL SCHMITTS 27 (1980).

<sup>51</sup> See GEORG JELLINEK, ALLGEMEINE STAATSLAHRE 533 (4th edition 1922).

<sup>52</sup> Niels Petersen, *Europäische Verfassung und europäische Legitimität*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 429, 450 (2004); Heller, *supra* note 19, at 391.

If one construes the policy-specific variability of Union constitutional law as an expression of constitutional compromises, it becomes clear that the Union's tendency to "overconstitutionalize" reflects the structural heterogeneity of the parties to the constitution and the resultant need to fence in the constitutional institutions. These insights reveal the great unlikelihood that the Convention or the ensuing IGC could have drafted a concise, highly abstract text to replace the detailed regulation of current primary law.<sup>53</sup> A renegotiation of all constitutional compromises was not intended, nor would it have been promising.<sup>54</sup> For the same reasons, the proposal of a bifurcation into a basic treaty and a detailed part, amendable by majority, was condemned to failure. Such a project fails to realize that what is now the Constitutional Treaty's Part III is by no means a "technical" chapter; rather, it forms part of the Union's constitutional core.<sup>55</sup>

#### E. The "Community Method" as the Constitutional Standard Case

Thus, the Convention faced a problem with an elusive answer: how can general rules and principles for the entire scope of Union action be formulated, while simultaneously leaving the sectoral constitutional compromises largely undisturbed? Conflicts between the relevant sections of the Constitution were preprogrammed. Against this background, the Constitutional Treaty remarkably manages to define a specific model of institutional balance as the standard case in European constitutional law.

##### I. *Towards a New Institutional Balance*

Catalyzed by the near failure of the Maastricht Treaty, the demand for a principled reorganization of the Union was prevalent in the constitutional debates during the 1990s, often formulated as a call for parliamentarization.<sup>56</sup> Successively, elements of

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<sup>53</sup> Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUROPEAN LAW JOURNAL 125, 141 and 146 (2001).

<sup>54</sup> See Armin von Bogdandy & Claus-Dieter Ehlermann, *Guest Editorial: Consolidation of the European Treaties: Feasibility, Costs, and Benefits*, 33 COMMON MARKET LAW REVIEW 1107, 1109 (1996); on the state of consolidation by the Treaty of Amsterdam, see Christoph Schmid, *Konsolidierung und Vereinfachung des europäischen Primärrechts*, EUROPARECHT (BEIHEFT 2) 17 (1998).

<sup>55</sup> For a German constitutional law perspective, see Hans-Jürgen Papier, *Die Neuordnung der europäischen Union*, EUROPÄISCHE GRUNDRECHT-ZEITSCHRIFT 753, 754 (2004).

<sup>56</sup> See Renaud Dehousse, *Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?*, 18 WEST EUROPEAN POLITICS 118, No. 3 (1995); on the Parliament's position in the constitutional setting, Philipp Dann, *European Parliament and Executive Federalism*, 9 EUROPEAN LAW JOURNAL 549 (2003).

an institutional structure crystallized, basically agreed on between the institutions and among the Member States. This is evident from the deliberations of the IGC which led to the Treaty of Amsterdam. The largely consistent positions of the institutions and the intergovernmental Reflection Group are testimony to the state of political consensus.<sup>57</sup> Therein, a remarkable recurring motif is that the Union's further development must take place while "maintaining the institutional balance."<sup>58</sup> Legally, institutional balance refers to a somewhat bland legal doctrine, molded by the ECJ from the normative material of Article 7 EC.<sup>59</sup> This concept sets limitations on irregular displacement of competences through institutional practice.<sup>60</sup> So what does it mean, when the demand for "institutional balance" is made in constitutional politics? It gives recognition to the fact that decision-making in the Community/Union takes place, as a general rule, by collaboration of various institutions, that is, in the form of cooperation of powers. In particular, there is a consensus that democracy in the Union requires a strong parliamentary component, which must not, however, outweigh other methods of formulating and bundling interests, especially through the work of the Council and Commission.<sup>61</sup>

Hence, institutional balance is no longer merely a description of the horizontal powers of the institutions, as conceived in the Treaties; it became a political and constitutional vision of a "balanced constitutionalism."<sup>62</sup> Certain constitutional doctrines, such as the Commission's monopoly on initiative, the co-decision procedure, or the qualified majority in the Council, were increasingly understood to be the standard case in European constitutional law, equally meeting demands for efficiency and democratic legitimacy. This is particularly remarkable for co-decision, which became the established method of parliamentarily legitimated law-making, only a few years after its introduction. Yet, the abovementioned political

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<sup>57</sup> Analysis in Paul Craig, *Democracy and Rule-making within the EC*, 3 EUROPEAN LAW JOURNAL 105, 107 (1997).

<sup>58</sup> Reflection Group's Report, SN 520/95, 5 December 1995, paras. 79 and 96, available at [http://www.europarl.eu.int/enlargement/cu/agreements/reflex1\\_en.htm](http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm); similarly, European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference, OJ 1995 C 151/56, para. 18.

<sup>59</sup> Summarizing, Jean-Paul Jacqué, *The Principle of Institutional Balance*, 41 COMMON MARKET LAW REVIEW 383, 387 (2004).

<sup>60</sup> Case 25/70, Köster, 1970 E.C.R. 116; Case 98/80, Romano, 1981 E.C.R. 1241.

<sup>61</sup> Koen Lenaerts & Amaryllis Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 35, 42 (Christian Joerges & Renaud Dehousse eds., 2002); Miguel Póiares Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in EUROPEAN CONSTITUTIONALISM, *supra* note 5, at 74, 90.

<sup>62</sup> Craig, *supra* note 57, at 113.

consensus does not include making these doctrines valid and applicable across all sectors. The focus of the discussion has, however, shifted to the controversy over whether peculiarities of a given sector or specific national interests hinder an extension. This line of discourse also shaped the debates of the Convention and the subsequent IGC.

## II. *The Invention of "the Community Method"*

The proliferation of these constitutional doctrines has benefited decisively from a conceptual synthesis which goes by the name "the Community method." The authorship of this term, in its present meaning, belongs to the Commission. Even before the European Council fired the official starting shot for the Convention in December 2001, the Commission had presented its White Paper on "European Governance," emphatically calling for a "strengthening" and "renewal" of the Community method.<sup>63</sup> In another paper, it addressed its appeals to the Convention: the Community method should not be "cut back to its historic success" but should, instead, be extended to policies not previously within its application.<sup>64</sup>

Talk of the supposed success "for almost half a century"<sup>65</sup> of this method is an astonishing historical construct. First of all, it proves blind in terms of the technocratic-functionalistic heritage, for which a democratic legitimation of Community action hardly had any meaning.<sup>66</sup> Second, the tale of continuity ignores the profound divisions and institutional shifts through which the Union became what it is today.<sup>67</sup> And, third and most relevant in the present context, the Commission apparently intentionally obscures the empirical heterogeneity of the truly existent Community in all its sectoral variability. Talk of *the* Community method evidences a strategic chutzpah because it describes not an image, but an idealization of the EC, creating a certain discursive normality.<sup>68</sup> The designation

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<sup>63</sup> European Governance: A White Paper, at 9 and 34, COM(2001) 428 final. See MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE, Jean Monnet Working Papers, No. 6/01 (Christian Joerges *et al.* eds., 2001).

<sup>64</sup> Communication from the Commission: A Project for the European Union, at 24, COM(2002) 247 final.

<sup>65</sup> European Governance, *supra* note 63, at 34.

<sup>66</sup> Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE 167, 189 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003); Bo Stråth, *Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community*, 6 GERMAN LAW JOURNAL 255, 268 (2005).

<sup>67</sup> JOSEPH H.H. WEILER, *The Transformation of Europe*, in THE CONSTITUTION OF EUROPE 10 (1999).

<sup>68</sup> For a discourse-theoretical and sociological analysis of the phenomenon of normalism, JÜRGEN LINK, VERSUCH ÜBER DEN NORMALISMUS: WIE NORMALITÄT PRODUZIERT WIRD (1999).

suggests a description of the operating mode of the first pillar.<sup>69</sup> Only on closer inspection does it become clear that the Commission fuses a substantively loaded concept of institutional balance, as crystallized only in the mid-1990s, with that of a Community method. Of course, the Commission also pursued its own institutional interests: it notably declared its exclusive right of initiative to be an indispensable component.<sup>70</sup> However, the Commission was remarkably successful in contriving acceptance of its conceptually synthesized elements as if they were an indivisible whole. During the process of the Convention, for instance, the Parliament no longer sought to achieve its own right of initiative.<sup>71</sup> In return, the Parliament's major gains (*e.g.*, in agricultural and commercial policies) may have been due to widespread acceptance of its claim for co-decision wherever there is legislation by majority voting.<sup>72</sup>

### *III. The Community Method as the Standard Case in the Constitutional Treaty*

This normalistic discourse translates into positive law in the Constitutional Treaty. It resonates, if somewhat indistinctly, as early as the second sentence of Article I-1(1) CT, according to which the Union shall exercise "on a Community basis" the competences conferred on it. Therein lay a direct reference to the Community method, as though it were an established legal doctrine.<sup>73</sup> The Constitutional Treaty exercises this programmatic confession by bestowing the status of constitutional standard case on all significant elements of the Community method:

- legislation requires agreement between Council and Parliament, on the basis of proposals of the Commission, under the "ordinary legislative procedure" (Art. I-34(1) CT),
- the Council decides by qualified majority (Art. I-23(3) CT),
- the normative implementation of Union law is a task of the Commission (Arts. I-36, I-37 CT),

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<sup>69</sup> See also the instructive "Explanatory note on the 'Community method'" by the Commission of 22 May 2002 (MEMO/02/102), available at: <http://europa.eu.int/rapid/searchAction.do>.

<sup>70</sup> Adrienne Héritier, *The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making*, in MOUNTAIN OR MOLEHILL?, *supra* note 63.

<sup>71</sup> CHRISTIAN VON BUTTLAR, DAS INITIATIVRECHT DER EUROPÄISCHEN KOMMISSION 274 (2003).

<sup>72</sup> On the Parliament's new powers, see Alan Dashwood & Angus Johnston, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty*, 41 COMMON MARKET LAW REVIEW 1481, 1484 (2004); Peter M. Huber, *Das institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa*, EUROPARECHT 574, 597 (2003).

<sup>73</sup> Giacinto della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 REVUE EUROPEENNE DE DROIT PUBLIC 221, 228 (2001).

- the standard type of competence is “shared competence” (Art. I-14(1) CT),
- administrative implementation takes place within the Member States in a framework established by the Union (Art. I-37(1) CT), and
- legislation and implementation are subject to the ECJ’s jurisdiction (Art. I-29(1) CT).

This, then, is the Constitutional Treaty’s constructive solution to the tension between the need for principled assertions as to the operation of the new Union and the concurrent protection of policy-specific compromises: it elevates a certain model to constitutional normality, as defined in Part I. Whether this model is exceptionally not applied in a given situation, is determined in the relevant legal basis, mainly in Part III. In contrast to the current Treaties, even the drafting technique shows which methods make up the standard case. For example, “special legislative procedures” apply only in “the specific cases provided for in the Constitution” (Art. I-34(2) CT). An enumeration principle, thus, exposes deviations in the constitutional text.

#### **F. The Constitutional Treaty as a Reflexive Constitution**

A proper understanding of the Constitutional Treaty has to identify the substantive incompleteness in terms of promoting unity, which shows itself in the persistence of sectorally specialized regimes (as described in sections C. and D. above). But it must also reveal the document’s ability to spotlight instances of the constitutional standard case (as seen in section E.).

##### *I. Conceptualizing the Relationship of the Parts of the Constitution*

A safe point of origin is the insight that Part I’s general assertions do not enjoy hierarchical precedence over the partly antithetical provisions of Part III.<sup>74</sup> Methodologically, the Constitutional Treaty must be conceived of as a unity. This, of course, does not rule out tension and value conflicts between individual provisions or groups of provisions. Such conflicts, however, cannot be resolved using the model of a hierarchy of norms. Rather, they involve issues of systematic interpretation.

In the context of exceptions to fundamental provisions, the arsenal of legal reasoning permits competing lines of argumentation. On one hand, there is the

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<sup>74</sup> Mayer, *supra* note 32, at 399; Öhlinger, *supra* note 24, at 389; Wouters, *supra* note 31, at 7.

principle that more specialized law takes precedent (*lex specialis*). This would prefer the specific provisions of Part III over the fundamental provisions of Part I. On the other hand, however, exceptions are to be interpreted with a view to the fundamental provisions from which they deviate. In particular, the interpretive principle *singularia non sunt extenda* advocates the strict limitation of an exception's scope and the preference for the fundamental provision in case of doubt. The case law of the ECJ has repeatedly applied such a rule in the context of fundamental freedoms.<sup>75</sup> As such, this principle would speak for a formulation such as *in dubio pro parte una*, or more specifically *in dubio pro Community method*.<sup>76</sup> The latter, however, would have to be restrictively applied, owing to the constitutional functions of sectoral differentiation. Sectoral compromises remain binding on both institutional action and constitutional interpretation, even when they stand in conflict with principles used by the Constitutional Treaty in self-description.

## II. On the Operating Mode of a Reflexive Constitution

Putting the spotlight on constitutional standard cases may help arrange specific legal consequences, but its primary advantage is the systematization of heterogeneity, that is, the determination of normality and deviance. The tension between—only partially “correct”—self-description (Part I) and normative reality (Part III) cannot, for the most part, be resolved by jurisprudence, but by constitutional politics. This confers on the Constitutional Treaty the status of a *reflexive constitution*. Such a constitution makes normative demands of itself, without (yet) fully accounting for them. The Constitutional Treaty's self-referentiality unfolds in two alternative modes of operation, a “not here” rationale and a “not yet” rationale.

### 1. The “Not Here” Rationale

In the first mode of operation, deviating configurations stand under the pressure of political justification. Valid reasons are demanded to justify an enduring deviation (“not here”). Convincing justifications are attainable either where the peculiarity of a given sector warrants a departure from the standard model or where substantive legal safeguards for structural minorities are insufficient (*e.g.*, particular concerns of certain or even all Member States). A prominent example of the former is the monetary policy, whose deviation from the standard case of the Community method is justified by the principled desire for an independent central bank, a

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<sup>75</sup> *E.g.*, Case C-405/01, *Colegio de Oficiales de la Marina Mercante Española*, 2003 ECR I-10391.

<sup>76</sup> I am grateful to Philipp Dann for this thought; see his contribution to this volume.



deviation which is supported by broad political consensus.<sup>77</sup> As an example of the latter, one could mention the required unanimity under the so-called flexibility clause (Art. I-18 CT); in this case, counterbalancing the wide scope of empowerment with procedural safeguards seems systematically justifiable.

## 2. *The “Not Yet” Rationale*

Where such justification is not plausible, constitutional politics set sectorally specialized regimes under pressure to reform; thus, they take on a provisional, stopgap character (“not yet”). Here, the Constitutional Treaty shows strikingly innovative potential. It not only—as is common in written constitutions—lays down the procedure for its own amendment, but also holds in readiness the standard for its own further development.

Certainly, amendability is generally a characteristic of a modern constitution. Defining constitutional amendment as part of law-making itself solidifies the autonomy and continuity of the legal order.<sup>78</sup> Moreover, a constitution’s proclamation of an agenda for the future is by no means uncommon.<sup>79</sup> Typically, though, at the moment of its enactment, a constitution claims not only validity, but also consonance with principles.<sup>80</sup> The Constitutional Treaty, in contrast, is defined by its partial imperfection. Conceived of as a reflexive constitution, the Constitutional Treaty does not present itself as a perfect order to be juxtaposed with an imperfect social reality. The Constitutional Treaty’s programmatic reference to the future does not address (only) the legislator; instead, it addresses the constitution-making power itself. To take up a metaphor by Kirchheimer,<sup>81</sup> the Constitutional Treaty, to some degree, “lags ahead” of itself.

The paradigm of reflexivity finds its expression in a particular legal concept, the so-called *passerelle* (bridging clause), that is, the power of the European Council or the

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<sup>77</sup> However, it is doubtful whether these considerations justify all deviations from the standard case, see Arts. III-186(2), III-187(4), III-190(3) CT.

<sup>78</sup> Günter Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, 6 EUROPEAN LAW JOURNAL 257, 270 (2000); Luhmann, *supra* note 21 at 190.

<sup>79</sup> FRANZ L. NEUMANN, BEHEMOTH: STRUKTUR UND PRAXIS DES NATIONALSOZIALISMUS 31 (1984); Otto Kirchheimer, *Weimar und was dann? Analyse einer Verfassung*, in POLITIK UND VERFASSUNG 9, 54 (1964).

<sup>80</sup> HASSO HOFMANN, DAS RECHT DES RECHTS, DAS RECHT DER HERRSCHAFT UND DIE EINHEIT DER VERFASSUNG 55 (1998).

<sup>81</sup> Otto Kirchheimer, *Verfassungsreform und Sozialdemokratie*, in FUNKTIONEN DES STAATS UND DER VERFASSUNG 79, 85 (1972).

Council to adopt constitution-amending decisions (e.g., Arts. III-210(3), III-300(3), III-422, IV-444 CT). The ultimate end of these bridging clauses is the constitutional standard case, namely, the crossover from unanimity to qualified majority and the crossover from a “special” to the “ordinary legislative procedure.” The institutions so empowered are, for the sake of the Constitution, called to permanent examination of whether the justification of a “not here” still exists, or whether the time has come for an “also here.”

### *III. The Constitutional Treaty between Manifesto and Constitutional Statute*

As a reflexive constitution, the Constitutional Treaty is a set of guidelines, an aspiration, for how the Union should become in the future.<sup>82</sup> Hence, the Constitutional Treaty connects to older layers of constitutional reasoning, to the tradition of the manifesto-constitution, whose archetypes are the Declaration of Independence and the *Déclaration* of 1789.<sup>83</sup> In contrast to these, however, the Constitutional Treaty—in the tradition of the constitutional statute<sup>84</sup>—purports, in all its parts, to be a normative constitution, a directly valid legal text with detailed rules for the constituted community. The construal as reflexive constitution makes it possible to take the Constitutional Treaty seriously, despite its contradictions, and to appreciate its characteristic tension between the polar extremes of manifesto and statute. Such a reading permits us to maintain a critical distance from the actual reality of the implementation of constitutional principles, as set out by the Constitutional Treaty itself. Nothing requires the lowering of the normative standards of democracy, for example, simply to match the level actually attained.<sup>85</sup> The Constitutional Treaty points forward, beyond itself: it is an important phase, but not the end point, of European constitutionalization.

### **G. What if the Constitutional Treaty Fails?**

The obvious result of a failure of the Constitutional Treaty—a realistic scenario after the referenda in France and the Netherlands—would be that the European Union has to live with its current Treaties for quite a while. It is difficult to assess which direction European constitutionalism would then take. Yet, the constitutional consensus that the unity of the Union should be based on the Community method

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<sup>82</sup> See Birkinshaw, *supra* note 26, at 45.

<sup>83</sup> Frankenberg, *supra* note 78, at 261.

<sup>84</sup> *Id.* at 264.

<sup>85</sup> Agustín José Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUROPEAN PUBLIC LAW 105, 142 (2005).

seems to be still intact. What was in fact rejected by the French and Dutch voters arguably applies more to the incomprehensible Union of today than to the Union outlined in Parts I and II of the Constitutional Treaty. One has to admit, however, that reflexive constitutionalism has a weak textual basis in the current Treaties. *De lege lata*, co-decision is only “the procedure referred to in Article 251,” *i.e.*, one among various equal-ranking procedures provided by the Treaties. But there is no way back to the state of innocence. Today we *know* what the standard procedure is, and this forms the basis for disagreement on whether to extend it to, let us say, harmonization of direct taxes—in the language of this chapter: whether the “not yet” rationale applies or the “not here.” Our reading of the current primary law has already changed, and this will heavily influence the way we construe its provisions. Henceforth, they will be read against the backdrop of what is considered the standard case in Union constitutional law. In a sense, a reflexive constitution once agreed on does not have to enter into force to become effective.

Again, we end up with the tension between fragile unity and contested differentiation, a tension that has proven to be a leitmotif of Union constitutional law, albeit with a lot more differentiation than under the Constitutional Treaty. On one hand, the sectoral constitutional compromises of positive law have to be respected. Even a blatantly unfounded deviation cannot be abolished by jurisprudence alone: it has ultimately to be remedied by formal Treaty amendment (*e.g.*, by using Art. 42 EU). On the other hand, legal scholarship is mandated to strengthen unity by construing the law from the perspective of the standard case and the constitutional principles it is meant to serve, namely the rule of law, democracy, and federal balance. The recent judgment of the ECJ in the *Pupino* case<sup>86</sup> sets an example of how a strong case for unity could be made.

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<sup>86</sup>ECJ, Case C-105/03, Maria Pupino, (16 June 2005, <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML>).

## Thoughts on a Methodology of European Constitutional Law

By Philipp Dann\*

### A. Introduction

Constitutional law is special not only for the salient importance of its substance, but also for its concentrated yet open form and terminology. Hardly surprising, therefore, the issue of how to interpret and analyze constitutional law is a commonly and sometimes hotly debated topic in most constitutional systems.<sup>1</sup>

It is not so in the European Union, though. Here, such questions have seldom been raised. Although discussion of the European Court of Justice and its general methods of interpretation is intensive and critical,<sup>2</sup> little thought is given to the specific question of interpreting the Union's constitutional law and even less to methods and approaches of European constitutional scholarship.<sup>3</sup> Considering the emergence of European constitutional law in past years and the breadth and scope of constitutional debate in the EU today, this state of discussion seems hardly appropriate.

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<sup>1</sup> MICHAEL DORF & LAWRENCE TRIBE, *ON READING THE CONSTITUTION* (1991); ANTONIN SCALIA, *A MATTER OF INTERPRETATION "FEDERAL LAW AND THE COURTS"* (1997); MICHEL TROPER, *LA THÉORIE DU DROIT, LE DROIT, L'ÉTAT* (2001); Otto Pfersmann, *Theorie de l'interprétation constitutionnelle*, 17 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 351 (2001); PETER HÄBERLE, *EUROPÄISCHE VERFASSUNGSLEHRE* 268 (2005); HANS J. KOCH, *SEMINAR: DIE JURISTISCHE METHODE IM STAATSRECHT* (1977); as to the debate in South-Africa ZIYAD MOTALA & CYRIL RAMAPHOSA, *CONSTITUTIONAL LAW* 13 (2002).

<sup>2</sup> Joxerramon Bengoetxea et al., *Integration und Integrity in the Legal Reasoning of the European Court of Justice*, in *THE EUROPEAN COURT OF JUSTICE* 43 (Gráinne De Búrca & Joseph H.H Weiler eds. 2001); 2 FRIEDRICH MÜLLER & RALPH CHRISTENSEN, *JURISTISCHE METHODIK* (2003); Hans Kutscher, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts, aus der Sicht eines Richters*, in *GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN (BEGEGNUNGEN VON JUSTIZ UND HOCHSCHULE)* 1 (1976).

<sup>3</sup> *But see* Armin von Bogdandy, *A Bird's Eye View on the Science of European Law*, 6 *EUROPEAN LAW JOURNAL* (ELJ) 208 (2000); FRANCIS SNYDER, *NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW* 12 (1989).

On the contrary, it is the calling of European constitutional scholarship to reflect on its methodological arsenal. It should inquire into its set of interpretative rules and analytical approaches, it should discuss, whether its object justifies a special set of methodological tools – and what such tools should be.

The following paper considers these questions in three steps. The first part will ask why the topic of European constitutional law should actually justify a specialized methodology – and how such a methodology can be developed (A.). Considering the specific nature of this body of law, the role and cognitive interests of legal academia and the virtues of a debate as such, it will argue for the distinct value of such a methodology.

The second part will then attempt to sketch contours of a methodology of European constitutional law (B.). It will propose that the analysis of European constitutional law must go beyond mere interpretation, so as to encompass three different methodological dimensions, namely interpretation, comparison, and systematization. The heuristic function of distinguishing these dimensions is to facilitate a more precise localization and discussion of the particular methodological challenges facing European constitutional law and its analysis.

Finally, an afterthought shall contemplate a rarely observed, though certainly not insignificant aspect of method-conscious analysis, that is the personal attitude of the critic, or, as it will be called here: his or her habitus (C.).

## **B. Preliminary Questions on a Methodology for European Constitutional Law**

### *I. A Specialized Methodology for European Constitutional Law – Why so?*

The issue of how to interpret constitutional law is a familiar motif in many countries.<sup>4</sup> However, before simply copying the question, transferring it to the European level and asking how European constitutional law should be analyzed, one might ponder first why this area of law may justify a specialized methodology.

The case against such a specialized methodology is strong. Firstly, the acceptance of special rules to analyze European constitutional law must presume the relativity of methodologies and, thus, their multiplicity. Hesitance regarding such relativity seems called for. A shared methodology of all legal disciplines has a unifying element. It is one of the great advantages of legal academia, in contrast to many

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<sup>4</sup> See literature cited, *supra* note 1.

other fields of social sciences, that it is much less divided into schools of thought and different methodologies. Also, the relatively close ties and permeability between legal academia and practice is based in no small part on this shared reservoir of accepted methods and arguments.<sup>5</sup> This common methodological basis appears fundamental, especially to a discipline, such as European constitutional law, based so strongly on court-actions and case law.

Another unifying aspect of methodology might militate against a specialized methodology. Those who follow the same rules, that is, speak the same methodological language as it were, have a chance of understanding. This aspect should be of particular significance in a heterogeneous Europe of many languages and legal cultures. Characteristic methodological differences certainly exist, for example, between the practices of continental and British jurists;<sup>6</sup> nonetheless, common foundations can be seen across the quite different legal cultures.<sup>7</sup> To compromise such commonalities by way of a disciplinary specialization would be difficult to justify.

Further concerns are perhaps even more fundamental. Is not the very question of a methodology for a European constitutional scholarship incurably German—and thus more of a national cul-de-sac than the route to a European debate? Other countries, indeed, discuss the rules for constitutional interpretation; however, such discussion relates predominantly to the action of (constitutional) courts and precisely not to scholarly methods.<sup>8</sup> Why should the German delight in methodological navel-gazing be imposed on other countries and on European law? And even if one were to venture into such a topic, a separate question would be how such a debate could be carried out productively. National methodology debates are already highly complex and, for the most part, far from agreement. How is it supposed to function on a pan-European level? And in the end does one not have to ask whether the call for such a debate resonates with the none too

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<sup>5</sup> Ulfried Neumann, *Wissenschaftstheorie der Rechtswissenschaft*, in *EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART* 387 (Arthur Kaufmann & Winfried Hassemer eds., 5<sup>th</sup> ed. 1989); 1 FRIEDRICH MÜLLER & RALPH CHRISTENSEN, *JURISTISCHE METHODIK* 30 (2004).

<sup>6</sup> 2 LÉONTIN JEAN CONSTANTINESCO, *RECHTSVERGLEICHUNG* 30 (1972); *But see* STEFAN VOGENAUER, *DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT* (2001). As to the differences in legal reasoning even between common-law systems, *see* PATRICK S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

<sup>7</sup> A systematic comparison of methods of constitutional interpretation in Europe is still missing. For statutory interpretation, *see* *INTERPRETING STATUTES* (Neil MacCormick & Robert S. Summers eds., 1991); WOLFGANG FIKENTSCHER, 1-3 *METHODEN DES RECHTS* (1975/1976); VOGENAUER, *supra* note 6.

<sup>8</sup> *See* literature cited, *supra* note 1.

subtle echo of a hegemonic project to export German viewpoints into other academic cultures?

However valid these questions may be, in this very pointedness they indicate the value of a reconsideration of methodological issues. A discussion about methodological understandings and cognitive interests could serve both as a starting point for self-reflection and as a point of crystallization of self-conceptions.<sup>9</sup> Scholarship on European law is not exactly blessed with this kind of reflection.<sup>10</sup> But wherever it is found, the debate on methodologies has reflected and sometimes clarified the self-conception of Community law—in the emancipation from international law as well as in delimitation from national law.<sup>11</sup> It remains, however, to be seen, whether a methodological discussion, in and of itself, could act as a unifying element. In any case, it would surely lead to more transparency in the handling of European constitutional law or would at least serve to improve awareness of intransparency.

Beyond these rather general considerations, several concrete factors do speak for a reevaluation of the methodology of European constitutional law and for a (moderate) methodological relativism.<sup>12</sup> Adequate methods promise rationality.<sup>13</sup> Over-simplified methods carry the danger of irrationality and camouflage. This seems especially true in European matters. The rash and imprudent transfer of nationally impregnated legal terms to the European level can lead to results just as dubious as the indiscriminate acceptance of supposedly objective, empirical assumptions—two phenomena observable, for instance, in the debate over the European democratic deficit.<sup>14</sup> Just as the Europeanization of national legal

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<sup>9</sup> 3 MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS* 153 (1999); Christoph Möllers, *Braucht das öffentliche Recht einen Methoden- und Richtungsstreit?*, 90 *VERWALTUNGSARCHIV* 187 (1999).

<sup>10</sup> H. Schepel & R. Wesseling, *The Legal Community. Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 *EUROPEAN LAW JOURNAL* 165 (1997).

<sup>11</sup> JOCHEN ANWEILER, *DIE AUSLEGUNGSMETHODEN DES GERICHTSHOFES DER EUROPÄISCHEN GEMEINSCHAFTEN* 76 (1997). On the institutional side of this development, see RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE* 16 (1998).

<sup>12</sup> Stefan Grundmann, *Methodenpluralismus als Aufgabe*, 61 *RABELS ZEITSCHRIFT* 424 (1997).

<sup>13</sup> Andreas Voßkuhle, *Methode und Pragmatik im öffentlichen Recht*, in *UMWELT, WIRTSCHAFT UND RECHT* 181 (Hartmut Bauer et al. eds., 2003).

<sup>14</sup> On how to deal with the national roots of the vocabulary of European constitutional law, see *infra*, Part C.III.1.

structures leads to reconsideration of methodical rules in national discourse, so too might the inverse prove beneficial.<sup>15</sup>

Additionally, the specific cognitive interests of academia justify the consideration of a special methodology for European constitutional law, in delimitation and in complement to judicial methodology.<sup>16</sup> The correct and convincing resolution of a case, as is the judiciary's task, follows methodological rules which are different than those employed for a systematic penetration of a legal field and the scholarly explication of its underlying concepts. Legal academia is called to reveal broader contexts, in which to consider the law; it is called to scrutinize and challenge the law itself as well as its praetorial development. In doing so, legal academia can—and must—make use of extralegal standards.<sup>17</sup> Thus, the methodology of European constitutional law must surpass a mere analysis and critique of the interpretive methods of the ECJ; indeed, it must delineate the entirety of an independent scholarly methodology.

Finally, the consideration of European constitutional law methodology is justified by the nature of its object.<sup>18</sup> Not only in the national context,<sup>19</sup> but also in the European, the unique nature of constitutional law incites reflection on its methodology.

## *II. On the Nature and Notion of Constitutional Law – Nationally and in the EU*

The specific nature of constitutional law, on the national level, follows from its substance, form, and function. The relevant aspects shall briefly be noted here.<sup>20</sup>

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<sup>15</sup> Voßkuhle, *supra* note 13, at 178.

<sup>16</sup> Eberhard Schmidt-Aßmann, *Methoden der Verwaltungswissenschaft*, in *METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT* 393 (W. Hofmann-Riem & E. Schmidt-Aßmann eds., 2004); MARTIN KRIELE, *THEORIE DER RECHTSGEWINNUNG* 37 (2d ed. 1976); *but see* Bernhard Schlink, *Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft*, 19 *DER STAAT* 106 (1980).

<sup>17</sup> KRIELE, *supra* note 16. Looking rather at the self-understanding of legal academics, *see* Ralf Dreier, *Zum Selbstverständnis der Jurisprudenz als Wissenschaft*, 2 *RECHTSTHEORIE* 41 (1971).

<sup>18</sup> MÜLLER & CHRISTENSEN, *supra* note 2, at 30; Rudolf Bernhard, *Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht*, 24 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 451 (1964); *but see* OLIVER LEPSIUS, *GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG* 304 (1994).

<sup>19</sup> For the German discussion, *see* Horst Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 *VERÖFFENTLICHUNG DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 62 (1963); Ernst-Wolfgang Böckenförde, *Die Methoden der Verfassungsinterpretation*, 29 *NEUE JURISTISCHE WOCHENSCHRIFT* 2097 (1976).

<sup>20</sup> *See* KARL LÖWENSTEIN, *POLITICAL POWER AND GOVERNMENTAL PROCESS* 123 (1957); KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 3 (20<sup>th</sup> ed. 1999); MARTIN



First of all, constitutional law deals with power and its limitations. It establishes the framework for political disputes, sets procedures and fundamental values, and circumscribes the basic order of a polity. Constitutional law also serves to foster national self-affirmation and unity. At the same time, it acts as a communicative link between societal and legal discourse. In terms of form, constitutional law norms are as a general rule rather open, broad, and seldom formulated as conditional standards. Furthermore, rigorous procedures restrict its being amended. Finally, with supremacy over statutory law, constitutional law also functions to enable systemic coherence.

And what, in contrast, is specific to European constitutional law? Before answering this question, we should first clarify what exactly the term is intended to connote, since there are several concepts (and the denegation) of "European constitutional law".<sup>21</sup> Two basic conceptions can be distinguished, namely a formal and a material concept. The formal concept refers to the contours of European primary law.<sup>22</sup> The material concept of European constitutional law, in contrast, comprehends only certain foundational provisions that are considered as fundamental, such as basic values or institutional settings.<sup>23</sup>

The present article makes use of the formal conception of constitutional law. Admittedly, the material conception seemingly captures the "true" substance of constitutional law, separating the significant from the insignificant in the mass of European primary law. Yet it requires the drawing of difficult boundaries, since the standards for differentiating between significant and insignificant are, by nature, unclear and subjective. Also, the concept of a material constitutional law leaves dubious its degree of and relationship to the concept of constitutional supremacy.

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MORLOK, WAS IST UND ZU WELCHEM ENDE STUDIERT MAN VERFASSUNGSTHEORIE? 84 (1988); ULRICH PREUSS, ZUM BEGRIFF DER VERFASSUNG (1994); FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL 17 (28<sup>th</sup> ed. 2003).

<sup>21</sup> See JÖRG GERKRATH, L'EMERGENCE D'UN DROIT CONSTITUTIONNEL POUR L'EUROPE 51 (1997); Christoph Möllers, *Pouvoir Constituant - Constitution - Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., forthcoming 2005); ANNE PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 38 (2001). As to the development into a "constitution," see MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION 123 (2001); JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE (1999).

<sup>22</sup> Möllers, *supra* note 21. On the notion and scope of primary law, see KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 705 (2d ed. 2005).

<sup>23</sup> PETERS, *supra* note 21, at 91. As to this distinction, see N. Petersen, *Europäische Verfassung und Europäische Legitimität*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 445 (2004).

Against this backdrop, a formal understanding of constitutional law proves to be more persuasive as well as more transparent.

On this basis, we can now turn to the specific characteristics of European constitutional law. What are these? First, European constitutional law describes a legal order that is not a state, but uses the terminology of state law. Basic conceptual terms, such as constitution, democracy, or law, readily call this dilemma to mind.<sup>24</sup> Union constitutional law also describes a legal order that is beyond national and conceptual unity – and defies attempts to serve these concepts, as national constitutional law regularly does. Instead, European constitutional law has to deal with a sometimes distressing heterogeneity based on sectoral and territorial differentiation.<sup>25</sup>

The indeterminacy of language, typical of constitutional law generally, is at the European level coupled with multilingualism and textual complexity. European constitutional law is not contained in a single, discrete text; rather, it is to be found in diverse sources and in diverse languages.<sup>26</sup> While these sources have consisted of the various founding treaties of the Communities, and then the Union, plus the protocols, even under the Constitutional Treaty it would be four quite distinct parts of a treaty and a distressing myriad of protocols.<sup>27</sup>

Moreover, a particular openness characterizes the substantive contours of European constitutional law. This openness is more than the prospective openness that is common to every constitution.<sup>28</sup> What is meant here is that national legal orders as well as the European legal order take part in defining Union constitutional law, in particular, as regards fundamental rights.<sup>29</sup> At the same time, the supremacy of

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<sup>24</sup> Armin von Bogdandy, *Zur Übertragbarkeit staatsrechtlicher Figuren auf die Europäische Union*, in DER STAAT DES GRUNDGESETZES 1034 (Michael Brenner ed., 2004).

<sup>25</sup> DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT (2004); ALEX WARLEIGH, FLEXIBLE INTEGRATION (2002); FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999).

<sup>26</sup> Franz Mayer, *The Language of the European Constitution – beyond Babel?*, in THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION 359 (Adam Bodnar et al. eds., 2003); VIVIANE MANZ, SPRACHENVIELFALT UND EUROPÄISCHE UNION (2002).

<sup>27</sup> Currently, the primary law of the EC/EU contains some 35 protocols. The Constitutional Treaty has 36 protocols and 50 declarations. See Manfred Zuleeg, *The Advantages of the European Constitution*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21.

<sup>28</sup> MORLOK, *supra* note 20, at 105.

<sup>29</sup> NEIL MACCORMICK, DEMOCRACY, SUBSIDIARITY AND CITIZENSHIP 335 (1997); Torsten Kingreen, *Article 6 EUV*, in KOMMENTAR ZUM EU-VERTRAG UND EG-VERTRAG para. 33 (Christian Callies & Matthias Ruffert eds., 2d ed. 2002).

European constitutional law, a cornerstone of the importance of constitutional law in the national realm<sup>30</sup>, is not undisputed.<sup>31</sup>

Finally, European constitutional law is set apart by its own unique dynamic, resulting not only from the teleological orientation of the treaties themselves,<sup>32</sup> but also from the political dynamic of treaty revisions in the past twenty years.<sup>33</sup>

### *III. On the Development of a European Methodology – Epistemological Options*

If the contours and unique nature of the object of a specialized methodology can be sketched, and if good reasons for reflection on a European constitutional methodology can be named, then one meta-query remains open. That is the question of how such a methodology of European constitutional law can be developed at all.

Such a methodology would find its starting point in the currently used methods. A systematic comparison of the methodologies in Europe would, thus, be the most desirable route to arrive at a common European method. Conceivably, the national methodological arsenals could be analyzed, and various critical schools of thought could be juxtaposed, thereby testing their suitability for extrapolation onto the European project. Such an analysis would reveal similarities and differences and bring about a common arsenal. Such an undertaking, however, is beyond the scope of this article, not to mention the fact that the necessary preparatory work seems to be lacking.<sup>34</sup> The systematic and pan-European comparison of constitutional methodologies and its reflection onto issues facing Europe, as a whole, are still desiderata.

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<sup>30</sup> Rainer Wahl, *Der Vorrang der Verfassung, in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG, 121 (Rainer Wahl ed., 2003).

<sup>31</sup> PETERS, *supra* note 21, at 305.

<sup>32</sup> AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 141 (2002); THE DYNAMICS OF EUROPEAN UNION (Roy Pryce ed., 1990). As to the aspect of dynamic interpretation, see Rudolf Streinz, *Der effet utile in der Rechtsprechung des EuGH*, in Festschrift für Ulrich Everling 1491 (Ole Due ed., 1995); Joxerramon Bengoetxea, LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 251 (1993).

<sup>33</sup> LENAERTS & VAN NUFFEL, *supra* note 22, at 41; Ulrich Everling, *The European Union between Community and National policies and legal orders*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21, at part II.

<sup>34</sup> See literature cited, *supra* note 7.

Nonetheless, the previous thoughts might provide a starting point, hinting at two significant factors that shape a European methodology of constitutional law: the nature and specific features of European constitutional law itself – and the cognitive interests of academia (in contrast to those of courts).

### **C. Sketches of a Methodology of European Constitutional Law**

European constitutional law grapples with an entirely new phenomenon and is observed by a multinational academia with diverse and specific cognitive interests. A methodology of European constitutional law, which matches this subject and those observers, must go beyond mere rules of interpretation. Legal scholarship, in general, and European constitutional scholarship, in particular, surely encompass the interpretation of legal texts, but also include intra- and interdisciplinary comparison and systematization. Thus, the following methodological sketch distinguishes these three dimensions of legal analysis, namely, interpretation, comparison, and systematization.

This trichotomy primarily has a heuristic function. It promises to frame better and more transparently the methodological challenges specific to European constitutional analysis; that is, it promises to highlight the various methodological peculiarities in analyzing European constitutional law. Especially if a European conversation on these issues is to succeed, the debate on its aspects should already be as transparent as possible.

The interrelationship of these dimensions then is neither chronological nor hierarchical. Rather, they each ask distinct questions and thus elicit distinct insights about the law at hand. The respective insights inform and complement the others; they reinforce each other's content reciprocally.

A methodology of European constitutional scholarship is meant to capture what distinguishes the analysis of this body of law from the analysis of European secondary law – and from the analysis of national constitutional law. This starts with the methods of interpretation.

#### *I. Interpretation*

European constitutional law consists of texts and thus requires exegesis and interpretation.<sup>35</sup> In Community law and later in Union law, the methodological discussion has concentrated on this hermeneutic dimension of legal analysis. In its

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<sup>35</sup> HELMUT COING, *GRUNDZÜGE DER RECHTSPHILOSOPHIE* 319 (4<sup>th</sup> ed. 1985); HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* 307 (1963); KLAUS FRIEDRICH RÖHL, *ALLGEMEINE RECHTSLEHRE* 69 (1994).

course, this discussion reflected the methodological emancipation of Community law from international law, and also its delimitation from the methods of national law.<sup>36</sup>

For the scholarship on European constitutional law this interpretive dimension is unquestionably essential, as it shares the general canon of rules, i.e. grammatical, historical, systematic and teleological interpretation of a norm.<sup>37</sup> But further questions may be raised. It has to be asked whether the interpretation of European constitutional law also has specific aspects, in contrast to the interpretation of secondary law, or whether such differentiations might be reasonable. For reasons of transparency, we might distinguish between (1) rules and (2) principles of interpretation:<sup>38</sup>

### 1. *Rules of Interpretation*

Turning to the rules of interpretation, the objective here is obviously not to formulate completely new rules exclusively for constitutional interpretation; instead, the question is whether there might be certain characteristic shifts of emphasis between the interpretation of constitutional law and secondary law. The two following examples may demonstrate this.

The ECJ's case law plays a much more prominent role in the systematic interpretation of constitutional law than does secondary law.<sup>39</sup> Because the latter is more easily amended, it permits the lawmaker to take a more active role, thereby reducing the importance of case law. In contrast, constitutional law's resistance to quick amendments correspondingly increases the importance of precedents.

Teleological interpretation, to name a second example, generally is a central interpretive rule of Union law.<sup>40</sup> But it relates to fundamentally different objectives in European constitutional law and in secondary law. For the latter, the objectives

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<sup>36</sup> ANWEILER, *supra* note 11, at 76.

<sup>37</sup> CARL FRIEDRICH VON SAVIGNY, *JURISTISCHE METHODENLEHRE* 18 (G. Wesenberg ed., 1951). About Savigny and these rules, see 3 WOLFGANG FIKENTSCHER, *METHODEN DES RECHTS* 51, 67 (1976); U. Huber, *Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht*, 58 *JURISTENZEITUNG* 1 (2003). Presenting a similar list with regard to European Community, see BENGOETXEA, *supra* note 32, at 233.

<sup>38</sup> ATIYAH & SUMMERS, *supra* note 6, at 70.

<sup>39</sup> CARSTEN BUCK, *ÜBER DIE AUSLEGUNGSMETHODEN DES GERICHTSHOFS DER EUROPÄISCHEN GEMEINSCHAFTEN* 201 (1998); BENGOETXEA, *supra* note 32, at 240.

<sup>40</sup> BENGOETXEA, *supra* note 32, at 251.

enumerated in the text of the directive or regulation serve as a point of orientation; in the former, the basic considerations of the treaties come to the fore.

In contrast to these shifts in systematic and teleological interpretation, the demise of a supposed difference can be seen regarding the rule of historical interpretation. The widespread opinion that historical interpretation is impermissible in Union law owing to the lack of publication of the *travaux préparatoires*<sup>41</sup> has become invalid since they began to be published.<sup>42</sup> If the Constitutional Treaty enters into force, historical interpretation by recourse to the myriad documents of the Convention could possibly even play a significant role in the future.<sup>43</sup>

## 2. Principles of Interpretation

Principles of interpretation can be differentiated from the just described rules of interpretation. Their differentiation indicates two categories of interpretational tools and their relative dependence on the interpreted object.<sup>44</sup> On the one hand, rules of interpretation are rather narrow, independent in terms of the object and are thus, generally speaking, applicable across all legal disciplines, though also accounting for extenuating features, as seen above. On the other, principles of interpretation derive from specific material problems, which is to say, they have a topical core. Such principles of constitutional interpretation can be understood, as Horst Ehmke put it, as “substantive rules of problem-solving, developed through problem-solving.”<sup>45</sup> Such principles of interpretation have not yet been formulated for European constitutional law. But they might play a specific role, which can also be demonstrated by two examples.

An interpretive fundamental of *in dubio pro parte una* could be considered for the new Constitutional Treaty, in light of the divergence between its Parts I and III. One might also weigh the merits of a principle of preference, in cases of doubt, for the ‘Community method’ and its institutional implications. Such a principle would, for

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<sup>41</sup> HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 134 (1972); RUDOLF BERNHARD, *AUSLEGUNG VÖLKERRECHTLICHER VERTRÄGE* 133 (1963). *But see* Carl Friedrich Ophüls, *Über die Auslegung der Europäischen Gemeinschaftsverträge*, in *FESTGABE MÜLLER-ARMACK* 285 (F. Greiß ed., 1961).

<sup>42</sup> *DOKUMENTE ZUM EUROPÄISCHEN RECHT* (Reiner Schulze ed., 1999/2000).

<sup>43</sup> Thomas Oppermann, *Europäischer Verfassungskonvent und Regierungskonferenz 2002-2004*, *DEUTSCHE VERWALTUNGSBLÄTTER* 1264 (2004).

<sup>44</sup> ATIYAH & SUMMERS, *supra* note 6, at 70; JOSEF ESSER, *GRUNDSATZ UND NORM IN DER RICHTERLINCHEN FORTBILDUNG DES RECHTS* 87, 107 (1956); ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 71 (2d ed. 1994); Joseph Raz, *Legal principles and the Limits of Law*, 81 *YALE L.J.* 838 (1972).

<sup>45</sup> Author’s translation, *see* EHMKE, *supra* note 19, at 182.

example, apply to cases of conflicting or overlapping legal bases or procedures: in doubt, the ordinary legislative procedure under Article III-396 CT would be the normal case, preferred over any given special procedure.

## *II. Comparison and Contextualization*

Beyond interpretation, a second dimension of legal analysis and methodology is comparative law, or as it shall be referred to here: comparison and contextualization. This dimension does not deal with the understanding of a provision based on its wording, its systematic context, its purpose, nor its history. Rather, comparison pursues a deepened understanding of law by way of contrast – with norms of other legal orders or through knowledge about the norm, be it political, historical, economical, or conceptional.<sup>46</sup> If interpretation operates endogenously, then comparison operates exogenously, so to speak.

However, the labeling as comparison and contextualization implies the larger radius of this dimension of legal analysis. Law is placed in the broader context of its neighboring branches of academia.<sup>47</sup> This broader notion of comparison includes (but is not limited to) synchronic<sup>48</sup> and diachronic<sup>49</sup> comparative law,<sup>50</sup> and also inter-, intra-, and transdisciplinary analysis.<sup>51</sup>

Turning to comparison in Union constitutional law, this dimension here has a particular importance and carries particular difficulties. The European constitution

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<sup>46</sup> ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW* (2004); *COMPARATIVE LEGAL STUDIES* (Pierre Legrand ed., 2002). Arguing for a comparative methodology of administrative law, see Christoph Möllers, *Theorie, Praxis und Interdisziplinarität in der Verwaltungsrechtswissenschaft*, 93 *VERWALTUNGSARCHIV* 46 (2002).

<sup>47</sup> This is not only meant in a substantive, but also a methodological way since comparison is a central method in most humanities, see *VERGLEICH UND TRANSFER: KOMPARATISTIK IN SOZIAL-, GESCHICHTS- UND KULTURWISSENSCHAFTEN* (Hartmut Kälble et al. eds., 2003).

<sup>48</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999); GIORGOS TRANTAS, *DIE ANWENDUNG DER RECHTSVERGLEICHUNG BEI DER UNTERSUCHUNG DES ÖFFENTLICHEN RECHTS* (1998); Karl-Peter Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung*, in 1 *HANDBUCH DER GRUNDRECHTE* 659 (Detlev Merten & Hans Papier eds., 2004).

<sup>49</sup> As an example (on the subject of institutional law of the EU), see PHILIPP DANN, *PARLAMENTE IM EXEKUTIVFÖDERALISMUS* 21, 43 (2004); Stefan Oeter, *Souveränität und Demokratie als Probleme der "Verfassungsentwicklung" der Europäischen Union*, 55 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 659 (1995).

<sup>50</sup> Susanne Baer, *Verfassungsvergleichung und reflexive Methode*, 64 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 737 (2004) 737; but see BERNHARD, *supra* note 18, at 451.

<sup>51</sup> See *INTERDISZIPLINARITÄT* (Jürgen Kocka ed., 1987); MARKUS KÄBISCH, *INTERDISZIPLINARITÄT* (2001).

stands, like hardly any other subject matter, at the intersecting point of highly varied disciplinary interests. Insofar, it can be conceived of as a transdisciplinary object of analysis; indeed, one could even consider constitutionalization itself, in part, as the result of an interdisciplinary discourse.<sup>52</sup> It is no surprise, therefore, that the 'law in context' school emerged from the study of European constitutionalism – and in a cross-national and inter-disciplinary (Florentine) environment.<sup>53</sup>

At the same time, European constitutional scholarship, not unlike comparative constitutional law in general, faces particular methodological difficulties. Especially in constitutional law, substantial differences often hide behind superficially similar formulations. Some scholars even believe that constitutional law represents such a culturally and nationally distinct law, as to prevent any meaningful legal-constitutional comparison.<sup>54</sup> Such a viewpoint regarding Union constitutional law, however, would be absurd. Nevertheless, the typical, "functional approach" to comparative law – especially as developed in private law<sup>55</sup> – encounters particularly obvious limitations here.<sup>56</sup> The methodology, therefore, should be expanded to include a more intensive analysis of the basic national understandings underlying the text, because such understandings shape historical experience, which in turn shapes cognitive history.<sup>57</sup> Even for this reason alone, comparative law relates closely to an expanded form of contextualization, which must be performed in dialogue with neighboring academic branches, that is, interdisciplinarily.

However, a unified methodology of legal comparison seems elusive.<sup>58</sup> Too divers are the contexts and too context-related the steps of analysis. However, certain

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<sup>52</sup> The list of contributions from several disciplines, which contributed substantially to the understanding and development of European constitutional law, is long. See B. HAAS, *THE UNITING OF EUROPE* (1958); HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* (1972); HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986); ROBERT O. KEOHANE & STANLEY HOFFMANN, *THE NEW EUROPEAN COMMUNITY* (1991); Joseph H.H. Weiler, *The Transformation of Europe*, in *THE CONSTITUTION OF EUROPE* 10 (Weiler ed., 1999).

<sup>53</sup> Francis Snyder, *Editorial*, 1 *EUROPEAN LAW JOURNAL* 3 (1995); see WIND, *supra* note 21, at 113.

<sup>54</sup> RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY* (2<sup>nd</sup> ed. 1997); see TUSHNET, *supra* note 48, at 1269.

<sup>55</sup> KONRAD ZWIEGERT & HEINRICH KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34-36 (3d ed. 1998).

<sup>56</sup> Baer, *supra* note 50, at 739.

<sup>57</sup> See Rainer Wahl, *Verfassungsvergleichung als Kulturvergleichung*, in *VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG*, *supra* note 30, at 96.

<sup>58</sup> SOMMERMANN, *supra* note 48, at 659; ÖRÜCÜ, *supra* note 46, at 51.



comparative challenges and tasks for the comparative analysis of European constitutional law can still be formulated. Three are particularly noteworthy.

First of all, comparison in European constitutional law must perform a specific task in areas that are substantively open, such as in fundamental rights (Art. 6(2) EU) or state liability (Art. 288(2) EC). Here, comparison as methodological approach is not only beneficial or simply interesting, but even normatively imperative.<sup>59</sup> The ECJ is – in these areas – explicitly called to progressive development of the law, indeed, to judicial law-making.<sup>60</sup> As such, it makes use of a specific method, which has (in German literature) been called *wertende Rechtsvergleichung* (valuing or evaluative comparative law).<sup>61</sup> Methodically, this is not a functional comparison of legal provisions; hence it is not an analysis of a provision's objectives in its given context. Rather, it is a method of carefully selecting or crafting certain rules on the basis of prior evaluation. The standard of selection comprises the goals of safeguarding the highest possible level of protection, especially in fundamental rights, and the new rules' compatibility with the objectives and structures of Union law.<sup>62</sup> Hence, it is not a simple transfer of national rules onto European law, but the development of common European standards.

Another, second aspect makes European constitutional law especially attractive for comparison – and that is its dynamic. Given the constantly shifting gestalt of Union law, its current specifics and its developmental stage can best be perceived by scholarly comparison with other legal orders or with individual legal doctrines. Comparison of the Union with other systems – especially other dynamic systems – seems most likely to permit flexible and at the same time precise localization and analysis.<sup>63</sup> This is true, whether one is analyzing individual legal principles, institutional designs, or the character of the Union as such. Federalism as a framework has proven particularly appropriate. Federal systems are by nature

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<sup>59</sup> ANWEILER, *supra*, note 11, at 359. The South-African constitution proscribes in its Art. 39 that “when interpreting the Bill of Rights, a court [...] must consider international law, and may consider foreign case law.” See MOTALA & RAMAPHOSA, *supra* note 1, at 36.

<sup>60</sup> MÜLLER & CHRISTENSEN, *supra* note 2, at 317.

<sup>61</sup> Ernst Werner Fuss, *Die allgemeinen Rechtsgrundsätze über die außervertragliche Haftung der Europäischen Gemeinschaften*, in *STUDIEN ZUM STAATS- UND VÖLKERRECHT: FESTSCHRIFT FÜR RAUSCHHOFFER* 43 (Manfred Abelein ed., 1977); Markus Heintzen, *Gemeineuropäisches Verfassungsrecht in der Europäischen Union*, 32 *EUROPARECHT* 8 (1997).

<sup>62</sup> See MÜLLER & CHRISTENSEN, *supra* note 2, at 315-316; Jürgen Kühling, *Grundrechte*, in *EUROPÄISCHES VERFASSUNGSRECHT* 590 (Armin v. Bogdandy ed., 2003).

<sup>63</sup> See SIONAIDH DOUGLASS-SCOTT, *EUROPEAN CONSTITUTIONAL LAW* (2002) (constantly and convincingly employing a comparative look at her object).

dynamic and multifaceted—and thereby directly impel to comparison of their components and their stages of development. A comparative localization of Union constitutional law—in the context of its own dynamic development as well as in contrast to other federal systems—thus appears particularly promising.<sup>64</sup>

Finally, a third aspect calls for a comparative approach to European constitutional law, namely, the European Union's specific evolution from an organization for market integration into a political union.<sup>65</sup> This unique genesis—from economic association to political community—has elicited various disciplinary points of view. Already within legal studies in Germany, the disciplines of private law and public law present widely varying conceptions of the Union, a situation explained in no small part by this genesis.<sup>66</sup> But also beyond that, the genesis of the European endeavor lends itself exceptionally well to interchange with other academic branches, that is, to interdisciplinary contextualization: what meaning does its origin have for the current Union, or where might remnants of the previous order still manifest themselves in the present? An understanding of European constitutional law should benefit even more from the viewpoints of other academic branches with respect to this genesis.<sup>67</sup>

In sum, one can distinguish three different motives and approaches of comparison to European constitutional law: first, the substantive openness of European constitutional law calls for a “valuing comparative law”; second, the special dynamic of European integration is motive for a “dynamic or diachronic comparative law”, juxtaposing European constitutional law to other inherently dynamic systems of law; and finally, the very special genesis of the EU from market association to political union instigates a special kind of “transdisciplinary comparative approach” to contextualize this European *Sonderweg*.

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<sup>64</sup> See, e.g., 1 INTEGRATION THROUGH LAW (Mauro Cappelletti *et al.* eds., 1986); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW 205 (1990); Christoph Schönberger, *Normenkontrolle im EG-Föderalismus*, 38 EUROPARECHT 617 (2003); Philipp Dann, *European Parliament and Executive Federalism*, 9 *European Law Journal* 551 (2003); see Ignatz Seidl-Hohenveldler, *Das föderalistische Prinzip als Mittel einer vergleichenden Darstellung des Rechts der Internationalen Organisationen*, in 1 FESTSCHRIFT LEIBHOLZ 795 (Karl Dietrich Bracher ed., 1966).

<sup>65</sup> Everling, *supra* note 33.

<sup>66</sup> Ernst Joachim Mestmäcker, *Zur Wirtschaftsverfassung in der Europäischen Union*, in ORDNUNG IN FREIHEIT 263 (Rolf Hasse ed., 1994).

<sup>67</sup> *But see* Voßkuhle, *supra* note 13, at 182; Schmidt-Aßmann, *supra* note 16, at 398.

### III. Systematization

To systematize the manifold is ambition and task of all disciplines of legal academia.<sup>68</sup> Constitutional theory and constitutional doctrine are both involved in performing this task of systematization. And both thereby go – methodologically – beyond the two dimensions described so far. Interpretation and comparison serve, respectively, the hermeneutic comprehension and the contrasted understanding. Systematization, in contrast, deals with synthesizing the interpretive and comparative insights. It seeks to provide general categories<sup>69</sup> and their constituent terms and concepts.<sup>70</sup>

It is this dimension and task which continues to confront the study of European constitutional law with its greatest challenge: to comprehend, conceptually and terminologically, its object and thereby the evolving legal and political order therein.<sup>71</sup> Two methodological aspects of systematization in European constitutional law shall be considered here: (1) the dilemma of the vocabulary and ways of dealing with it, and (2) further pitfalls of systematization in European constitutional law.

#### 1. Dilemma of the Vocabulary of European Constitutional Law and How to Deal With It

The vocabulary of European constitutional law itself contains a fundamental dilemma. The EU is neither a state nor intended to evolve into one. Nonetheless, Union constitutional law operates with terms and concepts which either derive from national constitutional law or have somehow evolved in the context of the evolution of modern constitutionalism, and are thus intrinsically linked to the modern nation-state. The usage of such terms in the Union's constitutional law seems to be as much a legal-political strategy<sup>72</sup> as an expression of the modern

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<sup>68</sup> See ARMIN VON BOGDANDY, *SUPRANATIONALER FÖDERALISMUS ALS WIRKLICHKEIT UND IDEE EINER NEUEN HERRSCHAFTSFORM* 9 (1999).

<sup>69</sup> Schmidt-Aßmann, *supra*, note 16, 395; EBERHARD SCHMIDT-ASSMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEE* 2 (2d ed. 2004); KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 429 (6th ed 1991).

<sup>70</sup> See RÖHL, *supra* note 35, at 31.

<sup>71</sup> Peter Badura, *Bewahrung und Veränderung rechtsstaatlicher Verfassungsstrukturen in den internationalen Gemeinschaften*, in 21 *VERÖFFENTLICHUNG DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 38 (1964); Martin Morlok, *Möglichkeiten und Grenzen einer europäischen Verfassungstheorie*, in *DEUTSCHE UND EUROPÄISCHE VERFASSUNGSGESCHICHTEN* 118 (Roland Lhotta et al. eds., 1997).

<sup>72</sup> Case in point is the early self-description of the European "Assembly" as "European parliamentary Assembly" and its rules of procedure as those of a "European Parliament" (Treaty Establishing the

nation-state's monopoly on the vocabulary of political organization.<sup>73</sup> It may depend on whether one perceives the use of such terminology as ultimately hypocritical (and hence sees, for example, the Constitutional Treaty merely as a "semantic constitution"<sup>74</sup>) or whether one wants to understand the terms and concepts of the European treaties as an indication of the Union's progression.<sup>75</sup> In any case, it seems incumbent on European constitutional scholarship to break the current state-monopoly on legal concepts and to resurvey their concrete content and meaning in a Union context.

Various approaches can be suggested to that end. It would perhaps be imprudent, not to mention impracticable, to expend hope and scholarly energy on the development of an entirely new European vocabulary. The term supranationality exhibits how painstaking the establishment and enrichment of new concepts can be, in particular when propagated mainly by academia without judicial assistance.<sup>76</sup>

At the same time, European constitutional scholarship should avoid stumbling into the trap of simple but ultimately empty *sui generis*-classifications, thereby exposing its "classificatory impotence".<sup>77</sup> *Sui generis*-terms can act as middle stages for conceptual construction and can thus be functional. As such, they draw attention to phenomena that are yet unidentified, or unconceptualized. They point out gaps and conceptual shortages. But filling those gaps—that is, conceptualizing and providing a term, or forming concepts—is a separate, subsequent matter.<sup>78</sup>

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European Community art. 5, Mar. 24, 1957, Official Journal C 325. *in* 2 KOMMENTAR ZUM EWG-VERTRAG, art. 137, para. 1 (Hans von der Groeben et al. eds., 1960); also for the use of the notion of "Law" in the Constitutional Treaty, *see* Jürgen Bast, *Legal Instruments*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 21, at part V.

<sup>73</sup> As to the history of the modern state, *see* WOLFGANG REINHARD, *GESCHICHTE DER STAATSGEWALT* (2000).

<sup>74</sup> *See, e.g.*, Möllers, *supra* note 21, at Part VI.

<sup>75</sup> *See, e.g.*, Armin von Bogdandy, *Konstitutionalisierung des europäischen öffentlichen Rechts*, 60 JURISTENZEITUNG 529 (2005).

<sup>76</sup> J. C. Wichard, *supra* note 29, at para. 2; VERHOEVEN, *supra* note 32, at 134; WOLFRAM HERTEL, *SUPRANATIONALITÄT ALS VERFASSUNGSPRINZIP* (1999). A somewhat contrary example could be the notion of "institutional balance," invented by the ECJ, but not really picked up by scholars, *see* LENAERTS & VAN NUFFEL, *supra* note 22, at 560.

<sup>77</sup> Bogdandy, *supra* note 24, at 1034.

<sup>78</sup> Providing a convincing demonstration, *see* Bast, *supra* note 72.

Above all, scholars have to work with, and on, traditional, inherited concepts. Academia and its methods are critical.<sup>79</sup> European constitutional scholarship should critically dissect these legal, political, and judicial concepts in the Union context and stratify their temporal and conceptional content. Especially those concepts inherited from the state demand inquiry into what about them is necessarily state-related and what can be conceived outside the state context.<sup>80</sup> The concept of federalism is exemplary. In its state-restricted sense of federal state, it is certainly improper for use in the Union's context.<sup>81</sup> In its original form as conceptual federalism, however, it contains varying currents of meaning, which have proven quite beneficial to European constitutional law, without having to resort to the significantly more recent concept of political science, that of the multilevel system.<sup>82</sup> Generally, the study of European constitutional law should work on its concepts, differentiate pre-state, state, and post-state levels of meaning and identify their crucial content.

Sometimes, though, the point is simply more honesty. Not infrequently, academia (at least in Germany) tends to insist on peculiarly strict and demanding conceptualizations when it comes to EU matters. Concepts are then reduced to their often hardly practicable, idealized forms, so that their use for the EU seems presumptuous. The best example is the concept of democracy. German scholars like to pretend as if the homogeneous nation-state were the only conceivable vehicle for democracy. In doing so, they not only display their grandiose ignorance of less homogeneous, multilingual nation-states and their unquestionably democratic forms (e.g. Switzerland, Belgium, Canada, India); they also expose themselves as simply incapable of utilizing the tremendous versatility of an old and multilayered concept.

But working on and with concepts goes beyond diagnosing their state-related components, beyond merely stratifying and differentiating. It can also be prescriptive. Concept formation, then, becomes system formation; it promotes conceptualization. Such efforts come up against their own problems and risks.

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<sup>79</sup> Schlink, *supra* note 16, at 107.

<sup>80</sup> See Joe Shaw & Antje Wiener, *The Paradox of the "European Polity,"* in RISKS, REFORM, RESISTANCE, AND REVIVAL - THE STATE OF THE EUROPEAN UNION 64 (Maria Green Cowles ed., 2000); UTZ SCHLIESKY, SOUVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT (2004).

<sup>81</sup> See Christoph Schönberger, *Die Europäische Union als Bund*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS 81 (2004).

<sup>82</sup> BOGDANDY, *supra* note 68; Cappelletti et al., *supra* note 64; DANN, *supra* note 49.

## 2. *Pitfalls of Systematizing European Constitutional Law*

In European constitutional law, systematization is confronted with, above all, the unwieldy phenomena of absent unity and asynchrony.<sup>83</sup> These are equally formative and persistent characteristics of the European makeup. Here, European constitutional scholarship must resist overhasty diagnosis of normalities and teleologies, which are often inspired by the nation-state's arsenal of concepts.<sup>84</sup> Otherwise, European fundamental freedoms quickly become 'fundamental rights' lacking only the right doctrine; regulations become laws; and the European Parliament becomes a sort of Bundestag or Sejm lacking only the right of initiative. In such process, European uniqueness falls by the wayside.

The phenomenon of disunity however also involves another risk – the one of yielding to it. Disorder then becomes a principle, and asynchrony becomes postmodern progress. As charming and tempting as this may initially seem, it can prove to be just as ineffectual as recourse to *sui generis*-labels. Constitutional scholarship would then fail to fulfill its function to promote the law's transparency and manageability. It would waste its chance to play a formative role. Through its basic nature and supreme rank, constitutional law has an exceptional impact on the law, in general.<sup>85</sup> However, this influence is obstructed where constitutional law gets caught in particularities and exceptionalities. The mere acknowledgement of disorder does not dispense with the scholarly duty of differentiation and systematization.

One promising method of systematization has thus far been largely neglected in European constitutional law, although it seems fine-tuned for differentiation and dynamics: the analytical use of typologies or models.<sup>86</sup> Such analysis strives to identify what is typical—the model content as it were—of the given normative material, thereby spotlighting the differences between special and general. Constructing types or models thus connects closely with a comparative approach.

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<sup>83</sup> Deirdre Curtin, *The Constitutional Structure of the European Union*, 30 COMMON MARKET LAW REVIEW 17 (1993); C. Richmond, *Preserving the Identity Crisis*, 16 LAW AND PHILOSOPHY 377 (1997); BOGDANDY, *supra* note 68; THYM, *supra* note 25.

<sup>84</sup> IPSEN, *supra* note 41, at 1050.

<sup>85</sup> SCHMIDT-ARßMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE*, *supra* note 69, at 5, 11-12.

<sup>86</sup> LARENZ, *supra* note 69, at 443; Susanne Baer, *Schlüsselbegriffe, Typen, Leitbilder als Erkenntnismittel und ihr Verhältnis zur Rechtsdogmatik*, in *METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT*, *supra* note 16, at 223.

A type is an intensification and ultimately only understood in juxtaposition with other types, where it reveals its full cognitive force. Such a methodical approach might prove highly beneficial to a European constitutional law that so far tends to be secluded in the category of *sui generis* and often resists comparison.<sup>87</sup>

#### D. An Afterthought on Methodology and Habitus

Methods delineate ways to rationalize scholarly insight. They enable the 'traceability' of outcomes and knowledge. But then again, methods remain reliant on the will and specific mindset of the researcher to actually apply them. It is this habitus, as I would like to call it, that ultimately acknowledges the method.

Such a habitus, as such self-reflexive and method-conscious, is a fundamental precondition of the analysis of European constitutional law, although obviously not exclusive to the treatment of this body of law. Three aspects, however, underscore the peculiar significance of habitus to European constitutional law. Firstly, the heterogeneity of the Union. If constitutional law functions as a communicative nexus between legal system and society<sup>88</sup>, the performance of this task must be transparent and method-conscious—all the more in the multinational order of the EU. It is the heterogeneity of the multinational Union combined with the complexity of the European Constitution, which makes it the more urgent for the legal community to explain its subject – not just to its colleagues but to a broader public. And this task surely is enhanced by the use of transparent methods.

Secondly, the particular dynamic of European constitutional law puts the constitutional critic to the test. Political developments and their legal outcome afford him or her far less opportunity than his or her nationally-focused counterpart to keep a certain distance from the object of research. Perhaps the goal, here, is not so much 'academic self-restraint' as a particular transparency via methodological clarity.

And finally, a third aspect renders habitus especially important in European constitutional law. That is the fundamental importance of law for the European Union and European integration as such. In the course of integration, the law has served as backbone, providing a well-respected means to achieve common goals amidst the heterogeneous political interests of the Member States. If integration

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<sup>87</sup> Examples for such approaches are with regard to the constitution, Möllers, *supra* note 21; and with regard to the EU's institutional structure, DANN, *supra* note 49.

<sup>88</sup> NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 468 (1993).

through law is one of the secrets of integration, dealing with the law requires a certain respect, or to put it differently: a certain habitus.

This leads back to the starting point of these thoughts on a methodology of European constitutional law. Their intention was to mark a topic and initiate further debate, but also to venture beyond the self-imposed limits of scrutinizing the ECJ only. Methodological debate should cover all approaches and avenues to the analysis of European constitutional law. The distinction made here between three dimensions of methodological approaches, that is interpretation, comparison and systematization, is an offer to clarify the value of different approaches and specify the precise challenges. The combination of these three dimensions offers an integrated method, which should be able to encompass the specifically European and the specifically constitutional challenges posed by that law.





## ***Comment on Philipp Dann - Some Remarks on the Methodology of the “Constitutional Law” of the European Union***

*By Artur Kozłowski\**

First of all, I would like to make it clear that the following observations on the methodology characteristic of European Union (EU) law are made from the viewpoint of the international law doctrine.

While searching for a methodological framework for the EU legal phenomenon, we should first define in this context the meaning of the EU legal substance itself. This is a necessary assumption, which in my opinion determines the question of definition of an appropriate methodology. Proper definition of the EU legal substance is a prerequisite to the selection of an appropriate methodology. This relationship is necessary because the primary aim of each methodology is to describe and perceive a given legal system so that all individual decisions taken within it meet certain recognised values. The final result of such an attitude should be the establishment of a law-abiding, coherent, and transparent system, which is open to further development, internally ordered, free of paradoxes, respecting the specific and inherent theory of the origins of rights and obligations.

In light of the above observations, we should now concentrate on the validating aspect of the creation of a “new” methodology of the EU legal system.

As regards the legal substance of the entity itself, we can choose from several typical solutions. According to the first one, the European Union is an example of an international organisation.<sup>1</sup> Granted, it has an extensive axiology and scope of action, but it is still a recognised form of cooperation among states, as defined by

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<sup>1</sup> DELANO R. VERVEY, *THE EUROPEAN COMMUNITY, THE EUROPEAN UNION AND THE INTERNATIONAL LAW OF TREATIES. A COMPARATIVE LEGAL ANALYSIS OF THE COMMUNITY AND UNION’S EXTERNAL TREATY-MAKING PRACTICE* 4-7 (2004).

international law.<sup>2</sup> Further inference leads to the conclusion that the EU intends to become a separate state, either in the form of a federation, a confederation, or a completely new concept of state existence, yet in any case characterised by a primary scope of subjectivity.<sup>3</sup> Further reasoning may lead to the acceptance of cooperation of the member states in a form *sui generis*, undistinguishable against the background of the existing ideas, concepts and notions.<sup>4</sup> A choice made from the available options entails an applicable methodology. If we agree on the dominant role of the validating criterion, then, by adopting a certain simplification necessary to sharpen our vision, we will basically bring the field of choice down to a search for methodological description of the legal system connected with the functioning of either a primary or derivative entity of international law.

Such a research outlook will allow us to draw several more general conclusions. If the European Union accomplishes its objectives in the form of an international organisation, then the methodology of its “constitutional” law must in its essence remain within the domain of international law. In recognition of the noticeable specificity of the EU legal system, its descriptions use the concept of self-contained regime or the concept of autonomy of EU law.<sup>5</sup> In each of the above cases, the boundaries of international law have not been exceeded. Consequently, terminological or conceptual reshufflings cannot by themselves change the basic perception of the problem of choice, or possible change, of the methodology. Thus, the term “constitutional law” can apply equally to the founding treaties of, e.g. the United Nations Organisation, the International Labour Organisation, the World Trade Organization, or any other international governmental organisation, if that is the will of their member states or the treaty matter exhibits receptivity to “constitutionalisation” understood as the process of ordering, hierarchization, and differentiation of general principles of a given system.

On the other hand, if the EU has already become a state entity or will soon acquire the requisite characteristics, then the methodology of its legal order should in its

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<sup>2</sup> JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 14 (2002).

<sup>3</sup> This view is usually negated in the doctrine but is ideologically popular. See THOMAS OPPERMANN, EUROPARECHT 336-342 (1999); A. ŁAZOWSKI & R. OSTRIHANSKY, PRAWO INSTYTUCJONALNE UNII EUROPEJSKIEJ 34 (2004); Jan Barcz, *Charakter prawny i struktura Unii Europejskiej- Pojęcie prawa Unii, in PRAWO UNII EUROPEJSKIEJ- ZAGADNIENIA SYSTEMOWE* 51, 70-72 (Jan Barcz ed., 2003).

<sup>4</sup> That means a form of cooperation independent from distinction into primary and secondary systems or present in the form of a derivative legal order.

<sup>5</sup> See Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC, 56<sup>th</sup> Session, A/CN.4/L.663/Rev. 1, item 23.

essence be reduced to the level of domestic law of the new entity without becoming entangled in unnecessary methodological elaborations.

The comparison of the above two basic models of describing the EU legal substance allows us to see the differences between the primary and derivative legal systems. Whereas the former is defined by its own validation rules, the latter, in situations critical to its existence and development, relies on the support of external sources. This determinant is a necessary component of the methodology of EU "constitutional law." Even the increasing autonomy of EU law cannot change the above limitation, which affects the areas of "autonomisation" of interpretation, contextualisation, or systematisation of EU law. The primary legal system is the system which can be associated with the feature of sovereignty depending on the criterion of effectiveness. In this case we are dealing with the extent of actual authority, its "quality" and appropriate demonstrations on the part of the EU member states (the objective element), and their expressed conviction that the EU does not possess the requisite quality (the subjective element). A derivative system, even an autonomous one, does not possess the above features. The methodology which relies on the characteristics of a primary entity while excluding the above criterion, even if it *prima facie* gives the impression of a logical construction, does not describe reality but is to some degree a wishful projection. For that reason, from the *de lege lata* point of view the combining of characteristics of sovereignty with a derivative legal system, such as the EU system, and its methodology should be perceived as a mistake. This is because such a model becomes illusionary in the case of an actual dispute between the member States and the organisation.<sup>6</sup> The criterion of effectiveness, constantly present on the part of the EU member states, reduces all artificial methodological constructions. The validating rule of the EU legal system still belongs to the domain of international law because a derivative system (here the EU legal order in its entirety) has not until now developed its independent source of norms. In fact, all normative actions within the EU legal system must be approved by the member states. This support can be explicit or implied and so far has been an indispensable element of the EU perception. The presented relationship extends to both primary and derivative EU law. It may appear unbelievable, but from the perspective of the already defined mechanisms

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<sup>6</sup> This concerns the kind of dispute which the parties (member states and the organisation) cannot resolve in the spirit of compromise invoking the idea of "Community". Regarding this concept, see Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the "European Commonwealth,"* in CONSTRUCTING LEGAL SYSTEMS: "EUROPEAN UNION" in LEGAL THEORY 332, 339 (Neil MacCormick ed., 1997) and Stanisław Kaźmierczyk, *Założenia o refleksjach nad teorią prawa europejskiego,* in TEORIA PRAWA EUROPEJSKIEGO 19, 28-30 (Jacek Kaczor ed., 2005).

of international law operation even those methodological attempts at reconstruction of the EU legal body that emerge from judgments and interpretations of the European Court of Justice are subject to the above dependency and become a description of reality only on condition of their express and implied support with the will of the member states having their own decisive criterion of effectiveness. Consequently, legal interpretation of the EU does not acquire the aftertaste of constitutional interpretation in the meaning that could be assigned to that process within the original legal system.

At the present state of development of cooperation between the member states, separation of the EU from the international law methodology would require argumentation at a level of seriousness comparable to Copernicus' proof, but going in the opposite direction. Such reasoning could only be effective if the EU founding treaties were stripped of their international law character and life were breathed into the mythical EU constitutional charter. This is impossible to realise considering the present distribution of effectiveness between the member states and the EU.

In light of the above, we should not currently place the notion of sovereignty or the criterion of effectiveness outside the scope of reflections on EU "constitutional law."<sup>7</sup> It should be emphasised that this feature on the part of the member states defines the whole methodological construction of the EU legal system. On the other hand, hasty attribution of that determinant directly to the EU can only be classified as an element of contextualisation of EU development. At present those attempts should not lead to clear-cut conclusions. Basically, their roles can be reduced to *de lege ferenda* deliberations. If we reject both of the above search areas for an appropriate methodology on the level of primary or derivative international law, then we must conclude that the EU legal system and its methodology evolve towards a completely new, internally specified normative order. Consequently, this third solution places EU law in the methodological category *sui generis*, where the notional instruments of both international law and internal law of the intended state entity are not enough to pinpoint the ordering principle of a given system. However, this attitude to the problem of the method calls for a certain degree of caution as on the one hand it can be interpreted as an example of a peculiar helplessness in grasping the full image of the researched problem, while on the other, due to the dynamic character of the EU, it is subject to the risk of temporariness.

Collective consideration of the above assumptions takes us to the conclusion that a fourth methodological solution of the EU legal essence is unlikely. *Quartum non datur*.

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<sup>7</sup> See MacCormick, *supra* note 6, at 338-339.

## The Primacy of European Union Law over National Law Under the Constitutional Treaty

By Roman Kwiecień\*

### A. Introduction

The primacy of Community law over national law of the EC/EU Member States was recognized as one of the constitutive principles of the Community legal order as early as before the signing of the Treaty establishing a Constitution for Europe on 29 October 2004. The primacy principle together with the principles of direct effect and of uniform applicability are believed to constitute not only the foundation of effectiveness of the Community legal order but also play the role of the pillars of the unofficial European Constitution. The primacy principle is even seen as the embodiment of actual transfer of constitutional power to Europe.<sup>1</sup>

Article I-6 of the Constitutional Treaty states: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.” The inclusion of this principle in Title I, Part I of the Treaty emphasizes its constitutive significance for the EU legal order. From this standpoint, it is recognized as reinforcing the position of the primacy principle in comparison with its role as an unwritten principle of primary Community law.<sup>2</sup>

The role of the European Court of Justice (ECJ) in giving prominence to the primacy principle of Community law cannot be overestimated. It is not accidental that the

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<sup>1</sup> J.H.H. WEILER, UN 'EUROPA CRISTIANA. UN SAGGIO ESPLORATIVO (2003) (Polish translation: J.H.H. WEILER, CHESCJANSKA EUROPA. KONTYTUCYJNY IMPERIALIZM CZY WIELOKULTUROWOSC? 102-104 (2003)). ALSO, see J.H.H. Weiler, *In Defense of the Status Quo: Europe's Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 7, 8 (J.H.H. Weiler & Marlene Wind eds., 2003)).

<sup>2</sup> See Mattias Kumm & Victor Ferreres Comella, *The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty*, Jean Monnet Working Paper 5/04, 8-10, <http://www.jeanmonnetprogram.org/papers/04/040501-15.pdf>.

judgments in the *van Gend & Loos* and *Costa/E.N.E.L.* cases denote the real origin of Community law,<sup>3</sup> which is why, if for no other reason, the case law of the ECJ deserves to be remembered. But there are also other reasons. In the light of Article IV-438(4) of the Constitutional Treaty:

The case-law of the Court of Justice of the European Communities and of the Court of First Instance on the interpretation and application of the treaties ... as well as of the acts and conventions adopted for their application, shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.

Worth noting is also the Declaration of Intergovernmental Conference stating: "The Conference notes that the provisions of Article I-6 reflect existing Court of Justice case law." There is at least one more reason why we should remember the ECJ case law, perhaps the most important for legal theory. The issue concerns the grounds for the principle of primacy: is it determined by the Constitutions of EU Member States, international law (these two sources are emphasized by the national courts) or does it stem from the specific nature and autonomy of the Community legal order? The latter view is justified in the ECJ case law. Therefore the ECJ's and national courts' stands should be compared with each other. Although the interpretation of the primacy principle given by the ECJ did not raise any controversy in some EU Member States, in others, however, especially in Germany, Italy, Denmark, Spain and recently in Poland the unconditional primacy of Community law was rejected by the main judicial bodies. It would be too optimistic to think that the entry into force of the Constitutional Treaty would automatically change the often criticized, but not entirely unfounded approach of the national courts. Moreover, the relation between the primacy principle of Union law and provisions of national Constitutions that emphasize the supremacy of the State's constitutional law still remains ambiguous. The fourth part of the present study is devoted to these issues. The last part deals with the interpretation of the primacy principle in the light of the international legal status of the EU Member States, which is occasioned by some provisions of the Constitutional Treaty (Articles I-1(1), I-5(1) and I-11(1-2)). I believe that in the context of the Constitutional Treaty's principles of conferral (Articles I-1, I-11(1-2)) and inviolability of the State's legal identity (Article I-5(1)) one can adopt the interpretation of the primacy principle that would reconcile, on the one hand, the specificity of the Union's legal order and effective application of its provisions and, on the other hand, both the special position of State Constitutions and the international legal status of the Members

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<sup>3</sup> See Armin von Bogdandy, *Doctrine of Principles*, Jean Monnet Working Paper 9/03, 41 (2003), <http://jeanmonnetprogram.org/papers/03/030901-01.pdf>.

will be protected. A one-sided approach to the primacy principle, i.e. an approach based either on *in dubio pro communitate* or *in dubio pro republicae* principles unjustifiably challenges the significance of some of the legal orders and runs the risk of being accused of arbitrariness.

### B. The Primacy of Community Law in the ECJ Case Law

Three principal arguments in the ECJ case law can be pointed out that justify the primacy of Community law: the international legal obligation to observe treaties, ensuring the efficacy and uniform application of Community law, and the autonomous character of the Community legal order.

In the comparatively little known decision on the *Humblet* case,<sup>4</sup> the ECJ saw the *pacta sunt servanda* principle connected with ratification of the EEC Treaty as a grounds for the primacy of Community law over national law. The ECJ took a similar stance in the *San Michele* case.<sup>5</sup>

A preliminary decision that distinguishes between the Community legal order and the traditional international legal order is, in general opinion, one adjudicated in the *Van Gend & Loos* case.<sup>6</sup> The ECJ recognized in it the EEC Treaty as “a new quality in the international legal order.” A year later, in what is perhaps the best known judgment in this context on the *Costa v. E.N.E.L.* case,<sup>7</sup> the ECJ went a step further and, while speaking of the primacy of Community legal order, termed it as its “own legal system” and underlined its “special and original nature.”

Although the ECJ later emphasized the autonomous nature of Community law in many better or less known judgments, it did not, however, offer any basically broader theoretical explanations for its meaning. The ECJ simply treated the autonomy of Community law axiomatically.<sup>8</sup> From the autonomy of the

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<sup>4</sup> Case 6/60, *Humblet v. Belgian State*, 1960 E.C.R. 559, 569 (English special edition). The importance of this decision was lately reaffirmed by Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 68 (2000). See also Bruno De Witte, “Retour à Costa”. *La primauté du droit communautaire à lumière du droit internationale*, 20 REVUE TRIMESTRIELLE DE DROIT EUROPEAN 425, 426-7 (1984).

<sup>5</sup> The Order of the Court of 22 June 1965, in Case 9/65, *Acciaierie San Michele SpA v. High Authority of the ECSC*, 1967 E.C.R. 27, 30 (English special edition).

<sup>6</sup> Case 26/62, *Van Gend & Loos*, 1963 E.C.R. 1, 12 (English special edition).

<sup>7</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 593-594 (English special edition).

<sup>8</sup> See JEAN BOULOUIS & R.M. CHEVALLIER, *GRANDS ARRÊTES DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES* 140 (6<sup>th</sup> ed. 1994); Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 66 (2000).



Community legal order the ECJ inferred two significant consequences: 1) the validity of Community law can be judged exclusively in the light of this law and constitutes the competence of a Community court; and 2) Constitutions of the Member States cannot prejudice the primacy of Community law.<sup>9</sup>

The third argument in the ECJ case law justifying the primacy of Community law is the efficacy and uniform application of Community provisions. In the judgment on the *Walt Wilhelm* case,<sup>10</sup> apart from stressing the distinctive nature of the legal system stemming from the EEC Treaty, the Court observed that “it would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty.” In the *Simmenthal SpA* case<sup>11</sup> the ECJ stressed that, in accordance with the principle of primacy of Community law, the provisions of domestic law that run counter to it are automatically inapplicable. The primacy principle further excludes, in the ECJ’s opinion, the possibility of enacting by the State any new legislation that runs counter to Community law. Otherwise, this might lead to the “denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.”<sup>12</sup>

The primacy principle established by the ECJ results in the following obligations on the State: 1) the prohibition on national agencies to challenge the validity of Community law; 2) the prohibition to apply national provisions that are contrary to Community provisions; 3) the prohibition to enact provisions that are contrary to Community provisions; and 4) the obligation to rescind national legislation that is contrary to Community law.<sup>13</sup>

As has been said before, it is difficult to find in ECJ decisions any broader legal-theoretical analyses justifying the primacy of Community law. This leads us to a

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<sup>9</sup> See especially Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, para. 3; Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, paras. 11-16.

<sup>10</sup> Case 14/68, *Walt Wilhelm et al. v. Bundeskartellamt*, 1969 E.C.R. 1, para. 6.

<sup>11</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, paras. 17, 18.

<sup>12</sup> *Id.* at para. 18. See also Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, para. 14.

<sup>13</sup> In the ECJ’s opinion this obligation is valid even if these provisions were not actually applied, because their binding force would, in the Court’s view, create a condition of uncertainty for citizens undertaking actions in trust law. See Case 167/73, *Commission v. France*, 1974 E.C.R. 359, paras. 41-48.

view that for the ECJ the ultimate grounds for primacy are pragmatic considerations, namely the creation of a *sine qua non* condition for the existence of the Community legal order.<sup>14</sup> In other words, primacy of Community law has been for the ECJ a necessary condition for direct effect of Community provisions. Effectiveness as an argument justifying primacy is certainly not a new one, because it provides the traditional justification for the primacy of international law obligations over State law. However, the ECJ's theses about the autonomy and independence of Community law ("own legal system," "special and original nature," "independent source of law") prompt us to ask the question whether the primacy of Community law can be really convincingly argued on grounds other than those stemming from international law.

### C. The Distinctive and Autonomous Nature of EC/EU Law as Justification for its Primacy: Critical Remarks

Recognition of the autonomy of Union law denotes that this law does not derive its justification either from international law or from the legal orders of the Member States – it validates its importance by itself. Autonomy constitutes a fundamental condition that, in the view of the ECJ and part of legal science, enables constitutionalization of Community law, at least in the functional sense, i.e. as a set of principles investing their legal subjects with rights and obligations.<sup>15</sup>

There are, however, good reasons for challenging the autonomy of EU law in the sense in which the autonomy of the State legal order is understood. It is fitting to speak of the interpretative autonomy of Community law (with the ECJ remaining its upholder), yet objections might be raised as to the view of the primary (normative) autonomy of this law, i.e. autonomy characteristic of a legal order that does not derive its validity from another legal order.<sup>16</sup> 'European monism' presented by the ECJ does not, in my view, reflect the situation *de lege lata*. It is contradicted by substantive borrowings by EU law from the Constitutions of the

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<sup>14</sup> Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 67 (2000).

<sup>15</sup> See, e.g., NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 97-122 (1999); NEIL MACCORMICK, THE NEW EUROPEAN CONSTITUTION. LEGAL AND PHILOSOPHICAL PERSPECTIVE 42-44 (2003). MacCormick does not, however, exclude international law as the normative basis of EU law. See also studies by J.H.H. Weiler in note 1; and by J.H.H. Weiler & Ulrich R. Haltern, *Autonomy of the Community Legal Order – Through the Looking Glass*, 37 HARV. INT'L. L.J. 411 (1996).

<sup>16</sup> See Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT'L. L.J. 389 (1996).

Member States and numerous references to them.<sup>17</sup> Also the position of the Member States as 'the masters of the Treaties' is unquestionable. The mutual agreement of States or the international legal paradigm continues to be a major justification for the EU legal order because it is the Member States that remain the primary source of EU powers to a larger extent than their nations. For that reason it is not a convincing argument that the presence of the primacy principle in the Constitutional Treaty denotes the recognition by the Member States of Union law as one that self-justifies its primacy.<sup>18</sup>

From the standpoint of material sources of law, the Union legal order and constitutional legal orders of the Member States constitute complementary sets of legal norms and values embodied in them, which enables us to speak of 'European monism' on the descriptive level. This mutual link is called 'constitutional pluralism,'<sup>19</sup> 'European legal pluralism,'<sup>20</sup> 'multicenter legal system,'<sup>21</sup> 'multilevel constitutionalism' (*Verfassungsverbund*)<sup>22</sup> or 'European unwritten social contract,'<sup>23</sup> whose consequence is the unwritten EU Constitution coordinating the operation of national law systems. It is emphasized that in such an approach to the relations

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<sup>17</sup> Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 34 (2000), speaks of "the large dependence of EU law on national constitutional law: without constitutional arrangements in the Member States there cannot be a European legal order."

<sup>18</sup> The argument is advanced by Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a "European Constitutional Order"*, 29 EUR. L. REV. 741, 751 (2004). See *Décision no. 2004-505 DC, Traité établissant une Constitution pour l'Europe* case, Conseil Constitutionnel, (Nov. 19, 2004); available at [www.conseil-constitutionnel.fr/decision/2004/2004505/dc.htm](http://www.conseil-constitutionnel.fr/decision/2004/2004505/dc.htm). The Conseil Constitutionnel concluded that the Constitutional Treaty was an international treaty and its title was of no constitutional significance. Moreover, the primacy clause (Article I-6) in the view of the *Conseil* does not alter the nature of the Union or the scope of the primacy principle (item 13). For critical comment, see Editorial, *A Pre-emptive Strike from the Palais Royal*, 30 EUR. L. REV. 1 (2005).

<sup>19</sup> NEIL MACCORMICK, *THE NEW EUROPEAN CONSTITUTION. LEGAL AND PHILOSOPHICAL PERSPECTIVE* 47 (2003).

<sup>20</sup> Miguel P. Maduro, *Europe and the Constitution: What if This Is As Good As It Gets?*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, 74, 98-101 (J.H.H. Weiler & Marlene Wind eds., 2003); Albi & Van Elsuwege, *supra* note 18, at 742.

<sup>21</sup> Ewa Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, 4 PANSTWO I PRAWO 3 (2005).

<sup>22</sup> Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, in WHI-PAPER 5/2002, available at <http://www.whi-berlin.de/pernice-constitutionalism.htm>; Franz C. Mayer, *The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System*, Jean Monnet Working Paper 9/03, <http://www.jeanmonnetprogram.org/papers/03/030901-03.pdf>.

<sup>23</sup> PHILIP ALLOTT, *THE HEALTH OF NATIONS, SOCIETY AND LAW BEYOND THE STATE* 179 (2002).

between the European Constitution and national constitutional orders the hierarchy of sources of law is challenged, whereby the problem of supremacy regarding EU law and State Constitutions ceases to be the most important one. As a result the concept of supremacy (*Geltungsvorrang*) is rejected in favor of the concept of primacy in application (*Anwendungsvorrang*). Indeed, the ECJ has not used notions “superior legal order” and “inferior legal order” to emphasize the primacy of Community provisions, although these notions have been used by national courts. Doubtless, the principle of primacy as part of European legal pluralism cannot obviously be explained based on EU law only. Such an approach would depreciate the State legal order and would thereby challenge pluralism which assumes a mutually amicable relationship between national law and EU law.

However, the normativist point of view still remains to be considered. In the light of the Constitutional Treaty’s provisions concerning mutual relations between the EU and the Member States it should not be disregarded. In this interpretation the primacy principle cannot be considered in isolation from another principle of Community law – the principle of conferral of competences. According to the conferral principle the Member States remain ‘the masters of the Treaties’ because they possess *Kompetenz-Kompetenz*, within which they define their own competences and those of the Union.<sup>24</sup> Viewed from this perspective, the grounds for the primacy of EU law do not stem from the autonomous nature of Community law but from its international origins, that is from the consent of the States that entails unambiguous consequences in international law. In the light of the *pacta sunt servanda* principle, the explicit establishment of the principle of EU primacy in the Constitutional Treaty is not a new quality because an implied clause of primacy is contained in every international agreement. One can even argue that the connection of the primacy principle with the conferral principle undermines its significance since it clearly indicates the limits of the primacy of Union law.

One cannot be convinced by the thesis<sup>25</sup> that owing to the primacy principle EU citizens will identify with the European Constitution as their common supreme law. This view should be regarded as wishful thinking. People identify with a

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<sup>24</sup> The importance of this principle is also stressed by the ECJ despite its pro-Community approach. In particular, the ECJ opposes the infringement of the conferral principle through too great a latitude in interpreting the flexibility clause from Article 308 (ex Article 235) of the Treaty establishing the European Community. See Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759, para. 4. On the issue of *Kompetenz-Kompetenz*, see Gunnar Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, 30 EUR. L. REV. 42 (2005).

<sup>25</sup> It is advanced by Koen Lenaerts & Damien Gerard, *The Structure of the Union according to the Constitution for Europe: the Emperor Is Getting Dressed*, 29 EUR. L. REV. 289, 301 (2004).

national Constitution because they have a national consciousness. It is difficult, however, to judge whether there is 'European consciousness,' because of, *inter alia*, a democratic deficit. It is questionable therefore to assert that sovereignty shifts from the Member States to European nations.<sup>26</sup> I would be more inclined to share Joseph Weiler's pessimistic assessment about the authorities drifting away from EU citizens with successive institutional modifications of the EU, and thereby argue for the existing informal European constitutionalism.<sup>27</sup>

Jeopardy to the primacy principle and thereby to the effectiveness of the EU legal order is undoubtedly posed by the conflict regarding the 'arbiter of constitutionality in Europe.' The origin of the conflict is connected with the lack of acceptance of the unconditional primacy of Community law by the most important national judicial agencies. Of assistance in working out the 'strategy of prevention' towards potential conflicts over the constitutionality of law in Europe can be the conclusions derived from the previous decisions of the national courts.

#### **D. The Primacy of Community Law and the National Courts**

The subjects of objections from the national constitutional courts against unconditional acceptance of the primacy of Community law have been essentially two matters: 1) the relation between constitutional principles, including fundamental rights protected therein, and Community law; and 2) delimitation of EU competences.<sup>28</sup>

It is a known fact that the opposition of the national courts against unlimited acceptance of the primacy of Community law arose with particular intensity in the States that rejected the 'European monism' represented by the ECJ and accepted the dualist paradigm of implementation of international law in national law. The dualist paradigm was applied *mutatis mutandis* to determine the relations between national law and Community law. The best-known is still the stance of the German Federal Constitutional Court – the *Bundesverfassungsgericht* (BVerfG). Objections against Community law, resulting from the national Constitutions were also raised

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<sup>26</sup> Thus argued, *e.g.*, by AMARYLLIS VERHOEVEN, *THE EUROPE UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY* 292 (2002); Albi & Van Elsuwege, *supra* note 18, at 755-759.

<sup>27</sup> Weiler, *supra* note 1.

<sup>28</sup> An impressive collection of decisions of the national courts relating to Community law can be found in *THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES* (Andrew Oppenheimer ed., vol. I 1994 [hereafter: Oppenheimer I]; vol. II 2003 [hereafter: Oppenheimer II]).

by the Supreme and Constitutional Courts of Italy, Ireland, Denmark, Greece, Spain, and France.<sup>29</sup>

*I. The Grounds of the Primacy of Community Law under the Case Law of National Courts*

The primacy of Community law, both primary and secondary, in relation to the ordinary legislation of the Member States has been widely accepted by the national courts, even despite the treatment of Community norms as 'infra-constitutional'.<sup>30</sup> In the opinion of the national courts the relationship between a Community norm and a national one cannot be explained within the rule of *lex posterior derogat legi priori*. Thus, in this area the national courts have accepted the pragmatic approach of the ECJ. Nonetheless, a divergence between them emerged relating to the grounds for the primacy of Community law. Unlike the ECJ, the national courts comparatively seldom justified primacy by the autonomy of the Community legal order. If the issue of autonomy of Community law was raised in judgments of national courts, this argument underwent a substantial 'international legal' modification.

The grounds for the primacy of Community law were seen by the national courts in the "specific nature of international treaty law,"<sup>31</sup> as a "result of the ratification of the EEC Treaty" and in the emergence of a "new legal order which has been inserted into the municipal legal order,"<sup>32</sup> or even "by virtue of partial cession of sovereignty."<sup>33</sup> Most often, however, the courts indicated the consent of the State

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<sup>29</sup> Mayer, *supra* note 22, 29-30. Mayer does not exclude this in relation to courts in Belgium, Sweden, Austria, Portugal, and the UK as well as in relation to the courts of the new Member States. E.g., as stipulated by the 1997 Constitution of the Republic of Poland, the Polish Constitutional Tribunal is the only arbiter of constitutionality of law binding in Poland. Its previous decisions indicate an amicable legal interpretation towards the process of European integration. Case K 15/04, *In the judgment of 31 May 2004*, OTK-A 5/2003, item 43 (2003), the Constitutional Tribunal indicated: 'constitutionally correct and preferable is such interpretation of the law that serves to implement the constitutional principle of favouring the process of European integration and cooperation between States.' However, in *The Accession Treaty* case of 11 May 2005 (K 18/04) the Polish Tribunal strongly emphasized the position of the Polish Constitution as the "supreme law of the State". There is an English summary of the judgment, available at [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_18\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf).

<sup>30</sup> See, e.g., the judgment of the Spanish Constitutional Court, *Electoral Law Constitutionality* case (1991), Oppenheimer I 702, 704-705.

<sup>31</sup> See "Le Ski" case (1971), Belgium, Cour de Cassation, Minister for Economic Affairs v. SA Fromagerie Franco-Suisse. Oppenheimer I 245, 266; Luxemburg, Conseil d'Etat, Bellion et al. v. Minister for the Civil Service, Oppenheimer I 668, 670.

<sup>32</sup> Germany, BVerfG, Alfons Lütticke GmbH, BVerfGE 31, 145.

<sup>33</sup> Spain, Supreme Court, Canary Islands Custom Regulation, Oppenheimer I 694, 697; Ireland, Supreme Court, Crotty v. An Taoiseach et al., Oppenheimer I 599, 603 (opinion of Judge Finlay).

Constitution or the accord of the national sovereign. This is especially characteristic of the case law of the courts in Germany,<sup>34</sup> France,<sup>35</sup> Italy,<sup>36</sup> Greece,<sup>37</sup> the UK<sup>38</sup> and Portugal.<sup>39</sup> The national courts thus reject the hierarchy of legal acts, within which the acts of national law, including the Constitutions, are subject to the supremacy of Community law. Having adopted the dualist paradigm of explaining the relationship between national law and Community law, the national courts derive the binding force of this law from the constitutional principle of observance of international law in good faith rather than from the distinctive nature of the Community legal order and its autonomy. Two important consequences follow therefrom. First, the courts and other State agencies are constitutionally obliged to apply Community law because failure to observe it constitutes a constitutional tort.<sup>40</sup> Second, national legal acts do not automatically cease to be operative because they are inconsistent with Community law.<sup>41</sup> They are repealed in accordance with the national legislative procedures.

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<sup>34</sup> BVerfG, *Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel* (Solange I), BVerfGE 37, 271; BVerfG, *Wünsche Handelsgesellschaft* (Solange II) case (1986), BVerfGE 73, 339; BVerfG, *Kloppenburg* case (1987), BVerfGE 75, 223. The *Bundesverfassungsgericht* spoke of the “unwritten rule of primacy of Community law which has been inserted into the municipal legal order by laws approving the Community Treaties taken in conjunction with Article 24 (1) of the Basic Law.”

<sup>35</sup> *Cour de Cassation, Administration des Contributions Indirectes et Comité Interprofessionnel des Vins Doux Naturels v. Ramel* case (1970), Oppenheimer I 279, 283. The court gave those acts of secondary Community law “the force of international treaties;” *Cour de Cassation, Administration des Douanes v. Société Cafés Jacques Vabre et Weigel et Compagnie* case (1975), Oppenheimer I 287, 309-310. Regarding the EEC Treaty the court waived the requirement of reciprocity applied to other international agreements on account of the Treaty’s established own procedure of dispute settlement in the event of failure to observe its provisions; *Conseil d’Etat, Nicolo* case (1989), Oppenheimer I, 335. Recently see *Décision no 2004-496 DC of Conseil Constitutionnel, Loi pour la confiance dans l’économie numérique* case, June 10, 2004, available at <http://www.conseil-constitutionnel.fr/decision/2004/2004496/2004496dc.htm>). The Conseil Constitutionnel recognized that implementation of directives in the French legal system was based on the constitutional approval.

<sup>36</sup> *Constitutional Court, Frontini v. Ministero Delle Finanze* case (1973), Oppenheimer I 629, 634; *Constitutional Court, Spa Grantial v. Amministrazione delle Finanze dello Stato* case (1984), Oppenheimer I 642, 646-647.

<sup>37</sup> *Council of State, Banana Market* case (1984), Oppenheimer I 576, 578; *Council of State, Mineral Rights Discrimination* case (1986), Oppenheimer I 581, 582; *Council of State, Karella v. Minister of Industry* case (1989), Oppenheimer I 584, 586.

<sup>38</sup> *House of Lords, Factortame LTD v. Secretary of State for Transport* case (1990) [judgment of Lord Bridge of Harwich], Oppenheimer I 882, 883.

<sup>39</sup> *Court of Appeal of Coimbra, Cadima* case (1986), Oppenheimer I 675, 679.

<sup>40</sup> See, e.g. *Kloppenburg* case, *supra* note 34.

<sup>41</sup> See, e.g. *Spa Grantial* case, *supra* note 36, at 648-650.

## *II. The Relationship between Community Law and the Constitutional Law of the Member States*

Another clear manifestation of the dualist approach of the national courts to Community law is simply jealous protection of the supremacy of national constitutional law. It manifests itself as early as at the stage of ratification of the treaties creating the primary law of the EC/EU. During the ratification process, the national courts examined the validity of the State's binding itself by the treaties in the light of constitutional provisions concerning the exercise of national sovereignty and constitutionally protected rights.<sup>42</sup> An adverse judgment on this issue prompted constitutional amendments, whose objective was to create the legal grounds for ratification of the European treaties.

The protection of supremacy of the national Constitution manifests itself even stronger in the national Constitutional Courts' emphasis of their role as guardians protecting the Constitution against the constitutionally unfounded actions of international agencies and legal acts made by them. The basic principles of State legal orders and fundamental human rights present in the Constitutions constitute the limit to the unconditional acceptance of the primacy of Community law. Although an open conflict between the ECJ and the national Constitutional Courts has not occurred, the Constitutional Courts have shown a clear tendency to emphasize their autonomy in the national legal order and thereby not to recognize the ECJ as 'the arbiter of constitutionality in Europe.'<sup>43</sup> Well-known are the conditional reservations of the Constitutional Courts regarding a potential refusal to apply Community law in the event it does not meet the requirements and criteria for constitutionality.<sup>44</sup> Moreover, the national Constitutional Courts aspire to

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<sup>42</sup> See, e.g., the decision of the Irish Supreme Court, *Crotty case*, *supra* note 33, at 600-603; the decision of the German BVerfG *Maastricht Treaty Constitutionality case* (1993), BVerfGE 89, 155; the decisions of the French Conseil de Constitutionnel, *European Communities Amendment Treaty case* (1970), Oppenheimer I 276; *Treaty on European Union (Maastricht I) case* (1992), Oppenheimer I 385; *Treaty on European Union (Maastricht II) case* (1992), Oppenheimer I 399; *Treaty establishing a Constitution for Europe case* (2004), *supra* note 18; the decision of the Danish Supreme Court, *Carlsen et al. v. Rasmussen case* (1998), Oppenheimer II 175. In this context, of importance are also British decisions on account of the principle of Parliamentary sovereignty. See *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg*, Divisional Court (1993), Oppenheimer I 911.

<sup>43</sup> Mayer, *supra* note 22, at 34-36, where the author speaks of 'frictional phenomena.'

<sup>44</sup> BVerfG, *Solange I*, *supra* note 34; BVerfG, *Solange II*, *supra* note 34; BVerfG *Banana Market Organization Constitutionality case* (2000), BVerfGE 102, 147; *Spa Granital*, *supra* note 36; *Fragd v. Amministrazione Delle Finanze Dello Stato case* (1989), Oppenheimer 653, 657; *Frontini*, *supra* note 36, 640 (Italy); *Aepesco case* (1991), Oppenheimer 705, 706 (Spain); *Carlsen et al. v. Rasmussen*, note 42 (Denmark). See Mayer, *supra* note 22, at 29-32. Recently such reservations were also raised by the Spanish Constitutional Court in the *Statement no. 1/2004 of 13 December 2004* where the Court stated that "the



control the activities of the EU and its bodies within conferred competences. The decision of the BVerfG concerning the constitutionality of the Maastricht Treaty is well known as a spectacular manifestation of this tendency.<sup>45</sup>

A similar standpoint was presented recently by the Polish Constitutional Tribunal in *The Accession Treaty* case of 11 May 2005.<sup>46</sup> The Tribunal remarked that the principle of interpreting domestic law in a manner “sympathetic to European law,” as formulated within the Constitutional Tribunal’s jurisprudence, had its limits. And below it stated:

The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.

*III. Conclusions Arising from the Conflict Over “The Final Arbiter of Constitutionality” Within the EU*

The controversy between the supreme national judicial organs and the ECJ proves first of all that both parties have kept their autonomy in their jurisdictional domains. This also challenges the thesis about the subordination of State law to EU law. Despite close connections between them, they do not remain in the relation of supremacy. In this sense European integration undermines the hierarchical understanding of the law.<sup>47</sup> In the present state of legal relations between the EU and the Member States (they will not be basically changed by the Constitutional Treaty), the issue of supremacy remains in fact insoluble.<sup>48</sup> Consequently, the postulates are unfounded that demand changes in the constitutional provisions

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powers the exercise of which is transferred to the European Union could not, without a breach of the Treaty itself, be used as grounds for the European rulemaking the content of which would [be] contrary to the fundamental values, principles, or rights of our Constitution.” Quoted after Ricardo Alonso Garcia, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, 6 GERMAN LAW JOURNAL 1001, 1012 (2005).

<sup>45</sup> BVerfG, *Maastricht Treaty 1992 Constitutionality*, *supra* note 42.

<sup>46</sup> *See, supra* note 29.

<sup>47</sup> *See* Maduro, *supra* note 20, at 95-96.

<sup>48</sup> Frowein observes in this context: ‘As long as the Community system has not developed into a federal structure, questions of sovereignty or final priority as to sources of law have to be kept in suspense,’ Jochen A. Frowein, *Solange II*, 25 CMLR 201, 204 (1988). Also, *see* Beck, *supra* note 24, at 67, who underlines that ‘the issue of *Kompetenz-Kompetenz* is part of the resultant catalogue of unanswered questions.’

stressing the supremacy of the national Constitution in the Member States.<sup>49</sup> The Constitutions of the EU Member States did not and, as long as the EU Members retain the status of States or sovereign subjects of international law, will not occupy a lower position in the hierarchy of sources of law than the Union provisions. For as long as the States retain the position of subjects vested with *Kompetenz-Kompetenz*, certain constitutionally protected values will be exempt from the operation of the principle of primacy of EU law.<sup>50</sup> On the other hand, however, the obligation of the Member States to absolutely observe EU law is indisputable. Therefore, it would be inappropriate to say that Community norms occupy a position below the provisions of national law. The basic obligation of the State, already emphasized by the case law of the Permanent Court of International Justice, is to take actions in this area, by the legislative and executive and judicial authorities, which will ensure the effectiveness on its territory of provisions adopted under international obligations. Such actions are meant to protect the inviolability of the presumption of compatibility of national law with Community law. This presumption allows a mutually amicable interpretation. Taking into account, however, the possibility of the EU's legal actions outside conferred competences, the national court can be confronted with the aforesaid difficult dilemma: whether to refuse to apply Community law (which was supported by the BVerfG) or start the procedure by the State of invalidation of a Community measure before the ECJ. The former solution is difficult to accept from the standpoint of Community law, which contains its own mechanisms for solving problems of this type, which is confirmed by the ECJ case law.<sup>51</sup> The latter solution may raise doubts in the light of the State's constitutional law, insofar as an international agency has exceeded the constitutional limits on its action within the State. We may therefore regard as well-founded the proposals that postulate the establishment of a neutral institution of judicial or quasi-judicial nature, authorized to express opinions in the event of a constitutional conflict within the EU.<sup>52</sup>

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<sup>49</sup> Such a postulate was voiced in reference to Article 8(1) of the Constitution of the Republic of Poland, which stipulates: 'Constitution shall be the supreme law of the Republic of Poland.' Stefan Hambura, *Wyjście jest tylko jedno: zmiana konstytucji*, RZECZPOSPOLITA of 27 May 2004, C2. For critical comments on this postulate see: Roman Kwiecień, *Konstytucja zmian nie wymaga*, RZECZPOSPOLITA of 2 June 2004, C2.

<sup>50</sup> See Carl U. Schmid, *The Neglected Conciliation Approach to the 'Final Arbiter' Conflict*, 36 CMLR 509, 512 (1999); Kumm/Comella (*supra* note 2), 24.

<sup>51</sup> See especially case 314/85 *Foto-Frost*, *supra* note 9.

<sup>52</sup> Schmid, *supra* note 50, at 513-514; Mayer, *supra* note 22, at 38-40 (and literature on the subject given therein).

Although the entry into force of the Constitutional Treaty probably will not conclude the 'final arbiter of constitutionality' controversy, a significant advantage of the Treaty appears to be the delimitation of limits within which the principle of primacy of Union law will operate. At issue is the protection of competences of the Member States, constitutive of their status in international law against the EU's actions not founded in the conferral principle.

### **E. The Limits of the Primacy Principle under the International Legal Status of the Member States**

In its famous judgment on *Maastricht* case<sup>53</sup> the German Federal Constitutional Court stressed *inter alia* the sovereign status of Germany. This stance reflects the actual international legal status of the Member States despite the frequent and even fashionable tendency in the present-day theory of international and European law to challenge the importance of State sovereignty or at least to considerably relativize it. By means of new conceptual constructs, the legal doctrine strives to explain the unprecedented widespread fact of interdependence in exercising State functions by the Members within the EU. Thus, the concepts of "divisible sovereignty,"<sup>54</sup> "post-sovereignty,"<sup>55</sup> "sovereignty beyond the State"<sup>56</sup> are used. A view is even expressed that there "simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."<sup>57</sup> Contrary to that, however, my view is that the old concept of sovereignty – despite its ambiguity – can still be a good means for analyzing the legal status of the Member States. It is obvious that the EU Members did not cease to be States, instead retaining their identity under international law,<sup>58</sup> thereby still remaining "the masters of the

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<sup>53</sup> BVerfG, *Maastricht Treaty Constitutionality* case, *supra* note 42. Also there and in the earlier judgment on *Kloppenburg* case, *supra* note 34. The BVerfG used the well-known term to denote the EC/EU Member States as 'the masters of the Treaties.' The sovereign status of the Member States has recently also been emphasized by the courts of other Members. See, e.g. the Danish Supreme Court's *Carlsen et al. v. Rasmussen* case, *supra* note 42; the Spanish Constitutional Court's *Statement no.1/2004* case, *supra* note 44; the Polish Constitutional Tribunal's *The Accession Treaty* case, *supra* note 29.

<sup>54</sup> See Daniela Obradović, *The Doctrine of Divisible Sovereignty in the Community Legal Order*, in *STUDIES ON EUROPEAN LAW*, 26 (Michal Sewerynski ed., 1996).

<sup>55</sup> MACCORMICK, *QUESTIONING SOVEREIGNTY*, *supra* note 15, at 132-142.

<sup>56</sup> ALLOTT, *supra* note 23, at 176-179. See *Abbi & Van Elsuwege*, *supra* note 18 *passim*.

<sup>57</sup> Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *AM. J. COMP. L.* 205, 220 (1990).

<sup>58</sup> See Alan Dashwood, *States in the European Union*, 23 *EUR. L. REV.* 201, 202 (1998); Roman Kwiecień, *Sovereignty of the European Union Member States: International Legal Aspects*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES* 339, 351-354 (Adam Bodnar *et al.* eds., 2003).

Treaties.” Accordingly, I share the view that it seems appropriate to describe the unique polity created by the European Treaties as “a constitutional order of States.”<sup>59</sup>

The ECJ has consistently emphasized the “permanent limitation of sovereign rights” of the Member States, without, however, giving specific reasons for this thesis.<sup>60</sup> It is often adopted uncritically by the national courts that juggle with the concept of sovereignty and sovereign rights like a ball. There are even decisions, where we could find two mutually contradictory understandings of sovereignty.<sup>61</sup> Therefore, it appears justifiable to approach the question of State sovereignty with caution and refrain from hasty judgments in this respect, at least until one can establish consistently rather than arbitrarily what sovereignty is today.

The phenomenon of interdependence is treated with caution by the Member States themselves. For example, the ‘Decision of the Heads of State or Governments concerning certain problems raised by Denmark on the Maastricht Treaty on European Union’ of 11-12 December 1992 asserted that the Treaty on the European Union “involves independent and sovereign States having freely decided, in accordance with the existing Treaties, to exercise in common some of their competences.”<sup>62</sup> Of significance in this field is also Article I-1(1) of the Constitutional Treaty speaking about conferring competences to the EU by the Member States “to attain objectives they have in common.” One could speak about limiting the sovereignty of the EU Members, assuming that sovereignty is a sum of State competences. This interpretation of sovereignty cannot, however, find its justification in international law. In case law of international courts there is an established assertion that the capacity to undertake international obligations that even permanently orient the exercise of State functions is a manifestation rather

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<sup>59</sup> ALAN DASHWOOD in WYATT & DASHWOOD’S EUROPEAN UNION LAW 151 (4<sup>th</sup> edition 2000).

<sup>60</sup> In the Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079, para. 21 (the ECJ stated that the Member States had “limited their sovereign rights in ever wider fields.”).

<sup>61</sup> See *e.g.* the judgment of the Irish Supreme Court on *Crotty* case, *supra* note 33.

<sup>62</sup> DOCUMENTS ON EUROPEAN UNION 285-286 (Anjo G. Harryvan & Jan Van Der Harst eds., 1997). A similar presentation of the problem is to be found in the French Constitution of 1958, where Article 88(1) states: “La République participe aux Communautés européennes et l’Union européenne, constituées d’Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d’exercer en commun certaines de leurs compétences. Elle peut participer à l’Union européenne dans les conditions prévues par le traité établissant une Constitution pour l’Europe signé le 29 Octobre 2004,” available at <http://www.conseil-constitutionnel.fr/textes/c1958web.htm>.

than limitation of sovereignty.<sup>63</sup> In international law, sovereignty is the State's complete capacity to define the forms in which its functions are exercised.<sup>64</sup> This is why the primacy of Union law in the domain of conferred competences is fully justified because it stems from mutual international obligations undertaken by the Member States. On the other hand, the exceeding by the EU bodies of the limits of conferred competences suspends the operation of the primacy principle. Therefore, an important issue in the Constitutional Treaty is the division of competences between the Member States and the EU.

The primacy of EU law in the Constitutional Treaty encounters one more, not less important limitation. It is introduced by Article I-5(1) which emphasizes the legal position of the State more strongly than does the currently binding Article 6(3) of the EU Treaty.

There are clear analogies between the provision of Article I-5(1) of the Constitutional Treaty and the provisions of the United Nations Charter. The equality of the EU Members before the Constitution corresponds to the principle of sovereign equality of the Charter's Article 2(1); however, one should have in mind that it is just analogy owing to the special rights of permanent members of the Security Council. The duty of the Union to respect national identities and fundamental State functions or functions that international law attaches to the nature of State corresponds in turn to the provision of Article 2(7) of the UN Charter. Article I-5(1) thus establishes the 'domain reserved,' resulting from international law and exempt from appraisal by Union courts and its other agencies. This provision embodies values that are constitutive for the legal nature of States as sovereign subjects. Due to this status it is the EU Members that confer competences on the Union and not the other way around. The values that make up this status cannot be interfered with by Union law and that is why they are excluded from the primacy of this law.<sup>65</sup> Union legal acts aimed at the fields referred to in Article I-5(1) would certainly be *ultra vires* acts. For they would not find justification either in the light of the national Constitutions or international law or the Constitutional Treaty alone.

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<sup>63</sup> Here especially worth noting is the first judgment of the Permanent Court of International Justice - Case of the S.S. Wimbledon (Great Britain *et al.* v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25.

<sup>64</sup> Such an understanding of State sovereignty is justified more broadly, e.g. Jerzy Kranz, *Réflexions sur la souveraineté*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY* 183 (Jerzy Makarczyk ed., 1996); ROMAN KWIECIEŃ, *SUWERENNOŚĆ PAŃSTWA. REKONSTRUKCJA I ZNACZENIE IDEI W PRAWIE MIĘDZYNARODOWYM* *passim* (2004).

<sup>65</sup> Such a position was directly emphasized by the Polish Constitutional Tribunal in *the Accession Treaty* case. *See, supra* note 29.

## **F. Conclusions**

The inclusion of the primacy principle in the Constitutional Treaty does not bring about a fundamental breakthrough in the existing legal order of the EC/EU. This principle, albeit with restrictions relating to the basic rules of national legal orders, has been accepted by the courts of the Member States as well as their governments. However, while the ECJ saw its grounds in the autonomy and specific nature of the Community legal order, the national courts justified it mainly by constitutional consent. The entry into force of the Constitutional Treaty basically will not change this perspective of viewing the grounds of the primacy of Union law. Nor will it, in my estimation, strengthen the primacy principle because its presence alone in the Treaty does not entail a stronger obligation to observe EU law than what is required by the international law principle of *pacta sunt servanda*.

In the context of the conferral principle and the EU's obligation to respect the nucleus of statehood of its Members, the primacy principle will function within more stable limits than until now, which surely underlines the position of EU Members as the masters of the Constitutional Treaty. This context forms a barrier against the 'Europeanization' of State law, without legitimacy recognized by law.



## The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?

By Niels Petersen\*

### A. Democracy as Fundamental Value of the European Union

“Our Constitution ... is called democracy because power is in the hands not of a minority but of the greatest number.” This statement by Thukydides preceded the preamble of the draft constitutional treaty elaborated by the European Convention.<sup>1</sup> Although not adopted by the intergovernmental conference, the proposed introduction illustrates that the Convention intended to attribute a central role to the concept of democracy – at least symbolically.

The democratic constitution of the European Communities has not long been an issue in legal discussions. Democratic legitimacy of the European institutions was believed to be unnecessary by many scholars who argued that the creation of an internal market only served the purpose of promoting individual freedom.<sup>2</sup> However, with the EU’s development from a purely economic to a political cooperation, the topic has frequently appeared on the agenda of scientific discourses in legal and political science.

With the treaty of Amsterdam,<sup>3</sup> democracy was expressly introduced as a fundamental value into the foundational treaties.<sup>4</sup> In the Treaty Establishing a

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<sup>1</sup> Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003.

<sup>2</sup> E.-J. Mestmäcker, *On the Legitimacy of European Law*, 58 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 615, 631 (1994).

<sup>3</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.



Constitution for Europe<sup>5</sup> (CT), democracy is listed in Art. 2 among the core values of the Union. The notion of democracy is concretised in Arts. 45 et seq. CT under the title “The Democratic Life of the Union” as representative<sup>6</sup> and participatory<sup>7</sup> democracy.

In spite of these affirmations of the democracy principle, the scholarly critique of the democratic legitimacy of the European Union and its institutions is still considerable.<sup>8</sup> In the course of this analysis, I shall therefore try to define the democracy principle in the context of the European Union (Section B). Then I will apply the determined normative standards on the institutional design in order to analyse whether the Constitution contains a coherent concept of democracy (Section C). Finally, I will provide a short outlook on future institutional reforms (Section D).

## **B. Defining the Normative Standards: Democratic Legitimacy in the European Context**

### *I. The Subject of Legitimacy – Communitarianism vs. Individualism*

While the necessity of democratic governance is almost universally accepted in the Western scientific discourse, premises and content of the concept are frequently discussed.<sup>9</sup> The holistic or collectivist approach takes the society or the people as a starting point, pretending that there may be a common good which is distinct from the sum of all individual interests. The individualist position, on the other hand,

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<sup>4</sup> Consolidated Version of the Treaty on European Union Art. 6(1), 1997 O.J. (C 340) 145 [hereinafter TEU].

<sup>5</sup> Treaty Establishing the European Constitution, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT].

<sup>6</sup> CT art. I-46.

<sup>7</sup> CT art. I-47.

<sup>8</sup> See e.g. A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 121 (2005); J.H.H. Weiler, *European Democracy and Its Critics: Polity and System*, in THE CONSTITUTION OF EUROPE 264 (J.H.H. Weiler ed., 1999); G. Lübbe-Wolff, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 246, 255 (2001); H. Steinberger, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft*, 50 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 9, 39 (1991); C. Gusy, *Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU*, 45 ZEITSCHRIFT FÜR POLITIK 267, 271 (1998); F. MÜLLER, *DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT* 127 (2003).

<sup>9</sup> A. v. Bogdandy, *Globalization and Europe: How to Square Democracy, Globalisation and International Law*, 15 EUR. J. INT’L L. 885, 890 (2004).

refers to the individual as subject of legitimacy. Thus, public policy has to concentrate on the promotion of individual interests.

In the European context, the question of the subject of legitimacy has consequences for the institutional design. A state-centered collectivist approach has to be reluctant with regard to any further step of integration. The decision-making competences have to remain as much as possible with the national parliaments.<sup>10</sup> On the European level, the Council of Ministers as an intergovernmental organ must play a crucial role. From an individualistic standpoint, the European Parliament as the “voice” of the European citizenry is the main organ procuring democratic legitimacy.<sup>11</sup> In the following, I will discuss this issue on a theoretical level (1) and then examine the normative foundations in the Constitutional Treaty (2).

### *1. Theoretical Foundation*

The state-centred democratic vision is only justified under a holistic legitimacy concept, according to which only national peoples are able to be subjects of legitimacy. It is argued that minorities only accept majority decisions if the citizenry has a certain national homogeneity.<sup>12</sup> Legitimacy therefore, has to be derived from national parliaments. Thus, the lack of a European *demos* is perceived as an obstacle to further integration.<sup>13</sup>

However, the plausibility of a state-centred, collectivist approach is debatable. Even assuming that the individual needs society in order to develop its personality, there is no necessary link between society and nation state.<sup>14</sup> Nation states are neither founded on an ethnic or homogenous group<sup>15</sup> nor on a cultural, religious or social

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<sup>10</sup> Exemplary D. Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282, 296 (1995).

<sup>11</sup> See Daniele Archibugi, *Cosmopolitical Democracy*, in DEBATING COSMOPOLITICS 1, 8 (Daniele Archibugi ed., 2003).

<sup>12</sup> J. Isensee, *Die alte Frage nach der Rechtfertigung des Staates*, 54 JURISTENZEITUNG 265, 274 (1999).

<sup>13</sup> *Id.*; M. KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP 262 (1997); Grimm, *supra* note 10, at 296.

<sup>14</sup> R. Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 498 (1989).

<sup>15</sup> See S. Kadelbach, *Union Citizenship*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005); see also J.H.H. Weiler, *Does Europe need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219, 240 (1995).

consensus.<sup>16</sup> The sharing of common values and ethical disparities transcend national borders.<sup>17</sup> Belonging to a political community therefore cannot be based on substantial elements, but rather requires a will to belong.<sup>18</sup> Hence, it presupposes the existence of a political order every citizen will agree to.<sup>19</sup> This will to belong is the key characteristic of the individualist concept being expressed by the fiction of the social contract.

## 2. Subject of Legitimacy in the Constitutional Treaty

The individualistic conception of democracy has in principle been adopted by the Constitutional Treaty. Art. 2 CT mentions dignity and individual liberty first in its list of the Union's fundamental values. As liberty is expressly mentioned distinctly from human rights and fundamental freedoms the first principle has to be understood as going beyond the latter.<sup>20</sup> Art. 2 CT has to be perceived as a normative transformation of the Kantian postulation that liberty is the original human right.<sup>21</sup> This understanding of liberty would correspond with the protection of human dignity. For in the philosophical debate, dignity is perceived as serving the purpose of protecting human autonomy.<sup>22</sup> Consequently, Art. 2 CT places the individual into the centre of the European legal order.

This result is further punctuated by the guarantee of equality prescribed in Arts. 2 and 45 CT.<sup>23</sup> According to these provisions, every European citizen has equal rights<sup>24</sup> notwithstanding his nationality. Thus, a mediation of citizen's rights by a

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<sup>16</sup> See U. Haltern, *Integration als Mythos*, 45 JAHRBUCH DES ÖFFENTLICHEN RECHTS 31, 52 (1997); H. Abromeit & T. Schmidt, *Grenzprobleme der Demokratie: Konzeptionelle Überlegungen*, in REGIEREN IN ENTGRENZTEN RÄUMEN 293, 306 (B. Kohler-Koch ed., 1998).

<sup>17</sup> M. Mahlmann, *Constitutional Identity and the Politics of Homogeneity*, 6 GERMAN L. J. 307, 316 (2005).

<sup>18</sup> S. Dellavalle, *Für einen normativen Begriff von Europa: Nationalstaat und europäische Einigung im Lichte der politischen Theorie*, in DIE EUROPÄISCHE OPTION 237, 257 (A. v. Bogdandy ed., 1993).

<sup>19</sup> However, the capability of consent is sufficient, actual consent not necessary.

<sup>20</sup> A. v. Bogdandy, *Constitutional Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogdandy & Bast eds. forthcoming 2005).

<sup>21</sup> IMMANUEL KANT, METAPHYSICS OF MORALS 30 (M. Gregor trans., 1996).

<sup>22</sup> See, e.g. J. NIDA-RUMELIN, UBER MENSCHLICHE FREIHEIT (2005)

<sup>23</sup> See A. Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 43 (2004).

<sup>24</sup> Actually, CT art. 45 seems at first glance not to be a very effective right, as it (only) guarantees the reception of "equal attention from [the Union's] institutions." However the provision has to be read in its context. In the first half sentence the Union is obligated to observe the "principle of equality of its

state or nation as in classical public international law is not necessary. Therefore, both the guarantee of liberty and equality illustrate that the European Constitution is based on an individualistic concept of democracy.<sup>25</sup>

However, several allusions to the member states and the Union's peoples stress the federal structure of the EU. In Art. 1 (1) CT, the will of the member states to build a common future is mentioned beneath the will of the citizens. Furthermore, Art. 46 (2) CT establishes the Council of Ministers as an organ representing the member states. Because both provisions refer to the member states and the citizens they do not undermine the general individualistic concept of the European Constitution. Instead they point out that the European Union has no centralistic system of governance, but that it is characterised by a strong federal structure, in which the member states still play a vital role.

## *II. Participation and Efficiency: Complement or Contradiction?*

### *1. Input and Output Legitimacy*

The insight that democracy in the European context is meant as individualistic democracy provides our first guideline for concretising the concept of legitimacy. According to the classical concept, democracy presupposes that every citizen has the opportunity to participate at least indirectly in collective decisions of the community. If democracy is supposed to implement individual self-determination, every decision with sovereign character has to be traced back to the citizenry via a chain of legitimisation.<sup>26</sup>

Evidence for such an understanding can be found in Arts. 46 et seq. CT, where the European democracy is characterised as participatory and representative. In Art. 46 (2) CT the accountability of the Union's legislative organs to the citizens is particularly stressed. The citizens are supposed to be directly represented by the European Parliament, while the democratic legitimacy of the Council of Ministers is guaranteed by the fact that the governments represented therein are either directly or indirectly accountable to their national electorate.<sup>27</sup>

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citizens." Furthermore, the norm is superscribed with the title "Principle of Democratic Equality." Therefore the headline has to be taken literally and the right of equality is to be interpreted broadly.

<sup>25</sup> Bogdandy, *supra* note 20.

<sup>26</sup> See E.-W. Böckenförde, *Demokratie als Verfassungsprinzip*, in HANDBUCH DES STAATSRICHTS, VOL. II, PARA. 24, NO. 16 (3d ed., J. Isensee & P. Kirchhof eds., 2004).

<sup>27</sup> See A.V. Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, 83 KRITISCHE VIERTELJAHRSSCHRIFT 284 (2000) (on the strategy of double legitimisation).

However, the normative postulate of self-government of a people,<sup>28</sup> the ideal of a political community without rule, which is the foundation of participation-based democracy concepts,<sup>29</sup> has practical shortcomings. Even in direct democracies, the majority always reigns over the minority. Moreover, collective decisions may have significant external effects, either of extraterritorial<sup>30</sup> or of inter-temporal<sup>31</sup> character. Therefore, not every person who is affected by a public decision is involved in the decision-making process.

In representative democracies, sovereign power is, in addition, not exercised by the citizenry, but by its representatives. Thus, there may be considerable differences between the interests of the representatives and those of the represented.<sup>32</sup> Because of this divergence, parliamentary decisions are not always in the interest of the affected society.<sup>33</sup> Furthermore, the electoral decision will only refer to certain parts of a candidate's or a party's programme and consequently always be a compromise. This can be demonstrated by the so-called "Ostrogorski-paradoxon." This paradoxon illustrates that a vote concerning the combination of different topics might result in results opposite of distinct votes on the individual topics.<sup>34</sup> Elections in representative systems however necessarily imply a combination of diverse subjects. Democratic legitimacy therefore cannot solely be determined by the electoral decision and the degree of participation.

Instead, the yardstick must be the quality of collective decisions. Thus, legitimacy must be determined by the degree of problem solving capacity of public

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<sup>28</sup> See M.T. Greven, *Grenzen und politischer Raum*, in REGIEREN IN ENTGRENZTEN RÄUMEN 249, 255 (Kohler-Koch ed., 1998).

<sup>29</sup> F.W. SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG 25 (1970).

<sup>30</sup> D. Held, *Democracy and the New International Order*, in COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER 96, 99 (D. Held & D. Archibugi eds., 1995); Peters, *supra* note 23, at 40.

<sup>31</sup> N. Petersen, *Book Review*, 64 HEIDELBERG J. OF INT'L L. 851, 853 (2004).

<sup>32</sup> G. Majone, *Independence versus Accountability? Non-Majoritarian Institutions and Democratic Governance in Europe*, in THE EUROPEAN YEARBOOK OF COMPARATIVE GOVERNMENT AND PUBLIC ADMINISTRATION 117, 133 (J.J. Hesse & T. Toonen eds., 1994); W.H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 433 (1980).

<sup>33</sup> See R. Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 155 (J.H.H. Weiler & Marlene Wind eds., 2003).

<sup>34</sup> Claus Offe, *Politische Legitimation durch Mehrheitsentscheidung?*, in AN DEN GRENZEN DER MEHRHEITSDEMOKRATIE 150, 163 (B. Guggenberger & Claus Offe eds., 1984).

institutions.<sup>35</sup> As the evaluation of decisions is always dependent on individual conceptions of value, it is certainly not possible to assess the quality of a decision *ex post* according to the attained results. The analysis must concentrate on whether institutional design and decision-making process lead to the expectation of decisions aiming to promote the common good.<sup>36</sup>

## 2. *The Differentiation Between Political Goals and Strategies of Implementation*

Political decisions can principally be divided into two categories: the determination of political goals or policy choices on the one hand and the implementation of these aims by concrete strategies of action on the other.<sup>37</sup> While the former are principally decisions of value every society must adopt as its own, the latter can, at least in theory, be evaluated more or less objectively by scientific methods. Thus, the legitimacy of both kinds of decisions follows different standards.<sup>38</sup>

As decisions of value are personal decisions, they presuppose that all persons affected by them have the opportunity to participate equally in the decision-making process in order to express their preferences. Certainly, there are practical obstacles to consulting the whole electorate for every such decision. Therefore, indirect participation via the election of representatives has to be considered sufficient. However, the quality of policy choices is better the more the criteria of equal participation and immediacy are met. Consequently, in a representative system, the political accountability of the decision-makers plays a vital role in this context.

The strategies for the implementation of democratic ideas must be applied in a procedure that is as rational as possible.<sup>39</sup> Examples in the European context are particularly regulative decisions. The major problem these decisions face is that strong particular interests compete with the diffuse interests of a considerable part of the population. While the benefit for the latter is low with regard to each individual, there is often no incentive to organize lobbying. In party dominated political systems, such constellations often lead to a policy favoring different

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<sup>35</sup> See F.W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999); M. Jachtenfuchs, *Theoretical Perspectives on European Governance*, 1 EUR. L. J. 115, 129 (1995).

<sup>36</sup> N. Petersen, *Europäische Verfassung und europäische Legitimität*, 64 HEIDELBERG J. INT'L L. 429, 456 (2004); see also M. Nettesheim, *Decision-Making in the EU: Identity, Efficiency, and Democratic Legitimacy*, 16 EUR. REV. PUB. L. 197, 215 (2004).

<sup>37</sup> See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 4 (1965).

<sup>38</sup> Petersen, *supra* note 36, at 461.

<sup>39</sup> See, A. v. Aaken, *Rational Choice*, in *DER RECHTSWISSENSCHAFT* 300 (2003).

clienteles.<sup>40</sup> The decisive standard for the quality of regulative decisions therefore is technical expertise rather than a high degree of participation.<sup>41</sup> In this context, the political independence of the decision-makers is not a downfall, but a virtue.<sup>42</sup>

Certainly, it is not always possible to distinguish clearly between policy choices and implementation strategies. Decisions often contain both elements. Therefore, it is necessary to find a balance between participation on the one hand and decision-making efficiency on the other. Moreover, it seems appropriate to differentiate the decision-making procedures according to the goals to be achieved.

A striking example for the division of policy choices and implementation strategies is the institutional design of the European Central Bank (ECB).<sup>43</sup> The objectives the ECB is supposed to pursue are prescribed in Art. 30 (2) and 185 (1) CT. As the constitution has to be accepted by the national parliaments or by popular referenda during the ratification process, these policy choices have been defined in an input-based procedure. In order to implement these objectives, the members of the ECB have been vested with a high degree of independence<sup>44</sup> and a correspondingly low level of political accountability.

### C. Democratic Legitimacy of the European Institutional Design

In the following, the normative standards developed in this paper will be applied to the European institutional framework. I will analyze whether the general principle of democracy is coherently implemented in the Draft Constitutional Treaty or whether there are remaining disparities. In order to answer the question, we will have a look at the three main organs involved in the legislative process according to the standard legislative procedure prescribed in Art. 396 CT: the European Parliament (Section I), the Council (Section II), and the Commission (Section III). Finally, the Constitutional Treaty also seems to have introduced a fourth actor: the citizenry by means of direct participation in the legislative process (Section IV).

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<sup>40</sup> G. Majone, *Redistributive und sozialregulative Politik*, in *EUROPÄISCHE INTEGRATION* 225, 242 (Markus Jachtenfuchs & Beate Kohler-Koch eds., 1996); W. Hoffmann-Riem, *Gesetz und Gesetzesvorbehalt im Umbruch: Zur Qualitäts-Gewährleistung durch Normen*, 130 *ARCHIV DES ÖFFENTLICHEN RECHTS* 5, 31 (2005).

<sup>41</sup> Majone, *supra* note 32, at 118.

<sup>42</sup> Petersen, *supra* note 36, at 462.

<sup>43</sup> See Tohidipur, in this volume.

<sup>44</sup> CT art. 30(3).

*I. European Parliament*

In the standard legislative procedure, the European Parliament and the Council equally co-decide on the European laws and framework laws proposed by the Commission. Thus, the Parliament is together with the Council the principal legislative organ of the European Union.<sup>45</sup>

Contrary to Art. 190 TEC, Art. 20 (2) CT prescribes that the European Parliament represents the European citizens, not the European peoples.<sup>46</sup> However, the representatives are not elected by the European citizenry as a whole. On the contrary, the Parliament is composed by representatives of the individual member states. Moreover, the member states are not represented equally, but on the basis of a “digressive proportionality.” According to the Nice Protocol on Enlargement,<sup>47</sup> one delegate of Luxemburg currently represents 72 thousand citizens, a Dutch delegate 632 thousand citizens, a Polish delegate 713 thousand citizens, and a German delegate 828 thousand citizens.

Such a significant disproportionality in the representation of the Union’s citizens runs counter to the general principles of political equality laid down in Art. 45 CT, and democratic representation prescribed in Art. 46 (1) CT.<sup>48</sup> The choice of a digressive system of representation has practical reasons. If Germany had the same ratio of representation as Luxemburg, the Parliament would have a total number of delegates that would put its working capability into question.<sup>49</sup>

However, it is not required that the Parliament be composed of representatives of the individual member states. On the contrary, such a system contains collectivist

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<sup>45</sup> A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 130 (2005) (there are still important fields remaining in which the Parliament is not equally involved in the legislative process).

<sup>46</sup> S. Kadelbach, *Bedingungen einer demokratischen Europäischen Union*, 32 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (forthcoming 2005).

<sup>47</sup> The Treaty of Nice Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001, 2001 O.J. (C 80) 1, 49 (the protocol on the enlargement of the EU).

<sup>48</sup> G. Lübke-Wolff, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 246, 248 (2001); C. Gusy, *Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU*, 45 ZEITSCHRIFT FÜR POLITIK 267, 271 (1998); F. MÜLLER, *DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT* 127, 269 (2003); J. Sack, *Die Staatswerdung Europas – kaum eine Spur von Stern und Stunde*, 44 DER STAAT 67, 89 (2005).

<sup>49</sup> *Id.*



elements, tracing back the chain of legitimacy not to a European citizenry, but to the individual peoples of the member states. As we have seen,<sup>50</sup> the Union's concept of democracy refers to the individual and not to the nation state's people as subject of legitimacy.

Furthermore, the present composition of the European Parliament is not compatible with the idea of "[p]olitical parties at European level contribut[ing] to [...] expressing the will of citizens of the Union," as it is sketched by Art. 46 (4) CT. For, the latter provision aims at a representation of the European citizenry as a whole and not via a mediation by the individual member states.

There are voices who justify the present composition of the European Parliament by pointing out that the federal element of the European Union is strengthened if the Parliament consists of member states' delegates.<sup>51</sup> However, the main characteristic of federal systems is the vertical allocation of competences. The involvement of the member states in the decision-making process of the federal level thus already needs to be justified.<sup>52</sup>

In order to relieve these internal tensions, the European Parliament should *de lege ferenda* be elected by Europe-wide party lists. Such a procedure would not only eliminate the existing inequalities with regard to parliamentary representation, but would also have other positive side effects. The national parties would be forced to cooperate closer during the election campaign, which would fill the idea of the European party expressed in Art. 46 (4) CT with life. Moreover, the election promises would concentrate on common European topics rather than on national concerns like they do today.<sup>53</sup> Elections for the European Parliament would no longer be *referenda* on national governments. On the contrary, the citizens could express their preferences concerning European politics, which would strengthen the Parliament's legitimacy.<sup>54</sup>

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<sup>50</sup> See Part B I 2 of this piece.

<sup>51</sup> F. Arndt, *Distribution of Seats at the European Parliament: Democratic Political Equality, Protection of Diversity and the Enlargement Process*, in THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES 93, 102 (A. Bodnar, M. Kowlaski, K. Raible, & F. Schorkopf eds., 2003).

<sup>52</sup> See Part C II 2 of this piece.

<sup>53</sup> See P. Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9 EUR. L. J. 549, 571 (2003) (on the latter point); see also A. Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 46 (2004).

<sup>54</sup> See C. Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & Bast eds., forthcoming 2005); Sack, *supra* note 48, at 87 et seq.; M. Rau, *Overcoming the Democratic Deficit in the European Union – the Neglected Role of Political Parties*, in

## II. Council of Ministers

The Council of Ministers is the second legislative organ of the EU. Contrary to the European Parliament, the Council does not represent the European citizenry, but the member states. Even if the votes are weighted according to the size of the population, the Council is composed of representatives from each member state, which have to vote *en bloc*. Different opinions within the member state's population cannot be expressed in this forum.

### 1. Representativeness of Council Decisions

With regard to the basic principle of individual democracy, this structure of the Council has some negative implications.<sup>55</sup> The sole representation of the member state's citizenry by their governments presupposes that a uniform national interest can be identified. Interestingly this implies that the underlying idea is a holistic conception of the people. As we have seen, this holistic conception does not reflect the reality of modern societies.<sup>56</sup> Therefore, governments represent, at best, a majority of their nationals. The minority, who has voted for the opposition in their national elections remains unrepresented in the Council. Thus, there is no assurance that a decision meeting the quorum of qualified majority is really representing the majority of the European citizens.<sup>57</sup>

In order to solve this deficiency, some legal scholars propose to raise the quorum for Council decisions.<sup>58</sup> To guarantee that Council decisions are representative, this proposition suggests increasing decision-making costs. It consequently presupposes that in cases of doubt the *status quo* is preferable to any changes because a high quorum might also halt the success of proposals that are supported by a majority of citizens.

Moreover, one has to bear in mind that in the regular legislative procedure the Council has equal decision-making power with the European Parliament. The involvement of the European Parliament already guarantees that the decisions will

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THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES 133, 148 (A. Bodnar, M. Kowlaski, K. Raible, & F. Schorkopf eds., 2003).

<sup>55</sup> See A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 126 (2005) (the critique of Menéndez).

<sup>56</sup> See Part B I 1 of this piece.

<sup>57</sup> A. Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 54 (2004).

<sup>58</sup> *Id.*

be representative. To have the Council as the second organ in the decision-making process leads to an increase in decision-making costs.<sup>59</sup> A further increase of these costs by raising the decision-making quorum is therefore not necessary to ensure that decisions represent the views of the citizens. It would only render the procedure less effective.

## 2. *Functional Legitimacy of State Representations in Federal Systems*

The identified lack of representativeness of Council decisions is not unique to the European Union. It is a common phenomenon in every federal system with two parliamentary chambers. In the US Senate, the two senator rule does not allow an exact representation of the state's citizenry. This deficit is increased by the fact that every state is represented by the same amount of Senators notwithstanding the size of its population.<sup>60</sup> Because the German *Bundesrat* (Federal Council of States) is composed of delegates of the state governments, it suffers from the same deficit; the citizens who have not elected the government remain unrepresented in the decision-making process.

The democratic logic of federal systems can be traced back to the insight that the degree of individual participation in collective decisions increases as the number of participants decreases. Yet, in certain cases a great number of participators may be desirable. These incidences can principally be divided into two categories.

The first category is related to democratic fairness and includes decisions having a territorial external effect. Otherwise the citizens who have the opportunity to participate at least indirectly in the decision-making process would not fully correspond to those who are effected by the decision.<sup>61</sup> The second category comprises cases in which the efficiency of collective decisions is increased by an increase of the size of a system because a public good can be better supplied on the federal level.<sup>62</sup> This has, for example, been the reason for the establishment of a European common market.

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<sup>59</sup> J.M. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 235 (1962).

<sup>60</sup> U.S. CONST. art. I, § 3, cl. 1.

<sup>61</sup> D. Held, *Democracy and the New International Order*, in *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER* 96, 99 (D. Held & D. Archibugi eds., 1995).

<sup>62</sup> C. Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 *TUL. J. INT'L & COMP. L.* 291, 303 (1998).

These deliberations reveal that the ideal size for collective decisions may vary according to their content. Therefore federal systems consist of several levels on which decision-making takes place. Decisions should be made on the federal level if democratic fairness or effectiveness can be increased.<sup>63</sup> Otherwise, the principle of subsidiarity demands that a competence has to be attributed to the national or even local level.<sup>64</sup>

If the main function of federal systems is the vertical division of competences, what is the role of state representing bodies in the decision-making process on the federal level? According to the preponderant scholarly opinion, the Council serves for the representation of the member states' national interests at the Union level.<sup>65</sup> But as we have seen, the idea of the existence of a national interest distinct from the sum of individual interests is in principle not compatible with an individualist concept of democracy. Therefore strategies of justification have to be developed, which do not merely refer to the representation of national interests.

The lack of representativeness is a restriction on the input-based principle of equality of participation. However, the European democracy concept is not solely input-related.<sup>66</sup> Instead, there is a strong accentuation of result-oriented elements. Consequently, this analysis shall in the following sections consider whether output-considerations may justify restrictions on the principle of equal participation. In this respect, we have to differentiate between the ordinary decision-making procedure (Section 3) and consensus decisions within the Council (Section 4).

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<sup>63</sup> M.G. SCHMIDT, *DEMOKRATIETHEORIEN* 435 (3rd ed., 2000).

<sup>64</sup> A. Follesdal, *Subsidiarity and democratic deliberation*, in *DEMOCRACY IN THE EUROPEAN UNION. INTEGRATION THROUGH DELIBERATION?* 85, 104 (E.O. Eriksen & J.E. Fossum eds., 2000).

<sup>65</sup> P. Raworth, *A Timid Step Forwards: Maastricht and the Democratisation of the European Community*, 19 *EUR. L. REV.* 16, 26 (1994).

<sup>66</sup> See Part B I 2 of this piece.

### 3. *Executive Federalism*

The role of the Council of Ministers in the legislative process can be explained by the model of executive federalism.<sup>67</sup> This model explains the involvement of executive representatives in the EU's law making process with the divergence of law-making and law-implementing powers. While the legislative power in many fields has been transferred to the Union level, the enforcement of EU law rests with the member states.<sup>68</sup> Even in the case of direct implementation of EU law the Union depends on the cooperation with national administrations and courts.<sup>69</sup> Because of these interwoven competencies, there is a strong need of cooperation in law adopting as well as in law implementing procedures. This process has been institutionalised by the involvement of the Council of Ministers in the legislature.<sup>70</sup>

By involving representatives of the member states' executives in the legislative procedure, the costs of the decision-making process are increased. On the other hand, the implementation of laws is simplified. Legislative acts are more easily applicable and thus are of a higher quality. In other words, the higher decision-making costs are balanced by reduced costs of law implementation. Consequently, the involvement of the Council of Ministers in the law-making process can be justified by output-considerations.

### 4. *Consociational Democracy*

The model of executive federalism however, cannot explain the elements of intergovernmental decision-making within the Union. Even under the regime of the Constitutional Treaty, there are still crucial matters, not subject to the normal co-decision procedure, that require a unanimous decision in the Council.<sup>71</sup> The rationale for intergovernmental decision-making can be found in consociational

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<sup>67</sup> P. DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 21 (2004); P. Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005).

<sup>68</sup> S. KADELBACH, ALLEGMEINES VERWALTUNGSCRECHT UNTER EUROPÄISCHEM EINFLUß 131 (1999).

<sup>69</sup> S. Bitter, *Zwangsmittel im Recht der Europäischen Union: Geteilte Rechtsmacht in Europa*, in EUROPA ALS RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS (Hofmann & Kadelbach eds., forthcoming 2005).

<sup>70</sup> P. Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005).

<sup>71</sup> G. della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 EUROPEAN REV. PUB. L. 221, 228 (2004); A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 130 (2005);

democratic theory.<sup>72</sup> According to this theory, consensual decision-making provides for stability in sharply segmented societal sectors.<sup>73</sup> Consequently, with regard to the EU, consensus is appropriate under two conditions. First, a substantive commonality among the member states has to be lacking.<sup>74</sup> Second, the existence of a relatively homogenous conviction within the national citizenry is required. Otherwise, a considerable part of the citizenry would not feel represented in the decision-making process and therefore be reluctant to accept the Council decision.

However, it must be noted that not all competences requiring a unanimous decision in the Council fulfill these two conditions. In these cases, the intergovernmental process serves the purpose of preserving power for national governments without having a theoretical justification. Here, the unanimity requirement must be conceived as a transitional stage. This is punctuated by the possibility of a simplified revision procedure prescribed in Art. 444 (1) CT allowing the introduction of qualified majority decision-making in fields where presently only unanimous adoption of legislative acts is possible.

As a consequence of the Council's unanimity requirement, Council decisions already represent at least a majority of the European citizenry. Further involvement of the European Parliament in the decision-making process would only increase the already high decision-making costs and consequently render legislation in this field even less effective. It is therefore theoretically consistent that the European Parliament has only an advisory role when the decision-making procedure has intergovernmental character.<sup>75</sup>

##### 5. Summary

These reflections show that the Council of Ministers still has an important role to play in the EU's law-making process. Contrary to the predominant scholarly opinion, its main function is not ensuring the representation of member states' interests. Instead its main function is simplifying how the laws are implemented. On the other hand, intergovernmental decision-making has to be reduced.

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<sup>72</sup> See J.H.H. Weiler, U. Haltern, & F.C. Mayer, *European Democracy and Its Critique*, 18 WEST EUR. POL. 4, 29 (1995).

<sup>73</sup> See J. Bast, *The Constitutional Treaty as a Reflexive Constitution*, in this volume.

<sup>74</sup> Weiler, *supra* note 72, at 29.

<sup>75</sup> Trüé, in this volume; compare Bast, *supra* note 73 (in favour of an involvement of the EP in cases where unanimity in the Council is required - it is paradoxical to exclude the Parliament as main representative organ from the decisions having the highest political importance).

Although the consensus requirement within the Council is justified in certain fields, the Constitutional Treaty applies this decision-making procedure in areas where unanimous decisions do not seem to be appropriate.

### *III. European Commission*

The Commission has two important functions in the EU's law making process. First, it has a quasi monopoly in legislative initiatives.<sup>76</sup> Second, legislative power may be transferred to the Commission.<sup>77</sup> This strong role of the Commission is often criticized because of its weak political accountability.<sup>78</sup> The political independence of the Commissioners is expressly prescribed in Art. 26 (7) CT. The Commissioners are accountable to the European Parliament, which has to approve the Commission by a majority decision and may force the Commission to resign by the way of a censure motion in accordance with Art. 340 CT. Nevertheless, the latter instrument is quite weak because it has to meet the quorum of a two-thirds majority.<sup>79</sup>

But as we have seen, a strong political accountability is not necessary for all kinds of political decisions.<sup>80</sup> Following the proposed differentiation,<sup>81</sup> independence and expertise are dominant criteria for determining the quality of decisions regarding implementation strategies. The Commission's monopoly over legislative initiatives principally concerns economic regulation. In other fields, including foreign policy,<sup>82</sup> monetary policy,<sup>83</sup> the area of freedom, security and justice<sup>84</sup> or the intra-organic

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<sup>76</sup> See CT art. 26(2).

<sup>77</sup> CT art. 36(1).

<sup>78</sup> See B.-O. Bryde, *Demokratisches Europa und Europäische Demokratie*, in *EUROPA UND SEINE VERFASSUNG*, FESTSCHRIFT MANFRED ZULEEG 131, 138 (C. Gaitandes, S. Kadelbach, & G.C. Rodriguez Iglesias eds., 2005); see also B. Stråth, *Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community*, 6 *GERMAN L. J.* 255, 268 (2005); see also J.-L. Dewost, *La Commission ou comment s'en débarrasser?*, in *L'EUROPE ET LE DROIT. MELANGES EN HOMAGE A JEAN BOULOUIS* 181, 190 (Charles Debbasch & Jean-Claude Venezia eds., 1991).

<sup>79</sup> CT art. 340, para. 2.

<sup>80</sup> See A. Menon & S. Weatherill, *Legitimacy, Accountability and Delegation in the European Union*, in *ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION* 113, 117 (A. Arnall & D. Wincott eds., 2002); see also A. Dashwood & A. Johnston, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty*, 41 *COMMON MKT. L. REV.* 1481, 1486 (2004).

<sup>81</sup> See Part B II 2 of this piece.

<sup>82</sup> E.g. CT art. 313 (3), para. 3; CT art. 322 (1); CT arts. 325, 329, 420 (2), para. 2.

<sup>83</sup> CT art. 187 (3) lit. b, (4) lit. b.

organization,<sup>85</sup> this monopoly is restricted as these decisions are based on political evaluations instead of technical reasons.

Certainly, regulative decisions are not free of evaluative elements. However, the Commission does not have the exclusive decision making competence, but only the right to submit a proposal. The decision is then taken jointly by Council and Parliament as politically accountable organs.

With respect to the delegated regulatory competences prescribed in Art. 36 (1) CT, the political control of the Commission is exercised *ex ante*. According to Art. 36 (1) CT, objectives, content, scope and duration of the delegation of power have to be explicitly defined in the enabling act. The basic decision of value is therefore taken by Council and Parliament in the authorizing act, while the Commission is solely concerned with the question of implementation.

Consequently, the cooperation of the Commission on the one hand and Parliament and Council on the other is an example of balancing expertise and participation in the law-making process.<sup>86</sup> In this context, the weak political accountability of the Commission is an advantage rather than a disadvantage because it increases the decision-making efficiency.<sup>87</sup> The need of a two-thirds majority guarantees that the Commission is not forced to resign solely on grounds of party policy, but only in cases of abuse of competences.

However, in the absence of personal accountability, the quality of the Commission's decisions has to be guaranteed by procedural requirements.<sup>88</sup> In this respect, the involvement of committees in the decision-making process plays a vital role.<sup>89</sup> In order to prepare legislative proposals, the Commission often consults expert committees.<sup>90</sup> Theoretically, these committees may serve two important

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<sup>84</sup> CT art. 264, lit. b.

<sup>85</sup> CT arts. 330 (1), 333, 357.

<sup>86</sup> See P.P. Craig, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, 3 EUR. L. J. 105, 118 (1997).

<sup>87</sup> G. Majone, *Regulatory Legitimacy*, in REGULATING EUROPE 284, 287 (G. Majone ed., 1996).

<sup>88</sup> A. VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 238 (2002).

<sup>89</sup> See K. Lenaerts & A. Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 35, 75 (C. Joerges & R. Dehousse eds., 2002).

<sup>90</sup> E. Vos, *The Rise of Committees*, 3 EUR. L. J. 210, 228 (1997).



purposes: they should provide the Commission with the necessary expertise and they should work as interface between the Commission and civil society at large.<sup>91</sup>

However, the actual design of the committee procedures has several shortcomings. In order to fulfill the described functions, the role and involvement of the committees have to be defined and formalised so that deliberative problem solving is favoured.<sup>92</sup> To date, such an attempt has only been made with regard to committee involvement in the process of law implementation.<sup>93</sup> A similar standardisation is missing in the context of the preparation of legislative proposals. Simultaneously, the transparency of committee procedures must be increased in order to allow the exercise of sufficient public control over the decision-making process.<sup>94</sup> Moreover, safeguards should be introduced that involve all affected interest groups in the composition of the committees in order to guarantee that all interests at stake are considered.<sup>95</sup> Unfortunately, the Constitutional Treaty has not brought any substantive improvement in this respect.<sup>96</sup>

#### *IV. The Popular Initiative as New Participatory Element*

With the Constitutional Treaty, the citizenry was supposed to be introduced as fourth actor in the legislative process. Art. 47 (4) CT introduced elements of direct democracy in order to strengthen the participatory element. According to this provision, the citizens may *invite* the Commission to initiate a legislative act by means of a popular initiative.

However, the popular initiative seems to be a fig leaf excusing the low degree of participation of Europe's citizenry rather than a forceful innovation. On the one hand, the utilisation of the term "invite" leads to the supposition that the Commission is only obliged to concern itself with the topic of the popular initiative. It is not bound to initiate new legislation and to enact the content of such a possible proposal. Consequently, the popular initiative has only moral force.

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<sup>91</sup> R. Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 152 (J.H.H. Weiler & Marlene Wind eds., 2003).

<sup>92</sup> C. Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUROPEAN L. J. 273, 282 (1997).

<sup>93</sup> See Council Framework Comitology Decision 1999/468, 1999 O.J. (L 184) 23.

<sup>94</sup> Dehousse, *supra* note 91.

<sup>95</sup> Vos, *supra* note 90, at 218.

<sup>96</sup> See G. della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 EUR. REV. PUB. L. 221, 234 (2004).

This moral force of popular initiatives has, on the other hand, some problematic implications. Art. 47 (4) CT requires a quorum of at least one million citizens. This number is however below one percent of the European electorate and therefore in no way representative. While such a popular initiative is capable of bringing up a matter of almost common concern, it may on the other hand also support the particular interests of a certain group. Therefore, the popular initiative in Art. 47 (4) CT can only serve as an instrument for collecting information, lacking the legitimacy necessary to be binding. Furthermore, a popular initiative would harm the existing system of expertise based legislative proposals.<sup>97</sup> Therefore Art. 47 (4) CT is foreign to the conception of the institutional design.

#### **D. Outlook: the Constitutional Treaty as Guide for Further Reforms**

Despite the prominent role which has been attributed to the concept of democracy in the first part of the European Constitution, there are remaining disparities between the general outline of the democracy concept in Arts. 2, 45 et seq. CT, and the Union's concrete institutional design. In particular the composition and election of the European Parliament are not in line with the concept of individual democracy. As the norms establishing the institutional structure are however *leges speciales*, this disparity has no direct normative consequences.<sup>98</sup>

Even if the Constitutional Treaty should not enter into force, the normative principles laid down in Arts. 45 et seq. may still have an impact on future changes in EU's constitutional law. Because these provisions can be interpreted in a theoretically consistent manner and because the proposed democracy concept is normatively convincing, they may direct further institutional reforms.<sup>99</sup>

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<sup>97</sup> See Part C III of this piece.

<sup>98</sup> On the relationship between first and third part of the constitution, see J. Bast, *supra* note 73.

<sup>99</sup> *Id.*



## ***Comment on Niels Petersen - A Democratic Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?***

*By Robert Grzeszczak\**

First, it should be noted that there is a clear tension between democratic principles and strengthening the process of European integration. We should also bear in mind that until recently the notion of democracy was not solely associated with the functioning of international institutions, even though many of them include parliamentary bodies. Instead, it was only in the last decades of the 20<sup>th</sup> century that the democratic way of thinking entered into international relations. Despite this development, many international law experts either deny the possibility of introducing democracy in international institutions or simply pass over the issue.<sup>1</sup>

In principle, democracy is state-based. Thus the fundamental issue for further consideration is how we understand the principle of democracy in the case of the European Union (EU), as compared to its position in the member states. Neither the founding treaties, nor the Constitutional Treaty, give a final answer to this question. These treaties illustrate however, that there is some interdependence between democracy and citizenship, freedom and the rule of law. They also point out that these concepts constitute the contents of democracy on the one hand and the limits of democracy on the other. The concept of democracy in EU structures was not emphasized until the 1990s, maybe because of the EU's exclusively economic character at the beginning of the integration process. Taking into consideration the discussion above, the following issue should be considered: what kind of solutions for European democracy does the Constitutional Treaty propose?

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<sup>1</sup> CEZARY MIK, EUROPEJSKIE PRAWO WSPÓLNOTOWE 416 (2002); Roman Kuźniar, *Demokracja w państwie a demokratyczność porządku międzynarodowego*, in DEMOKRACJA W STOSUNKACH MIĘDZYNARODOWYCH 42 (Edward Halizak & Dariusz Poplawski eds., 1997); Janusz Simonides, *Ocena demokratyczności systemu politycznego państw w prawie międzynarodowym i praktyce międzynarodowej*, in DEMOKRACJA W STOSUNKACH MIĘDZYNARODOWYCH 25 (Edward Halizak & Dariusz Poplawski eds., 1997).

The problem seems to require an unequivocal answer to the following question: can democracy be related to international institutions and realized by international organizations such as the EU?

Taking into account the features of EU law, the importance of the principle of sovereignty for the member states, and ever more intense competition in the economic sphere it is apparent that reaching a consensus and sharing common interests on the EU level will be exceptionally difficult. That is why the practical achievement and implementation of classical democratic values in the EU structure is not an easy task.

Big and modern states as well as international organizations that are characterized by well-developed structures of power such as the EU (especially in its constitutional shape), can realize only an indirect form of democracy, representative democracy.<sup>2</sup> In this form of democracy the governmental bodies are elected by citizens to govern on their behalf, while at the same time guaranteeing the rights of citizens.<sup>3</sup> Examining contemporary organizations, it is apparent that each of them is based on a principle of democracy, which is based in turn on the idea of self-determination and sovereignty of the nation.<sup>4</sup> Broadly speaking, decisions of public authorities require legitimisation deriving from the nation, and decision-making processes that are verified through elections.

The European Union does not correspond (neither at present, nor in the shape proposed by the Constitutional Treaty) to the principles of democracy accepted in the internal systems of the member states. However, the heterogeneity of solutions and structures in different member states is not the cause of the democratic deficit. I do not necessarily agree with the view that it would be advisable to introduce the well known legal procedures applied in member states or even those that are convergent in their solutions in all of the member states on the EU level. Because the EU is not a state, I believe that it should not be looked at or estimated

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<sup>2</sup> Compare Treaty Establishing the European Constitution Title VI, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT] (The Democratic Life of the Union); and Constitutional Treaty art. I-46 (the Principle of Representative Democracy).

<sup>3</sup> LEXIKON DES RECHTS, I/57 and I/58 (A. Reifferscheid, E. Bockel & F. Benseler eds., 1968).

<sup>4</sup> PHILIPPE WEBER-PANARIELLO, NATIONALE PARLAMENTE IN DER EUROPÄISCHEN UNION: EINE RECHTSVERGLEICHENDE STUDIE ZUR BETEILIGUNG NATIONALER PARLAMENTE AN DER INNERSTAATLICHEN WILLENSBILDUNG IN ANGELEGENHEITEN DER EUROPÄISCHEN UNION IM VEREINIGTEN KÖNIGREICH, FRANKREICH UND DER BUNDEREPUBLIK DEUTCHLAND 194 (1995).

exclusively (or ever) according to the assumptions created for the purpose of state structures.<sup>5</sup>

Thus I am of the opinion that EU structures do not correspond to Charles Louis de Secondat de Montesquieu's doctrine of division of powers and I do not see any reason why the division of powers principle should be fully implemented in an international organization such as the EU.

In the European Convention, all debate on the implementation of democratic principles within the European Union, as well as on incorporation of procedures and mechanisms from the spheres reserved for the member states, was focused on the institutional aspects. Such an approach is reflected by the provisions of the Constitutional Treaty which point out the need for reform of Community institutions, changes in legislative procedures and a stronger position of the national parliaments in EU decision-making procedures.

The main task for the framers of the Constitutional Treaty was to change the undemocratic image of the EU. However, I do not share the view that the scope of changes proposed in the Constitutional Treaty will in any way influence the existence of the EU's democratic deficit, which dates back to the very origins of the Communities and the Union.

Looking across European literature on the subject, it appears that the primary catalyst of the democratic deficit is the relationship between the European Parliament (EP) on one hand, and the Council of Ministers and the European Commission on the other.<sup>6</sup> That is why some authors stress the need for a change in this relationship, particularly between the EP and the Council of Ministers by

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<sup>5</sup> Compare MONTESQUIEU, O DUCHU PRAW 239 (1957), with Heinrich Oberreuter, *Demokratiedefizite in der EU*, 54 POLITISCHE STUDIEN 50 (1999) (“[...] Die EU ist kein Staat. Sie ist eine Gebilde sui generis, was der Begriff Staatenverbund zutreffend umschreibt. Institutionen und Verfahrensweisen in diesem Verbund waren immer schon nach Maß zu schneiden, nie nach einzelstaatlichem Vorbild”).

<sup>6</sup> DAVID COOMBES, SEVEN THEOREMS IN THE EUROPEAN PARLIAMENT. FUTURE OF EUROPEAN PARLIAMENTARY DEMOCRACY (1999); Albert Bleckmann, *Das europäische Demokratieprinzip – Zum Demokratieprinzip in der EG* 301, 7 JURISTEN ZEITUNG 30 (1990); WINFRIED KLUTH, DIE DEMOKRATISCHE LEGITIMATION DER EUROPÄISCHEN UNION 87 (1995); Albert Bleckmann, *Chancen und Gefahren der europäischen Integration. Zum Demokratieprinzip in der EG* 301, 7 JURISTEN ZEITUNG (1990); Klaus Pöhle, *Das Demokratiedefizit der Europäischen Union und die nationalen Parlament*, 1 ZEITSCHRIFT FÜR PARLAMENTSFragen 77 (1998); Dieter Grimm, *Mit einer Aufwertung des Europa-Parlaments ist es nicht getan. Das Demokratiedefizit der EG hat strukturelle Ursachen*, 6 JAHRBUCH ZUR STAATS- UND VERWALTUNGSWISSENSCHAFT (1992-1993); Frank Decker, *Demokratie und Demokratisierung jenseits des Nationalstaates: Das Beispiel der Europäischen Union*, 2 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 177 (2000); FRANK EMMERT, MATEUSZ MORAWIECKI, PRAWO EUROPEJSKIE 170 (2004).

making the Parliament a fully competent body that can approve every single act coming from the Council.<sup>7</sup>

The Constitutional Treaty increases the competence of the EP, but it is not enough to make the EP a fully independent legislator. Consequently the European Union, as shaped by the Constitutional Treaty, still does not have an appropriate institutional structure to ensure a democratic form of governance for the citizens.

Moreover, the extent to which the Constitutional Treaty takes into account the New Millennium's changing social conditions and the expansion of the EU, has been overemphasized. Often, what for politicians is simply a step in achieving further objectives (for instance political integration) is for many societies an absolute maximum of acceptable change. Activities of international institutions (Council, Commission or EP) should be broadly reflected in the support from the societies, in their opinions and expectations.<sup>8</sup> This aspect, although often raised and discussed in European circles, is not implemented strongly enough.

The support of the EU citizens for the Union is decreasing. The referenda show that in the old member states (Denmark, Ireland) support in favour of European integration is becoming weaker and weaker, and in the new ones it is surprisingly low (Slovakia). The framers of the Amsterdam Treaty realized this and tried to change this situation by introducing a new principle into Community law: transparency through the enhanced access of EU citizens to documents of the Community institutions (Art. 255 TEC). The entry into force of the Amsterdam Treaty (1999) and its provisions providing for the democratic principles in the functioning of the EU were supposed to put an end to debate on the EU as an enterprise of executive power.<sup>9</sup> However, those provisions were not followed by any further legal changes. So far, the principle of democratic legitimisation has not yet been implemented.

That is why this issue, a subject of discussion in many European bodies, has been added to the agenda of the European Convention. Moreover, this way of thinking is reflected in the Constitutional Treaty and laid down as a principle of participatory democracy (Art. I-47).

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<sup>7</sup>Albert Bleckmann, *Das europäische Demokratieprinzip*, 2 JURISTEN ZEITUNG 53 (2001).

<sup>8</sup> Grażyna Michałowska, *Spoleczne przesłanki demokracji w stosunkach międzynarodowych*, in PAŃSTWO, DEMOKRACJA, SAMORZĄD 449 (Tadeusz Mołdawa ed., 1999).

<sup>9</sup> *Id.* at 358.

The question remains, however, whether the Constitutional Treaty's entry into force will really strengthen the democratic image of the European Union. Its future practical application will answer this question. Nevertheless, the solutions proposed by the Constitutional Treaty seem quite superficial in this field and do not seem to propose any revolutionary changes in the integration process.

In a broader political context, the democratic deficit of the EU is linked with the European citizens weakening support for the deepening of the integration process. The Community institutions adopt laws without consulting with the citizens, thus the intention expressed in the Constitutional Treaty to implement the rules of transparency in the functioning of the EU institutions remains wishful thinking.<sup>10</sup> That is why it is not at all surprising that the European Community, and then the European Union, have not succeeded in creating a truly international community and that its citizens do not form one politically integrated society. The EU citizens are still far from being a European nation (*demos*) and in turn this makes it even more difficult to find a common European identity (*ethnos*).

Most of the treaty revisions have their roots in the underlying reform tendencies of the member states. That should be emphasized when observing how democracy is being introduced on the EU level. An example of this phenomenon is the above mentioned principle of granting EU citizens access to information (Art. 255 TEC). The principle was originally developed by the member states in their internal legal orders and was then incorporated into the Community's legal order. The principle has been reflected in the law of almost all member states but it has been regulated in a more or less detailed way depending on the individual member state.<sup>11</sup>

The right of access to the information and documents of the EU administration should be perceived as an attempt at incorporating the democratic principles that originated in member states on the Community level.<sup>12</sup> Until now, the right of access to information on the EU level has been interpreted in a limited way. Under Art. 255 of the EC Treaty, as well as under the provisions of the European Parliament, the relevant Council Regulation and the case-law of the ECJ this right

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<sup>10</sup> Monika Szwarc, *Zasady wglądu do dokumentów instytucji Wspólnot Europejskich*, in PAŃSTWO I PRAWO 34 (2001).

<sup>11</sup> They have been most broadly considered in the legal orders of the Scandinavian states.

<sup>12</sup> However, the EU solutions must have reached a consensus on different member states traditions and create a model incorporating on the one hand exceptionally transparent solutions of the Scandinavian states.



should be understood as the right of every single citizen to access the documents of each of the Community institutions.<sup>13</sup>

We should only support the provisions of the Constitutional Treaty (Art. I-47) which give citizens and representative associations the opportunity to publicly exchange their views in all areas of Union action. A common Europe cannot be achieved without the support of its citizens; alternatively, if such popular support cannot be mustered, a common Europe must be attained in compliance with the underlying, foundational values of the various member states.<sup>14</sup>

The mere fact that the Constitutional Treaty lays down provisions on representative democracy (Art. I-46) and introduces a general principle of participatory democracy (Art. I-47) does not ensure its true democratic character. These are envisaged provisions, which may lead to a more democratic character of the Union.<sup>15</sup> These democratic principles have been introduced in the Constitutional Treaty directly (*inter alia* by the Preamble and Art. I-2, I-45 and I-47), and indirectly from the rules and principles included throughout the Treaty. One of the avenues guaranteeing more democratic procedures for a democratic Union is amended by the Constitutional Treaty – the double-majority requirement in the weighting of Council voting, as introduced by the Nice Treaty.

One answer to the quest for more democratic rules in EU structures might be in the increasingly popular doctrine of deliberative democracy.<sup>16</sup> In the heart of the theory of deliberative democracy lies the assumption that a decision must result from a vote in order to be legitimate. This legitimisation may be acquired if a decision results from an argumentation process free from any pressure. The source of the legitimisation lies not only in the possibility for everybody to participate, but also in broad access to the deliberative process. Under these conditions, a mistake is not excluded from majority voting. Voting closes a debate because of the above mentioned external pressure. Argumentation free from any external pressure is the best solution, allowing separation of a specific interest from the common interest as

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<sup>13</sup> Commission Regulation 1049/2001, 2001 O.J. (L 145) 43.

<sup>14</sup> M. Fragde, *Sovranità diffuse e diritti umani nella prospettiva comunitaria*, in RIVISTA DI DIRITTO EUROPEO 19 (1999).

<sup>15</sup> Meinhard Hilf, *Amsterdam – Ein Vertrag für die Bürger?*, in EUROPARECHT 357, 358 (G. Nicolaysen & H.J. Rabe eds., 1997).

<sup>16</sup> The father of the theory of deliberative democracy is Jürgen Habermas. See JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT (1961).

well as the crafting of norms based on consensus. In consequence, the addressees should consider themselves co-authors of those norms.<sup>17</sup>

In light of this model, democracy is no longer understood as solving conflicts or weighing interests. The parties do not advocate strategic interests. Any interest can be generalised and this leads to a consensus without majority voting being necessary. Jürgen Habermas's model, following Klaus Bachmann's, emphasizes debate, the art of persuasion and the exchange of arguments (supranational deliberation). Many supporters of this theory see it as a way to add more legitimacy to EU actions.<sup>18</sup>

With a dose of criticism it should be noted that the provisions on democracy on the EU level do not teach anything new in substance. The guarantee of respect for the values enumerated in Art. I-2 of the Constitutional Treaty are already in place by virtue of EU law, *inter alia* the preamble to the Single European Act or Art. 6 of the Treaty on the European Union (TEU). The fact that Art. 6 TEU has been introduced in the Constitutional Treaty is of formal nature. It merely reconfirms the observance of those rights on the community law level.

I agree with the view that an elite is necessary for efficient governance in a state or within an international organization's structures. It is linked with the functioning of *invisible authority*, namely experts whose role is becoming ever more important as a result of the increasing complexity of the structures.<sup>19</sup> Such phenomena can be seen in the European structures and this shift is justified by the European Community's need for an effective executive. But if recognizing an authority as efficient is a fact, recognizing it as democratic refers to the evaluation of this fact.<sup>20</sup>

To conclude, I will invoke the well-known *Maastricht* judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court). In this decision concerning the compatibility of the Maastricht Treaty of 1993 with the German *Grundgesetz* (Basic Law), the Court referring to the issue of realizing democracy on the supranational level, stated that the EU Treaty considers nations from the ethnic and national perspective or cultural and ethnic perspective.<sup>21</sup> (Incidentally, the

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<sup>17</sup> KLAUS BACHMANN, KONWENT O PRZYSZŁOŚCI EUROPY. DEMOKRACJA DELIBERATYWNA JAKO METODA LEGITYMIZACJI WŁADZY W WIELOPLASZCZYZNOWYM SYSTEMIE POLITYCZNYM 51 (2004).

<sup>18</sup> *Id.* at 52.

<sup>19</sup> ANDRZEJ REDELBACH, SŁAWOMIRA WRONKOWSKA & ZENON ZIEMBIŃSKI, ZARYS TEORII PAŃSTWA I PRAWA 56 (2003); N. BIBLIO, THE FUTURE OF DEMOCRACY 42 (1987).

<sup>20</sup> ANDRZEJ WASILKOWSKI, SUWERENNOŚĆ W PRAWIE MIĘDZYNARODOWYM I W PRAWIE EUROPEJSKIM (2003).

<sup>21</sup> BVerfGE 89, 155 (F.R.G) (the judgment known as *Maastricht – Urteil*).

Constitutional Treaty takes this viewpoint, as well.) The Court explained that this is why the creation of any form of European statehood is impossible without the existence of one European nation, having a common heritage, language, culture and ethnic history. Such a view leads to the conclusion that on the *pan-European* level the full implementation of democratic principles, common to the member states, is not possible at least as long as the Union remains merely an international organization.

## The Plurality of the Legislative Process and a System for Attributing Procedures to Competences

By *Christiane Trüe*\*

### A. Introduction

This contribution aims to assess whether the Constitutional Treaty (CT) succeeds in achieving a systematic “fit” between the legislative procedures and the relevant underlying competences. The system to be developed here aims at promoting democratic legitimacy, transparency and efficiency in the EU’s legislative process. This is undertaken under the assumption that systematization might contribute to achieving these fundamental aims. Obviously, such a system needs to rely on generalization and simplification to a considerable extent; it cannot provide more than a model which must necessarily be subject to exceptions.

To elucidate this, the continuing variety of legislative procedures under the CT will be presented in Part B of this paper. Following that, in Part C, democratic legitimacy, transparency and efficiency will be identified as criteria for a systematic attribution of procedures to competences, and the requirements following from these criteria regarding the organization of legislative procedures will be elaborated: some variation among procedures will be found to be justified by the varying nature of competences. Finally, the attribution of procedures to competences in the CT will be analyzed in the light of these criteria in Part D.

### B. Continuing Variety of Legislative Procedures

At first sight, the CT seems to remove the “plurality” of the legislative process familiar from the past. Article I-34 (1) states that co-decision (Article III-396) is the “ordinary” legislative procedure for the adoption of legislative acts. However, Article I-34 (2) and (3) simultaneously hint at maintaining a diversity of legislative procedures by referring to “special legislative procedures” (whereby the Council or the EP can legislate with the other’s “participation”) and to “specific cases” of initia-

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tives or recommendations from players other than the Commission. These “special procedures” and “specific cases” can be found in Part III CT, which largely accumulates the current EC and EU Treaties without major amendments, and provides for numerous exceptions from co-decision, in particular, for consent or consultation of the EP instead of co-decision, or for no formal role for the EP (particularly in CFSP).<sup>1</sup> It is Part III CT which is ultimately decisive, as Article I-12 (6) leaves it to Part III to determine the scope and arrangements for exercising EU competences.

There is not much novelty either with regard to the basic versions of the three main legislative procedures: the position of the EP remains the same; the Commission’s main role in most fields continues to be the initiation and presentation of proposals and, where appropriate, of amendments. The Council retains the final decision in almost all procedures, in the co-decision procedure together with the EP; variants regarding the Council continue to centre on whether the latter must decide by unanimity or by qualified majority, i.e. whether a Member State can veto legislation or not. In politically sensitive areas, such as CFSP, taxation, the choice between different sources of energy etc., the unanimity requirement means that each Member State continues to be protected by having a right of veto. In the fields of social security (Article III-136 (2)) and criminal justice (Articles III-270 (3), III-271 (3)) a sort of “emergency brake system” is introduced: if a Member State anticipates dangers for fundamental aspects of its social security or criminal justice systems it may request that a draft framework law be referred to the European Council; this will have the effect of suspending the decision-making process.

The procedural element of qualified majority voting will be amended: Article I-25 replaces the current weighing of votes by a more elaborate system of a dual majority based on Member State votes (minimum of 55 %) and the representation of the population in the latter (minimum of 65 % of the EU population); this is complemented by minimum quorums for the qualified majority (15 Member States) and the blocking minority (four Member States).

More variety arises within the legislative procedures, due to a number of additional elements which may apply in several procedures, complementing their basic versions, in particular with regard to their legitimacy or efficiency. Many legal bases provide for a duty to *consult the Economic and Social Committee, the Economic and Financial Committee or the Committee of the Regions* in order to include their expertise and to broaden the basis of legitimation.

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<sup>1</sup> On the actual application of co-decision, see Armin von Bogdandy/Jürgen Bast/Felix Arndt, [Handlungsformen im Unionsrecht](#), 62 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 77, 137-9 (2002).

In addition, Article I-47 (4) introduces a new right of *petition* to initiate a legislative procedure where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution.

Further variety may result from the national parliaments' newly formalized role, as they can individually provide reasoned opinions on a proposed act.<sup>2</sup> All formal documents of the Commission, EP and Council during the legislative process are to be forwarded directly (i.e. not *via* the Council members) to the national Parliaments. The latter have six weeks to avail themselves of the new *ex ante* political *monitoring mechanism* for ensuring the effective application of the principle of subsidiarity: if national parliaments uniting a certain percentage of all the votes allocated to parliaments<sup>3</sup> give reasoned opinions on non-compliance with the principle of subsidiarity the draft must be re-examined (Art. 7 para. 3 Subsidiarity Protocol).<sup>4</sup>

To maintain Member State control, the European Council may determine the "*strategic interests*" of the Union for all areas of *external action* (i.e. including common commercial policy, Article III-293) and may thereby set guidelines before the actual legislative procedure begins, although, ostensibly, the European Council is not to acquire a legislative role as such (Article I-21(1)).

Finally, the CT specifies another group of exceptions to the co-decision rule, which may be roughly classed as legislation for the implementation of relatively specific CT articles. For example, co-decision will not be required for legislation to imple-

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<sup>2</sup> Treaty Establishing the Constitution for Europe, Article I-9, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT]; Articles 1 - 4 Protocol on the Role of the National Parliaments; Article 3 Subsidiarity Protocol.

<sup>3</sup> Usually a third but it is a fourth in Article III-264 CT.

<sup>4</sup> See Stephen Weatherill, [Better Competence Monitoring](#), 30 EUROPEAN LAW REVIEW (ELR) 23, 29 (2005); Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf*, 38 EUROPARECHT (EuR) 535, 546-7 (2003); Geneviève Tuts, *La Convention: plus de clarté, de transparence, d'efficacité et de démocratie pour l'Europe*, REVUE DE LA FACULTÉ DE DROIT DE LIÈGE 341, 359 (2004); Markus Ludwigs, *Die Kompetenzordnung der Europäischen Union im Vertragsentwurf über eine Verfassung für Europa*, 7 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEUS) 211, 221-4 (2004); Rupert Scholz, *Das institutionelle System im Entwurf eines Vertrags über eine Verfassung für Europa*, in DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 100, 105-6 (Jürgen Schwarze ed., 2004); Philipp Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 36 (Armin v. Bogdandy & Jürgen Bast eds., forthcoming October 2005); Franz C. Mayer, *Competences - Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 493, 502 (2005); Franz C. Mayer, *Die drei Dimensionen der europäischen Kompetenzdebatte*, 61 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 577, 605-7 (2001); Paul Craig, [Competence: Clarity, Conferral, Containment and Consideration](#), 29 EUROPEAN LAW REVIEW (ELR) 323, 343-4 (2004).

ment certain articles on the customs union,<sup>5</sup> competition law<sup>6</sup> and common agricultural policy.<sup>7</sup> These authorize the adoption of European regulations by the Council on a proposal of the Commission and provide for the EP to enjoy at most a right to be consulted. Sometimes the Commission may legislate on its own.<sup>8</sup> Accordingly, Article I-35 (2) generally provides for the adoption of European regulations and decisions by the Council, the Commission or the European Central Bank. In certain cases, specifically in CFSP (Article I-40), such powers may also be delegated to the Council alone.

In addition, regarding implementing legislation in nearly any field of EU activity, Articles I-36 and I-37 (2) retain the option currently found in Articles 202/211 EC to delegate appropriate powers to the Commission to supplement or amend certain non-essential elements of European laws and framework laws.<sup>9</sup>

Considerable plurality of legislative procedures thus becomes obvious.

### C. Criteria for the Attribution of Procedures to Competences

Before analyzing whether the procedural arrangements within the CT fit the competences to which they are attributed, three main criteria will be developed that should arguably underpin a well-founded attribution of procedures to competences in a multi-level system of legislation. These are, respectively: democratic legitimacy, transparency and efficiency.<sup>10</sup>

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<sup>5</sup> Article III-151 CT.

<sup>6</sup> Articles III-161 and III-162 CT (to be implemented according to Article III-163 CT).

<sup>7</sup> Within the CAP the Council shall, without consultation of the EP, adopt European regulations or decisions on the details of CAP (Article III-231 (3) CT); the Commission can fix certain countervailing charges (Article III-232 (2) CT; currently, Treaty Establishing the European Community, Art. 38, consolidated version Dec. 24, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]).

<sup>8</sup> Article III-166 (3) CT.

<sup>9</sup> On the quantity of delegated legislation, see von Bogdandy et al., *supra* note 1, at 139-42; Jürgen Bast et al., *Legal Instruments in European Union Law and their Reform*, 23 YEARBOOK OF EUROPEAN LAW 91, 126-7 (2004); Koen Lenaerts and Marlies Desomer, *Simplification of the Union's Instruments, in TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE* 107, 114 (Bruno de Witte ed., EUI-RSCAS/AEL 2003), available at <http://www.iue.it/RSCAS/Research/Institutions/EuropeanTreaties.shtml>.

<sup>10</sup> For similar criteria, see Peter-Christian Müller-Graff, *Strukturmerkmale des neuen Verfassungsvertrages für Europa*, 27 INTEGRATION 186, 187-8 (2004); Tuts, *supra* note 4, at 346.

### I. Democratic Legitimacy

In order to develop the requirements of democratic legitimacy, we should first consider the nature of the particular legislation that needs to be legitimized. Under the CT, the details of what kind of legislation is permitted continue to follow from the competences the latter is based upon. These competences can themselves be categorized on the basis of how far the relevant subject areas are integrated, i.e. have been moved to the EU level of responsibility, or how far they are intergovernmental, i.e. largely remain the domain of the Member States, with international co-operation being a matter for the governments. To some extent such a categorization needs to exceed that undertaken in Article I-12 and the following provisions.<sup>11</sup> As we shall see, different procedures are required in order to satisfy the ensuing different needs of legitimation.

#### 1. Categorization of Competences

On the basis of the supranational-integrative or intergovernmental-co-operative character of EU competences, and the resulting degree of integration achievable on their basis, the competences may be divided into three main categories, plus one additional one. These are, respectively, supranational-integrative, intermediate and intergovernmental-co-operational competences, plus competences for implementation. Which category a competence can be allocated to depends on the *effects of the legislative acts* (on the citizens and on the Member States) permitted by the relevant legal basis, and on the *aims and permissible scope and content* of such legislation; in particular the extent to which the subject area under regulation can be subject to EU legislation, how far EU legislation and Member State legislation interact, and in how far legislation has to be left to the Member States.<sup>12</sup>

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<sup>11</sup> The latter only provides a rather rough distinction based on the exclusivity or non-exclusivity of competences and does not as such consider the extent of integration achieved, nor is it fully consistent with the legal bases in Part III. See Christiane Trüé, *Das System der EU-Kompetenzen vor und nach dem Entwurf eines Europäischen Verfassungsvertrags*, 64 HEIDELBERG JOURNAL OF INTERNATIONAL LAW (HJIL) 391, 413 (2004). See also Weatherill, *supra* note 4, at 29-31; Stephen Weatherill, *Competence*, in TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE, *supra* note 10, at 45, 52; Martin Nettesheim, *Die Kompetenzordnung im Vertrag über eine Verfassung der Europäischen Union*, 39 EUROPARECHT (EUR) 511, 528 (2004); Matthias Ruffert, *Schlüsselfragen der Europäischen Verfassung der Zukunft*, 39 EUROPARECHT (EUR) 165, 189-92 (2004); Schwarze, *supra* note 4, at 542-6; Craig, *supra* note 4, at 326. For a more detailed classification, Armin von Bogdandy and Jürgen Bast, *Vertical Order of Competences*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 4, at 18; INGOLF PERNICE, *EINE NEUE KOMPETENZORDNUNG FÜR DIE EUROPÄISCHE UNION 6* (WHI-Paper 15/02), available at <http://www.whi-berlin.de/pernice-kompetenzordnung.htm>.

<sup>12</sup> In detail on the categorization of competences, see CHRISTIANE TRÜÉ, *SYSTEM DER RECHTSETZUNGSKOMPETENZEN* 97 (2002); see also Müller-Graff, *supra* note 10, at 193-4, Martin



First, as regards the *types of legislative acts* (Article I-33 (1)) permitted by the legal bases: their effect on the citizens and on the Member States differs.<sup>13</sup> *European laws, regulations and decisions* are to be directly applicable and to create direct legal relationships between the EU and the citizens. They are designed to regulate whole subject areas. If the making of European laws and regulations is permitted by a legal basis, this points towards a supranational-integrative competence.

By contrast, the relationship created by EU legislation may be more remote and indirect regarding the citizens, but may have more of an impact on the Member States and their ability to exercise their sovereign powers freely; in particular, Member State parliaments may be obliged to implement EU legislation. This effect will usually be achieved by *framework laws*; only in exceptional cases may these confer rights on the individual. In addition, citizens or Member States can be affected by a piece of legislation, even without a direct legal relationship, and with varying intensity, e.g. in environmental law. Legal bases permitting the making of framework laws may thus provide for a less integrative competence than those permitting European laws or regulations, but the competence will usually still exceed the intensity of integration inherent in *measures of cooperation*, in particular, due to its impact on the substantive law of Member States.<sup>14</sup>

However, depending on their content, European laws, regulations and framework laws as well as decisions<sup>15</sup> can also be instruments to bring about a mere *cooperation* of the Member States, or to complement or support their activities in certain subject areas. Accordingly, the types of acts permitted by the legal bases can only provide a starting point for categorization.<sup>16</sup>

In addition, therefore, *the aims and permissible scope and content*<sup>17</sup> of secondary legislation must be considered in order to establish the categories of competence, and

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Nettesheim, *Kompetenzen*, in *EUROPÄISCHES VERFASSUNGSRECHT* 415, 439-45 (Armin von Bogdandy ed., 2003).

<sup>13</sup> Also Conv/375/1/02 REV 1, Final Report WG V, 4 November 2002, p. 12-13, available under [www.european-convention.eu.int](http://www.european-convention.eu.int).

<sup>14</sup> Regarding the latter, see von Bogdandy et al., *supra* note 1, at 99.

<sup>15</sup> *Id.* at 103-4.

<sup>16</sup> On the current Treaties *id.* at 79; Jürgen Bast et al., *supra* note 9, at 93.

<sup>17</sup> See von Bogdandy and Bast, *supra* note 11, at 12-17 (with a distinction between empowering and standards-establishing provisions).

the corresponding requirements of legitimation. In general terms, the legal bases permit EU legislation either in pre-defined subject areas or in any subject area related to a defined aim to be pursued on a given legal basis (e.g. the functioning of the internal market); both may be subject to substantive restrictions.<sup>18</sup>

First, certain legal bases empower the EU to *make uniform law for given subject areas*. Here the resulting legislation will often be of direct application to the citizen, and thus serve to integrate the *subject areas* fully, possibly to the exclusion of the Member States (in so far this category corresponds to the category of exclusive competences in Articles I-12/13). Such subject area competences exist, e.g., for common commercial policy: regarding international trade uniform Community law replaces Member State law *en bloc*, but does not require intense interaction of EU and Member State law.<sup>19</sup>

By contrast, the second, intermediate group of EU competences (which forms part of the very diverse<sup>20</sup> category of “shared” competences in Article I-12) is characterized by an interaction of the EU and the Member States within the relevant subject areas. This indicates a less supranational-integrative approach; here the relevant legal bases do not usually permit the regulation of whole *subject areas*, but only of *certain issues* within the latter, and only to the extent that this is required for the pursuit of the objective defined in the legal basis.<sup>21</sup> EU framework laws may be used in order to oblige the Member States to adjust their legal systems to EU aims, whilst leaving the subject areas as such within the responsibility of the Member States. Internal market harmonization provides the main example: it means that the EU legislates in potentially all subject areas relevant to the functioning of the internal market, and requires the Member States to adjust their legal systems to the EU legal system. In effect, harmonized areas of law are usually regulated by Member State law; and the Member States have to ensure that it remains a consistent body of law. EU legislation will usually require the amendment of individual sectors or provisions, rather than a whole re-regulation of the area.<sup>22</sup> Such interactive law-

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<sup>18</sup> TRÜE, *supra* note 12, at 117; von Bogdandy and Bast, *supra* note 11, at 18-19.

<sup>19</sup> TRÜE, *supra* note 12, at 398.

<sup>20</sup> Craig, *supra* note 4, at 334-335; von Bogdandy and Bast, *supra* note 11, at 48.

<sup>21</sup> See Case C-376/98, Germany v. EP and Council, 2000 E.C.R. I-8419; Case C-377/98, The Netherlands v. EP and Council, 2001 E.C.R. I-7079; Case C-491/01, British American Tobacco, 2002 E.C.R. I-11453.

<sup>22</sup> von Bogdandy and Bast, *supra* note 11, at 28-29; Craig, *supra* note 4, at 334-335; Dann, *supra* note 4, at 8-10; PHILIPP DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 29 (2004). See also TRÜE, *supra* note 12, at 188.

making requires joint and well-adjusted legislation of both the EU and the Member States.

A third group, of even less integrative legal bases, tending towards the intergovernmental-cooperative end of the spectrum, only permits *complementation or support* of Member State activities, without the EU being able to require major or, indeed, any substantive amendments of Member State law. Such legal bases are those for EU contributions to Member State activity in the relevant field, still including limited harmonization, for example, contributions to environmental protection (also category of shared competences in Articles I-12/I-14), or excluding even limited harmonization, e.g. for contributions to the flowering of Member State cultures (category of complementary competences in I-12<sup>23</sup>). The least integrated legal bases within this category will only permit measures to bring about intergovernmental cooperation, whilst maintaining state control over the area, e.g. within the CFSP.

In addition to these three categories of legislation “proper,” a separate category of law-making competence can be established: the *competence to make implementing acts* where the main content and the essentials are pre-determined in the CT itself or in delegating secondary legislation.<sup>24</sup> The latter can be made on a legal basis from one of the three categories outlined above.

## 2. *Providing Democratic Legitimacy*

As already indicated, the different categories of competence outlined above appear to require different ways of providing for democratic legitimacy: all citizens or Member States, if affected by a legislative act, should be in a position to influence its content, the more directly they are affected, the more direct their influence should be.<sup>25</sup> On this basis it will be argued that supranational-integrative competences call for corresponding supranational-integrative legitimation. By contrast, the more competences tend towards the intergovernmental-co-operative end of the

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<sup>23</sup> Or “non-regulatory powers”, see von Bogdandy and Bast, *supra* note 11, at 31.

<sup>24</sup> See Part B. above.

<sup>25</sup> This is to include both individuals and collectives as sources for legitimacy. For details on theories of democracy, see Uwe Volkmann, *Setzt Demokratie den Staat voraus?*, 127 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 575, 582 (2002); Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 885, 890 (2004). With a preference for the individual-based approach, see Thomas Schmitz, *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union*, 38 EUROPARECHT (EUR) 217, 226 (2003). See also Petersen, in this volume.

spectrum, the more they will call for intergovernmental-co-operative legitimation.<sup>26</sup> At this point the question arises: what exactly is “supranational-integrative legitimation” or “intergovernmental-co-operative legitimation” with regard to the EU, and how is it provided?

The EU and its legislation are generally regarded as resting on two bases for democratic legitimacy (Articles I-1 (1), I-46).<sup>27</sup> On the one hand, citizens are represented at Union level as EU citizens by the directly elected European Parliament and, to some extent, by the Commission.<sup>28</sup> On the other hand, the Members of the Council, i.e. government ministers controlled by their home parliaments, represent their Member States and, indirectly, their people as a whole. They thus provide indirect legitimacy to EU acts, albeit each limited to his or her people.<sup>29</sup> The formal role for the national parliaments described above adds a new strand of legitimacy, addressing, on the side of the Member States, the problem of the shift from parliamentary to executive-governmental law-making in the Council.<sup>30</sup> How far this indirect legitimacy is fully provided depends on whether the Council decides by

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<sup>26</sup> For this approach, see LEONTIN-JEAN CONSTANTINESCO, RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 131 (1977); Paul Demaret, *The Treaty Framework*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 3, 4 (David O’Keeffe and Patrick Twomey eds., 1994); Siegfried Magiera, *Die Einheitliche Europäische Akte und die Fortentwicklung der Europäischen Gemeinschaft zur Europäischen Union*, in GEDÄCHTNISSCHRIFT FÜR WILHELM KARL GECK 507, 510 (Wilfried Fiedler and Georg Ress eds., 1989); Mayer, *Die drei Dimensionen der europäischen Kompetenzdebatte*, *supra* note 4, at 626.

<sup>27</sup> On the “dual dimension” of the EU, see Dimitris Tsatsos, *Die Europäische Unionsgrundordnung*, 22 EUROPÄISCHEN GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 287 (1995), Stefan Oeter, *Föderalismus*, in EUROPÄISCHES VERFASSUNGSRECHT, *supra* note 12, at 59, 88; Christian Calliess, *Demokratie im europäischen Staaten- und Verfassungsverbund 3* (Göttinger Online-Beiträge No. 14, 2004), available at <http://wwwuser.gwdg.de/~ujvr/europa/Paper14.pdf>; DANN, *supra* note 22, at 2, 15 and 43 (Council); *id.* at 279 and 363 (European Parliament); Dann, *supra* note 4, at 34 (based on his model of “executive federalism”).

<sup>28</sup> See Calliess, *supra* note 27, at 8-9; Jürgen Bröhmer, *Das Europäische Parlament: Echtes Legislativorgan oder bloßes Hilfsorgan im legislativen Prozess?*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEUS) 197, 205 (1999); Georg Ress, *Das Europäische Parlament als Gesetzgeber*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEUS) 219 (1999). More direct legitimation could be provided by the citizens themselves in referenda, but, as shown above, such direct legitimation is not provided for in the CT. See Dann, *supra* note 4, at 15 and 20-2 (on the limits of the EP’s powers and Commission legitimacy); *id.* at 16 and 22-7; DANN, *supra* note 22, at 306.

<sup>29</sup> On this problem, see Ress, *supra* note 28, at 221-24; MARCEL KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP 337 (1997); Dann, *supra* note 4, at 10-15; DANN, *supra* note 22, at 76-122.

<sup>30</sup> See, e.g., Müller-Graff, *supra* note 10, at 198; Ruffert, *supra* note 11, at 181-82; Oeter, *supra* note 28, at 100. On the limits, see Dann, *supra* note 4, at 35-39; DANN, *supra* note 22, at 163 and 269.

unanimity; decision-making by qualified majority voting tends towards the supranational-integrative as the outvoted Member States have agreed to accept the majority decision for the sake of membership and on the basis of the Treaties.

Consequently, one can distinguish between EU level legitimacy which is provided supranationally-integratively, mainly by the EP and to some extent also by the Commission, and legitimacy provided intergovernmentally by the Member States via their representatives in the Council. Each of the three legislative EU institutions is thus associated with a different form of legitimacy. The amount of democratic legitimacy provided by each varies according to the legislative procedure prescribed by the legal basis. Procedures will tend to be more supranational-integrative in proportion to the degree of influence accorded to the EP. By contrast, they will qualify as more intergovernmental-cooperative in so far as greater influence is accorded to the Council and, within it, the individual Member States.

In order to develop a more nuanced approach to the organization of the procedures, the relationship between direct EU level and indirect Member State level legitimacy, and the manner in which they interact, must be examined. Can they apply cumulatively, or are they mutually exclusive, but mutually substitutable in part?

A first glance at the two bases of democratic legitimacy identified above suggests that there is nothing to prevent cumulating direct and indirect legitimacy: the maximum of democratic legitimacy would be based on both the citizens as individuals and on the Member States as representing the collective identities of the citizens. Accordingly, for maximum legitimation, EU legislation would have to be issued by unanimity in the Council following involvement of both the Commission and the EP during the procedure, and, further, with final EP consent. Only unanimity in the Council provides full indirect legitimacy, and only equal involvement of the EP in the legislative process, with the opportunity to influence the content of the legislative act, gives full weight to the more direct legitimacy provided by the EP.

However, a second approach might be to see the two forms of direct and indirect democratic legitimacy as in opposition to each other. Of the amount of overall legitimacy achievable, its maximum could either derive from the indirect legitimacy provided by Member State parliaments and governments, *or* from the more direct legitimacy provided by the EP. This would take account of the fact that EU competence is, in many respects, bought at the expense of Member State power, which may also mean that legitimacy can come from one *or* the other source, but not from both at the same time.

If that is correct, a choice is required: the first solution would be to take an entirely state-based perspective, which is also based on legitimacy requirements such as the homogeneity of the electorate, the feeling of national solidarity, and equal value of votes. From this perspective, only the legislating institutions of the state can provide legitimacy, which would also be the maximum achievable. The Council would thus have to decide by unanimity, and the EP would be accorded no role at all, or only a complementary role, as in the consultation procedure.<sup>31</sup> From the opposite, euro-centrist perspective, the EP only, without the requirement of the Council's consent, should be the EU legislator, possibly with a complementary role for the national parliaments.<sup>32</sup> For the latter position one could rely on the fact that the EP is directly legitimated, and the only institution which represents the citizens as *European* citizens, and not as citizens of their Member States.<sup>33</sup>

However, there is a third possible approach. This is to regard EU and Member State legitimation as at least in part substitutable and thus able to replace each other: the part of legitimacy not provided by one is made up for by the other; for example, if a Member State is outvoted under qualified majority voting, the gap in indirect legitimation regarding its citizens could be filled by the more direct legitimation of the EP; the loss of legitimacy on one side is compensated by strengthening the legitimation by the other.<sup>34</sup> In fact, the CT can be seen to attempt just such a combination of both forms of legitimacy in the co-decision procedure. This approach of substitutability is also the most flexible one in order to provide legitimacy fitting the intensity of integration in the relevant area. However, strengthening the EP includes more centralization and less autonomy for smaller entities, thus also strengthening the dictatorship of the majority over minorities: minorities can be better protected in smaller entities.<sup>35</sup>

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<sup>31</sup> This is indeed the opinion of the German Federal Constitutional Court, as expressed in the *Maastricht* ("Brunner") decision. BVerfGE 89, 155. See KAUFMANN, *supra* note 29, at 224 and 337. For comments, see, e.g., RESS, *supra* note 28, at 219-20; THOMAS SCHMITZ, INTEGRATION IN DER SUPRANATIONALEN UNION, 94-6 (2001); OETER, *supra* note 27, at 93-107; DANN, *supra* note 22, at 281.

<sup>32</sup> Ruffert, *supra* note 11, at 181-82.

<sup>33</sup> On this approach, see SCHMITZ, *supra* note 31, at 492; Schmitz, *supra* note 25, at 217; RESS, *supra* note 28, at 221-22.

<sup>34</sup> See RESS, *supra* note 28, at 229; Calliess, *supra* note 27, at 7. Based on the concept of a plurality of overlapping (regional, state, supra-state) peoples, Schmitz, *supra* note 25, at 219.

<sup>35</sup> See SCHMITZ, *supra* note 31, at 95.

### 3. *Systematic Attribution of Procedures to Competences*

With regard to attributing procedures to constitution-making and to the three plus one main categories of EU competence established above, none of the ways of providing legitimacy outlined in the previous section seems wholly apt for all constellations of EU legislation. Rather, the different types of legitimacy and the options for their combination should match the different categories of competence, and procedures should be attributed to competences accordingly. One can identify the following main constellations.

Cumulative maximum legitimacy appears appropriate where the citizens are affected by the relevant rules both in their individual identities and in their collective identities as citizens of their Member States. This occurs, in particular, where a new, overarching entity is created or amended without replacing the existing ties of the citizens with the Member States. The obvious example is the adoption of the CT itself.<sup>36</sup> Otherwise, the model developed above, with its categories of competence on the one hand, and its identification of supranational-integrative and intergovernmental-cooperative legitimation on the other, can guide the building of groups:

The first *supranational-integrative category* of EU competence (where an integrative approach is followed that seeks to establish direct relationships between the EU and the citizens within a subject area, and/or aims at a uniform, directly applicable regulation of a subject area by EU law) would appear to require an equally integrated, relatively direct legitimation provided by the EP and the Commission, replacing any indirect legitimacy provided via the Council.

Second, the intermediate category of *competence between integration and cooperation* requires joint legitimation with equal influence of the EU (EP and Commission) and the Member States (Council), but not necessarily the cumulated legitimacy of a constitution. Here EU legislation interacts with Member State legislation in certain sectors, and influences its content. Such legislation occurs in types of EU acts with more of an indirect effect on the citizens, but a direct effect on the Member States. This does not create an additional need for legitimation exceeding the one previously present in the Member State alone, and part replacement of Member State legitimation by EU legitimation in the case of qualified majority voting appears acceptable within a framework of joint legitimacy, although this allows for a direct impact on the Member States' legal orders.<sup>37</sup>

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<sup>36</sup> Differentiating further in this vein, Schmitz, *supra* note 25, at 228-234.

<sup>37</sup> See Weatherill, *supra* note 4, at 49.

The third, *least integrated category of competences*, where the EU may only support, complement or co-ordinate Member State policy, requires legitimation by the Member States to be predominant. If there are some common concerns which may be furthered by coordination, complementation or support, the Member States should still hold the decisive power via the Council, with only complementary, if any, legitimation provided by the EP.

Finally, with regard to the *separate category of implementing acts*, the executive institutions either at EU level or at Member State level may be authorized to legislate within the framework of the relevant CT article or the empowering act, rather than the typical legislating institutions, in particular, the European Parliament or Member State parliaments. Legal bases for such implementing legislation have requirements of legitimation different from the three main categories; in particular, the essentials will have already been legitimized in the delegating act; this does not need to be duplicated.

In summary, as long as there are such different categories of competence, there cannot be any general rule as to the optimal balance between legitimacy provided by the EP and legitimacy provided by the Member States via the Council. The perfect balance will have to be elaborated for each legal basis individually. What emerges clearly, though, is that the co-decision procedure will not always be the most democratically legitimate procedure: by uniformly providing for dual democratic legitimacy, it accords the Member States influence over the direct relationship of the EU with its citizens, or the EP and Commission influence where only or predominantly the Member States are concerned.

## *II. Transparency*

Transparency is the second criterion which will be applied in assessing the manner in which the procedures are attributed to competences. Obviously, the easiest way to provide transparency would be to prescribe just one uniform legislative procedure involving a single legislating institution (parliament), as might be the case in a unitary state (not, however, in a federal state such as Germany).<sup>38</sup> However, if one accepts that at least some plurality of procedures is required in order to ensure democratic legitimacy in multi-level legislating systems, transparency must be achieved by alternative arrangements. The only way to achieve transparency whilst maintaining the current competences,<sup>39</sup> with their different needs for legitimacy,

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<sup>38</sup> See von Bogdandy et al., *supra* note 1, at 133-36.

<sup>39</sup> On the consequences of a strict delimitation of competences, see TRÜE, *supra* note 12, at 188 and 589; von Bogdandy and Bast, *supra* note 11, at 50; Mayer, *Competences – Reloaded? The Vertical Division of*



appears to be a limitation of procedures – or their basic versions – in number and complexity, laying these open as such, categorizing the types of competence systematically and consistently,<sup>40</sup> and matching the procedures equally systematically and consistently to the categories of competences. If the system becomes too complex, the present opaque state of affairs will continue.<sup>41</sup>

### III. Efficiency

Another principle for the organization of legislative procedures is efficiency. First, this concerns speed: it must be kept in mind that 25 or more Member States cannot usually decide by unanimity, negotiating until full consent in every detail is achieved. Neither can the EP or national Parliaments be granted unlimited time to arrive at their decisions. Time efficiency can be improved, though, by procedural variety, and in line with the legitimacy requirements outlined above: co-decision may be needlessly time-consuming where supranational decision-making without the Council would provide sufficient legitimacy. Similarly, delegated autonomous legislation, i.e. legislation where the EP has already decided in favor of the rule in the piece of legislation which forms the basis for the proposed act, does not necessarily require full democratic legitimation of the implementing provisions, and can be organized in a more time-efficient way (without the EP or unanimity in the Council).

Furthermore, ensuring the quality of legislation requires the involvement of experts and thus adds to the complexity of procedures; the current Treaties and the CT provide for the consultation of several committees. In addition, at least as far as interactive law-making by the EU and its Member States is concerned, legal experts from all Member States must be involved in order to prepare a smooth transposition of EU acts into the Member State legal orders. Efficiency thus requires the participation of the Member States, via the Council and its supporting bodies of experts, such as the COREPER.

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*Powers in the EU after the New European Constitution*, *supra* note 4, at 498; Udo Di Fabio, *Some Remarks on the Allocation of Competences Between the European Union and its Member States*, 39 COMMON MARKET LAW REVIEW (CMLR) 1289, 1298 (2002); Weatherill, *supra* note 11, at 46; Dann, *supra* note 4, at 36 (also regarding the matching consensual way of decision-making).

<sup>40</sup> On the defects of the CT here, see Mayer, *Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, *supra* note 4, at 496; TRÜE, *supra* note 12; Christiane Trüe, *EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents*, 59 JURISTENZEITUNG (JZ) 779 (2004).

<sup>41</sup> SCHMITZ, *supra* note 31, at 474-75.

#### IV. Preliminary Conclusions

It transpires from the above that legitimacy, transparency and efficiency cannot be achieved simultaneously to the maximum extent of each. Democratic legitimacy in the multi-level EU system cannot be perfect, and maximizing it requires variable and thus untransparent balances of procedural elements. As opposed to this, maximum transparency of procedures would require a reduction of procedures in number to just one, which would also have to be less complex. However, this would not satisfy the requirements of legitimacy and efficiency. On the other hand, democratic legitimacy requires transparency, as citizens can only legitimize, via their representatives, what they can understand.<sup>42</sup> Compromises between the three principles must thus be found.

#### D. Attribution of Procedures to Competences under the Constitutional Treaty

It now remains to assess whether the requirements identified in the previous section are met by the CT.

##### I. Democratic Legitimacy

As explained above, legitimacy regarding *supranational-integrative subject area competences* calls for a corresponding supranational-integrative EU legislative process. However, the relevant legal bases in the CT often provide for co-decision, to the effect that the Council maintains its control over legislation, albeit the control of individual Member States is mitigated by qualified majority voting. In addition, Member State influence will even be increased as a result of the formal involvement of national parliaments. Some justification for this may lie in the fact that it is the Member States' executives who have to ensure the administrative implementation and application of such law. Supranational EU legitimation would also appear most legitimate for acts on the direct relationship between the EU and its citizens, namely for the organization of the supranational institutions (EP and Commission). Indeed, specific procedures apply to *legislation* regarding the workings of *the European Parliament*: the EP has specific legislative powers, in particular, a right of initiative (Articles III-330, III-333, III-335 (4)). However, the Member States maintain a tight control over the emergence of a source of legitimacy potentially independent of their own: the Council's consent is required for the regulations and general con-

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<sup>42</sup> See Tuts, *supra* note 4, at 346 and 356. On the conflict of these principles, also DANN, *supra* note 22, at 6-7.

ditions and the rules on the temporary Committee of Enquiry.<sup>43</sup> Moreover, the Council decides on a uniform procedure for the elections to the EP by unanimity and with the consent of the EP.

Thus the CT fails to strengthen supranational-integrative legitimation and continues to rely on intergovernmental legitimacy where the former would be appropriate. This may, however, be justified by the – still existing – structural flaws of the EP, e.g., the lack of equality of votes in the EP.<sup>44</sup> In addition, considering the Member States' wish to remain masters of the Treaty, such an independent supranational development of the EU appears to be ruled out. A further strengthening of independent EU legitimation would arguably involve a change in the nature of the EU, which would begin to exist and legislate independently of the Member States, thus relegating their sovereignty to that of constituent states of a federal state.<sup>45</sup> In order to avoid this, and to ensure Member State control, administrative implementation by the Member States and legitimacy of the whole process of integration, co-decision or specific procedures with extra rights for the EP appear to be the maximum achievable at present.

As regards competence for *interactive law-making with a medium intensity of integration*, the joint democratic legitimation provided by the co-decision procedure is most appropriate. By providing for the latter the CT recognizes that joint legislation needs joint legitimation and expertise. However, there are exceptions: for example, tax harmonization is still a matter of unanimity voting within the Council in the consultation procedure: here the legislative procedure does not correspond to the need for combined legitimation.

For the *third, complementary category of competence*, co-decision does not appear to provide optimal legitimation. Rather, as argued earlier, procedures which allow more influence from the Council, and of the individual Member State within it, appear appropriate. This is because the influence of EU law on the citizen is usually indirect and only complementary, and the Member States retain the main responsi-

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<sup>43</sup> It was generally avoided to invest the EU with a legitimacy independent from the Member States, see von Bogdandy and Bast, *supra* note 11, at 36.

<sup>44</sup> See Dann, *supra* note 4, at 37-38; DANN, *supra* note 22, at 387; Calliess, *supra* note 27, at 18. Measured against state constitutions, see KAUFMANN, *supra* note 29, at 229.

<sup>45</sup> See Müller-Graff, *supra* note 10, at 196-8; see also Elisabeth Rumler-Korinek, *Kann die Europäische Union demokratisch ausgestaltet werden? Eine Analyse und Bewertung aktueller Beiträge zur "europäischen Demokratiedebatte"*, 38 EUROPARECHT (EUR) 327, 339-40 (2003). On the need for "consociational practices" to compensate for the lack of homogeneity and national subsidiarity, see Oeter, *supra* note 27, at 107-109.

bility for the relevant subject area. This is the case even where limited harmonization is permitted. Here full intergovernmental legitimacy would be catered for by unanimity rather than majority voting in the Council, whilst supranational legitimation would be required only to a limited degree. The latter may be needed in particular where the EU adds some supranational element to Member State activity, thus providing an overarching extra level of policy, possibly with a direct effect on the citizen, for example, by providing funds for student exchanges. For the latter co-decision, possibly with a unanimity requirement in the Council, appears appropriate based on the needs for legitimation. A concern which may explain the general move of complementary competences to co-decision was that citizens should perceive the EU, and particularly the EP, as something directly addressing their personal concerns. Personal engagement of the citizens is rather likely to occur in fields of such limited, complementary competences (environment, health, education, culture etc.) than in relation to the „cold“ internal market.

Intergovernmental *cooperation* in CFSP is now at least deemed able to exist within a uniform, consolidated Treaty framework,<sup>46</sup> but, in order to preserve the intergovernmental character of CFSP, the CT provides for separate CFSP institutions and instruments as well as for a specific, rudimentary legislative procedure, which requires an initiative from a Member State or a proposal of the Foreign Minister (Articles I-40 and I-41). The Council, as well as the European Council, usually decides by unanimity. The European Parliament shall only be consulted on the main aspects and basic choices of CFSP, and be kept informed of how it evolves. Here the intergovernmental character of the competence is mirrored very exactly in the procedure.

The distinction between legislative and non-legislative acts in Article I-35 and the following provisions facilitates the use of different procedures for the adoption of implementing legislation.<sup>47</sup> The requirements of legitimacy are usually fulfilled as long as delegated and implementing legislation remains within the limits set by the CT articles or by the “proper” legislative acts detailing the essentials. Leaving legislation to the executive institutions Council and Commission, to the exclusion of the EP, appears appropriate for implementing and executive law-making.

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<sup>46</sup> J. Kokott and A. R  th, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MARKET LAW REVIEW (CMLR) 1315, 1322 (2003).

<sup>47</sup> Previously Vedel-Commission, EC-Bull. Suppl. 4/1972; Art. 34 and following provisions; Draft Treaty 1984 of the EP; Commission, EC-Bull. Suppl. 2/1991, p.127.

## II. Transparency

Transparency has become an explicit requirement of the workings of the EU institutions, particularly regarding legislation (Article I-50). Moreover, an attempt has been made to improve transparency of the legislative process by making co-decision the “ordinary” procedure. However, rather than providing clarity this is deceptive: as shown above, considerable procedural diversity continues to exist.<sup>48</sup> If at all, the CT has made at best marginal progress in clarifying for the citizen “who does what in Europe.” At least the number of procedures has been slightly reduced; however, their complexity has rather increased due to the right of petition and the formalization of the role of national parliaments.<sup>49</sup>

The lack of transparency of the legislative process is, however, also due to the close institutional links between the EU and its Member States: the Council is a Union institution, but consists of representatives of the Member States.

## III. Efficiency

By extending the scope of the co-decision procedure the CT does not always improve time-efficiency. Legitimation by the Council, as well as the formal involvement of national parliaments, will nearly always be required under the CT, even where democratic legitimacy could be ensured appropriately by the EP alone.<sup>50</sup> However, the control of the individual Member State is mitigated by qualified majority voting, which ensures some efficiency, increasingly so due to the attribution of co-decision to further legal bases.<sup>51</sup>

A compromise between unanimity and qualified majority voting may also improve time efficiency: the “emergency brake system” introduced in the fields of social security (Article III-136 (2)) and criminal justice (Articles III-270 (3), III-271 (3)) appears to be a more efficient alternative to unanimity. It allows for a move from unanimity to majority voting, because it leaves to the Member States a last resort by which they can protect domestic systems regarded as particularly vulnerable. In

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<sup>48</sup> More optimistic Kokott and R  th, *supra* note 46, at 1324; Johann Schoo, *Finanzen und Haushalt*, in *DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS* 66 (J  rgen Schwarze ed., 2004).

<sup>49</sup> See Calliess, *supra* note 27, at 28.

<sup>50</sup> Pointing to the irreconcilability of exclusive competence and the cumbersome decision-making system, see von Bogdandy and Bast, *supra* note 11, at 22-3.

<sup>51</sup> See Tuts, *supra* note 4, at 355.

addition, the refining of majority voting by the 65-55%-rule, and the rule on the minimum number of States to make up a majority or a blocking minority, may have facilitated the move of some legal bases from unanimity to qualified majority voting. This appears to provide considerable protection for the individual states, whilst preserving efficiency and furthering equality in the representation of the citizens, and avoiding the blockade of the decision-making process. This improvement in time efficiency is limited to those legal bases which would otherwise continue to require unanimity in the Council; whether the co-decision procedure itself has become more time-efficient remains open to doubt.<sup>52</sup>

The legislative-non-legislative divide with a facilitated procedure for implementing and executing legislation is to be welcomed as an improvement in efficiency. It would indeed make democratic legitimacy ineffective and banal if involvement of the EP, the national parliaments, and the Council and Commission, were required regarding all the details of implementation. The introduction of this distinction has also opened up the possibility of moving the essentials of Common Agricultural Policy into co-decision, as it has removed the argument against that stemming from the number of purely implementing acts on the same legal basis (currently 37 EC) as legislation on the essentials.

### E. Conclusions and Prospects

The plurality of the legislative process continues under the CT. However, this plurality is justified to some extent, as far as it responds to the diverse needs of legitimacy and efficiency in relation to the different legal bases of EU competence, which authorize legislation ranging from the supranational-integrative to the intergovernmental co-operational. However, the CT fails to systematically attribute procedures to competences corresponding to their intensity of integration, and their ensuing different needs. Instead, the attribution of procedures to competences still appears to be the result of political pressure, towards increasing the influence of the EP and, at the same time, maintaining considerable Member State control over legislation. Thus the attributed procedures do not always match the character of the competences; it constitutes a certain *venire contra factum proprium* if a supranational competence is vested in the Union whilst leaving the legislative procedure intergovernmental. Even so, to some extent the procedures match the intensity of integration provided for by the legal basis, especially regarding the intermediate category of competence between integration and co-operation, and regarding implementing legislation.

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<sup>52</sup> Regarding the early warning mechanism, see PERNICE, *supra* note 11, at 22-4; Weatherill, *supra* note 4, at 31-33.

Thus, even if more by accident than design, some reasonable patterns emerge in line with the principles of legitimacy, transparency and efficiency. The attribution of procedures to competences thus answers the preamble's call, repeated by I-8, to be "united in diversity." However, the elements of unity, incorporated in the legal bases for supranational-integrative legislation, could have been supported further by adding a more supranational legislative procedure for the matching competences. Similarly, diversity within the EU could have been better protected by leaving more influence to the Member States, also via the Council, regarding the third category of competence.<sup>53</sup>

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<sup>53</sup> On the call of the CT for its own continuing reform, *see* Bast, in this volume.

## The Concept of the “Legislative” Act in the Constitutional Treaty

*By Alexander Türk\**

### A. Introduction

The constitutionalism<sup>1</sup> of the Community legal order as an evolutionary process of transforming an international organisation into a constitutional legal order has found its latest expression in the Treaty Establishing a Constitution for Europe.<sup>2</sup> This document evokes the language of the constitutional state when it refers to “this Constitution” in Article I-1 and expresses its gratitude to the “European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe.” However, ambiguity is not far behind. The length of the document resembles a carefully drafted prenuptial agreement rather than a constitutional text. Moreover, the reference to the Constitution cannot disguise the fact that it has been adopted as an international treaty in the usual procedure of an Intergovernmental Conference and will have to be ratified by each and every Member State to enter into force.

The same ambiguity seems to exist in case of the new concept of a “legislative” act in Articles I-33 and I-34 of the Constitutional Treaty. The use of the concept of a legislative act and the reference to a “legislative procedure” in Article I-34(1) are reminiscent of the language of constitutional states. On the other hand, the notion of a “special” legislative procedure in Article I-34(2) arouses the suspicion that the same ambiguity surrounding the Constitutional Treaty will surround its more specific parts. In order to elucidate the concept of a legislative act under the Constitutional Treaty, this paper will assess the concept of legislation in the national constitutional systems in Section B. This assessment will then form the basis of section C, in which an analysis of the concept of legislative act in the

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<sup>1</sup>See JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 221 (1999).

<sup>2</sup> Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) (hereinafter: Constitutional Treaty or CT). Articles without references are those of the Constitutional Treaty.



Constitutional Treaty will be undertaken. This section will also include a discussion of the consequences of the distinction between legislative and non-legislative acts, some of which are made explicit in the Constitutional Treaty. Other consequences could be expected to transfer from the existing case law of the ECJ under the EC Treaty.

## **B. The Concept of Legislation in National Constitutional Systems**

It can be observed that national constitutional systems apply a dual notion of "legislation."<sup>3</sup> Where legislation is used in a formal sense, it refers to a legal act that is defined by formal criteria. In this case a written constitution or an unwritten constitutional principle determines the procedure to be followed and the institution authorised for the adoption of such a legislative act. In the classical tradition of the principle of the separation of powers, the authority to adopt such acts is in principle vested in parliament, as the institution directly elected by the people.<sup>4</sup> However, a legislative act in the formal sense cannot be characterised merely by its adoption through the directly elected body, but by the legislative procedure, in which the directly elected body has a central, but not exclusive, position. The co-operative nature of the act allows various institutions, with different interests and loyalties, to scrutinise and to influence its content. The complexity of the process, its consensus-oriented approach, and the participation of a broad spectrum of interests explain why a legal act adopted in accordance with such a procedure, regardless of its content, enjoys a high degree of legitimacy, even if ultimately the will of the majority prevails. This is reflected in the legal privileges a legislative act in the formal sense enjoys.

National constitutional systems also consider legislative acts as legally binding rules which are of general application. This is supplemental to the concept of legislation in the formal sense. The classical separation of powers doctrine would also suggest that legislative acts lay down legally binding rules of general application.<sup>5</sup> In this view, the authority to adopt acts of general application is vested exclusively in the legislative authority. The increasing need for law-making, and the complexity of this task, made it clear that not all acts of general

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<sup>3</sup> For a detailed analysis of the British, French and German constitutions on the concept of legislation, see Alexander Türk, *The Concept of Legislation in European Community Law* (2004) (PhD thesis, University of London) in Part One.

<sup>4</sup> The reference to the directly elected institution is relevant for the qualification of acts adopted by institutions, other than parliament, that are directly elected. This is relevant to certain acts of the French President.

<sup>5</sup> See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* 61-64 (1992).

applicability could be decided in the legislative procedure, but that a substantial part must be adopted by the executive. In order to preserve the law-making authority of parliament, executive law-making usually requires an authorisation in the legislative act. However, national constitutional systems acknowledge autonomous law-making by the executive even though its extent might vary.

### **C. The Concept of a Legislative Act under the Constitutional Treaty**

#### *I. Legislation under the Constitutional Treaty*

Article I-33 stipulates that European Laws and European Framework Laws are to be considered legislative acts. Article I-33 makes it immediately apparent that European Laws and European Framework Laws are based on existing legal instruments. The *European Law* is in substance a Regulation and the *European Framework Law* a Directive within the meaning of Article 249 ECT. The use of existing terms is also evidenced in the category of non-legislative acts, which comprise European Regulations<sup>6</sup> and European Decisions. Recommendations and opinions have also been retained.

In contrast to the EC Treaty, which does not distinguish legal instruments in accordance with the procedure by which they were adopted, the Constitutional Treaty, without adding substantially new types of legal instruments, attempts a distinction of these instruments in legislative and non-legislative acts. Legislative acts are characterised by the procedure in which they are adopted. Article I-34(1) stipulates that legislative acts are adopted by the Council and the European Parliament, on a proposal by the Commission, in accordance with Article III-396, which replicates the existing co-decision procedure under Article 251 ECT. The principle of a different procedure as a distinguishing characteristic of legislative acts is, however, thrown into doubt by the provision of special legislative procedures under Article I-34(2). These procedures apply where specifically foreseen in the Constitutional Treaty. The special procedures provide for the adoption of legislative acts by the EP with the participation of the Council or by the Council with that of the EP. This of course raises the question whether the term "legislative" should be employed in these cases, in particular where the special legislative procedures are indistinguishable from those used for the adoption of European Regulations.

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<sup>6</sup> However, it should be noted that, quite confusingly, a European Regulation can be in substance a Directive or a Regulation within the meaning of Treaty Establishing the European Community, Art. 249, Nov. 10, 1997, 1997 O.J. (C340).

## *II. Justification for the use of Legislation*

The distinction in the Constitutional Treaty between legislative acts as a category of legal acts and non-legislative acts sets it apart from the EC Treaty and raises the presumption that legislative acts under the Constitutional Treaty correspond to legislation in form as employed in the constitutional systems of its Member States. However, it is doubtful whether the Constitutional Treaty establishes a state. Though prepared by a "Convention", the Constitutional Treaty was adopted in the procedure provided for by the Treaty on European Union for the amendment of its provisions. Following an Intergovernmental Conference, the new Constitutional Treaty was signed by the Heads of State or Government and is currently the subject of ratification in all Member States in accordance with their constitutional provisions. Moreover, the Constitutional Treaty lacks certain characteristics of the state, such as competence over direct taxation. Finally, it could be argued that the Constitutional Treaty does not, and could not, alter the absence of a *demos* in a Union that is still characterised by its cultural and linguistic diversity.

If the Union's Constitutional Treaty does not produce a constitution corresponding to those of its Member States, the use of the term "legislation" as the hallmark of the constitutional systems of states, might then be at best misguided, at worst a deception. However, as in the case of the Community legal system, the Union's Constitutional Treaty might legitimately use the term "legislation" if the term could be used in a functionally equivalent way to that employed in states. The following analysis will therefore focus on the nature of the Union's competences, the institutions, and the procedures for the adoption of legislative acts.

### *1. The Union's Competences*

Article I-11(1) provides, similar to Article 5 ECT, that the limits of the Union's competences are governed by the principle of conferral and that competences not conferred to the Union remain with the Member States. In a move to achieve "a better division and definition of competence in the European Union,"<sup>7</sup> the Constitutional Treaty establishes categories of competences in Article I-12. The Constitutional Treaty distinguishes between areas of exclusive competence; shared competence; co-ordination of economic and employment policies; the common foreign and security policy; and of supporting, coordinating or complementary action. This rationalisation of conferred competences is supported by the reinforced principles of subsidiarity and proportionality as limits on the exercise of Union competences.

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<sup>7</sup> Laeken Declaration, Dec. 15, 2001, available at: [http://www.europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://www.europa.eu.int/futurum/documents/offtext/doc151201_en.htm).

This competence order shows similarities with those of many federal states, all the more as the competences conferred on the Union remain as far-reaching, or even more so, as under the TEU. All the same, the nature of these competences would still be controversial. The new Constitution would presumably not alter the dictum of the *Bundesverfassungsgericht* (Federal Constitutional Court), which argued in its Maastricht decision that the Treaty on European Union established a "federation of States for the purpose of realising an ever closer union of the peoples of Europe (organised as States) and not a state based on the people of one European nation."<sup>8</sup> Additionally, the regulatory model<sup>9</sup> or the administrative model<sup>10</sup> of European integration would, in the absence of a European *demos*, deny that these competences are anything but delegated by the Member States. However, it seems a fallacy of these approaches to perceive the European *demos* in purely nation-state terms. It has been argued that "the *demos* that sustains the European integration project can be seen as constructive and multiple identity in that it is produced through the operation of the EU constitution, yet that production takes place on a base of a gradually transforming national identity."<sup>11</sup> Others have emphasised that the nation state still serves the important function of providing its nationals with a sense of belongingness, but that a European *demos* understood in civic terms would restrain "the in-reaching national-cultural *demos*."<sup>12</sup> This seems equally true for the Union under the Constitutional Treaty, which postulates the citizenship of the Union in Article I-10. If a European *demos* can therefore be constructed without recourse to state parameters, it should equally be possible to perceive the constitutional nature of the Union in non-statal terms.<sup>13</sup>

It can be argued that the nature of the Union rests on its systematic nature as a legal order.<sup>14</sup> Jurisprudential models, such as that of H.L.A Hart<sup>15</sup> or of trans-national

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<sup>8</sup> BVerfGE 89, 155 (para. 51).

<sup>9</sup> See GIANDOMENICO MAJONE, REGULATING EUROPE (1996); Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUROPEAN LAW JOURNAL 319 (2002).

<sup>10</sup> P.L. Lindseth, *Democratic Legitimacy and the administrative Character of Supranationalism: the Example of the European Community*, 99 COLUMBIA LAW JOURNAL 628 (1999).

<sup>11</sup> AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 160 (2002).

<sup>12</sup> Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUROPEAN LAW JOURNAL 219, 256 (1995). On a discussion of multiple *demoi*, see also WEILER, *supra* note 2, at 344-348.

<sup>13</sup> Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW 1, 2 (1993); VERHOEVEN, *supra* note 11, at 122.

<sup>14</sup> See VERHOEVEN, *supra* note 11, at 124 in relation of the nature of the European Union.

societal constitutionalism,<sup>16</sup> suggest that an autonomous legal order can exist beyond the nation state and therefore also within the Union. Therefore, the nature of the Union's competences does not *a priori* exclude the characterisation of legal acts adopted on the basis of such competences as legislation in form. However, because not all legal acts based on the Constitutional Treaty can be considered legislation in form, it is necessary to establish which of those acts can be regarded as legislation in form due to their characteristics. To that end, it is necessary to examine the institutions involved in Union law-making and the procedures which these institutions must follow to adopt such acts.

## 2. *The Union's Institutions*

None of the Union's institutions can be considered as representative on its own, in the traditional sense of a national parliament, of a European *demos*.<sup>17</sup> This would mean that the Union's law-making process would not be able to generate legislation in form. However, the major flaw of such a conclusion is, again, its inability to perceive the Union and its law-making process in any other way than by reference to state parameters. The democratic legitimacy of the Union can be constructed on the basis of an alternative model, which proceeds from the nature of the Union as "supranational integration project."<sup>18</sup> It is "a dynamic and ... relatively autonomous constitutional project, that ... rests on a constructive and multiple notion of *demos* and ... accommodates for a far-reaching differentiation while preserving constitutional unity."<sup>19</sup>

The Union has, as its constitutional core, its own set of values and objectives<sup>20</sup> which drive and determine the integration process. It is not characterised by the traditional view of national parliaments as representing the nation. Each institution

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<sup>15</sup> See MacCormick note 13; VERHOEVEN, *supra* note 11, at 296. See also Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUROPEAN LAW JOURNAL 259, 264 (1995) and Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUROPEAN LAW JOURNAL 225, 241-242 (1999).

<sup>16</sup> See the contributions in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges et al. eds., 2004).

<sup>17</sup> The possibility of constructing a European *demos* on the basis non-statal parameters, as outlined above, does not alleviate the concern on the limitation of a European public sphere. Therefore, and despite its enhanced role within the Union's legal order, the European Parliament cannot be considered as being equally representative as a national parliament.

<sup>18</sup> VERHOEVEN, *supra* note 11, at 362 in relation to the EU.

<sup>19</sup> *Id.* at 362.

<sup>20</sup> See Treaty Establishing the European Community, Arts. 2 and 3, Nov. 10, 1997, 1997 O.J. (C340).

represents a particular interest in the law-making process that allows the Union to form a system of functional representation. Despite its distinguishing features, similarities with the national system become apparent when bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making. The functional equivalent of legislation in form at the Union level to that of national legislation exists, where the Union institutions participate in the law-making process in accordance with the specific function they represent in the Union.

The Commission can be identified as promotional broker<sup>21</sup> to ensure the incorporation of diverse interests in the law-making process toward the attainment of a common European interest.<sup>22</sup> The Council represents the interests of the Member States in the law-making process.<sup>23</sup> This does not only reflect the desire of the Member States as signatories of the Treaty to protect their interests, but is also required as most of the Union acts are applied by the national authorities and therefore directly or indirectly affect national law. The European Parliament (EP) represents the citizens of the Union in the law-making process<sup>24</sup> and is best placed to protect minority interests and to provide a public forum of communication.<sup>25</sup> On this basis, the following subsection will examine which of the Union's law-making procedures could be considered as legislation in form by allowing an equal representation of these interests, in the law-making process.

### 3. *The Union's Legislative Procedures*

In contrast to the EC Treaty, the Constitutional Treaty designates in Article I-34 specific procedures as legislative. Article I-34(1) provides that European laws and European framework laws are adopted in accordance with the ordinary legislative procedure set forth in Article III-396. However, the Constitutional Treaty specifies that also other procedures shall be considered as legislative. Article I-34(2) stipulates that where the Constitution so states, European laws and European framework laws shall be adopted in special legislative procedures by the European Parliament with the participation of the Council or by the Council with the

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<sup>21</sup> Dietrich Rometsch & Wolfgang Wessels, *The Commission and the Council of the Union*, in THE EUROPEAN COMMISSION 213, 220 (Geoffrey Edwards & David Spence eds., 1997).

<sup>22</sup> See Treaty Establishing the European Community, Art. 26, Nov. 10, 1997, 1997 O.J. (C340).

<sup>23</sup> See Treaty Establishing the European Community, Art. 23, Nov. 10, 1997, 1997 O.J. (C340).

<sup>24</sup> See Treaty Establishing the European Community, Art. 20, Nov. 10, 1997, 1997 O.J. (C340).

<sup>25</sup> In the narrow sense that the EP provides a forum in which the arguments for and against legal acts are voiced, even though it might fail in the wider sense of providing a public sphere.

participation of the European Parliament. On the basis of the model of functional representation, the following subsection will assess whether these procedures can be regarded as leading to the adoption of legislation in form.

*a) Ordinary Legislative Procedure as Legislation in Form*

The ordinary legislative procedure in Article III-396 is a replication of the current co-decision procedure of Article 251 ECT. Article I-34(1) makes it clear that under the procedure legislative acts are adopted jointly by the European Parliament and the Council on a proposal of the Commission. The procedure thereby constitutes the basis for a joint effort by the EP and the Council, as both institutions need to reach agreement for the adoption of a legislative act. The ordinary legislative procedure allows the EP to protect minority interests that are otherwise not represented in the law-making process. In addition, the increased cooperation between the institutions will contribute to an intensive exchange of views,<sup>26</sup> which provides the EP with all necessary information to fulfil its function as a public forum. At first reading, the act will be adopted if the Council accepts all the amendments proposed by the EP.<sup>27</sup> This means that the adopted act reflects the discussion in the parliamentary committee and the plenary, where the proposals and the amendments are discussed in public. Moreover, the EP's Rules of Procedure make it possible for Council to appear before the EP's committees and to comment on draft amendments before the committee proceeds to a final vote. Where it adopts a common position, the Council, and the Commission, must comment on the common position.<sup>28</sup> The Council fulfils this obligation in writing.<sup>29</sup> Moreover Rule 76(2) of the Rules of Procedure of the EP makes it possible for the Council to present its common position to the committee responsible. Thereby the written communication can be supplemented by oral explanations. This shows that the EP is in full possession of the arguments before the Council and can, on this basis, provide a public forum for discussion on the issues before it. Where the Council does not accept the EP's amendments, the conciliation committee must be convened. Though the conciliation committee meets behind closed doors, the joint text, which might result from the conciliation committee, will be discussed in the EP in public. The presentation of these arguments in public reflects the spectrum of

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<sup>26</sup> RICHARD CORBETT ET AL., *THE EUROPEAN PARLIAMENT* 197 (2003).

<sup>27</sup> Until 2002, this happened in 25% of all co-decision procedures, *see id.*, at 186.

<sup>28</sup> *See* Article 251(2). *See also* Article 9(1)(a) of the Council's Rules of Procedure 2004, which provides for a publication of the results of votes, the explanation of votes and statements in the Council minutes and the items in those minutes in relation to the adoption of a common position.

<sup>29</sup> *See also* Rule 74 of the EP's Rules of Procedure.

the discussion and justifies the procedure to be considered as legislative.<sup>30</sup> It can therefore be concluded that the ordinary legislative procedure should be considered as legislative procedure, as it allows an equal representation and consideration of the relevant interests in the Union by the respective institutions. The EP is also in an adequate position to fulfil its public forum function in this procedure.

*b) Special Procedures as Legislation in Form*

The special legislative procedures to which Article I-34(2) refers are contained in Part III of the Constitutional Treaty. A survey of these procedures allows a classification into three different procedures. Where the Council adopts acts with the participation of the EP, the procedures require either the consultation<sup>31</sup> of the EP or its consent.<sup>32</sup> Where the European Parliament adopts acts with the participation of the Council, the procedures call for the consent of Council.<sup>33</sup> This raises the question which of those procedures should be regarded on the basis of the model of functional representation as legislative and which as regulatory.

The procedure in which the EP is merely consulted is indistinguishable from procedures under the Constitutional Treaty that lead to the adoption of European regulations,<sup>34</sup> i.e. non-legislative acts in the meaning of Article I-33(1)(4). It is therefore difficult to see on what grounds such procedures should be regarded as legislative. Under the existing consultation procedure in the EC Treaty, the EP often has, even considering its possibility of delaying matters, little influence over the outcome of the act adopted. What is more, it is doubtful that the EP can perform its public forum function in the consultation procedure. Under the existing regime, the Commission defends its proposal in the parliamentary committee responsible<sup>35</sup> and

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<sup>30</sup> It should be emphasised that a distinction has to be made between the deliberations on the one hand and the discussion in the parliamentary committees or in plenary on the other hand. It is not argued that the discussions that takes place in public in these *fora* reflect in their entirety the deliberations which take place informally between the EP and the Council, or the deals that are struck behind closed doors or in the corridors between the political groups. At public display are the arguments for and against a proposed act.

<sup>31</sup> Arts. III-125(2), III-126, III-127, III-157(3), III-171, III-176(2), III-184(13), III-185(6), III-210(3), III-234(2), III-251(3), III-256(3), III-269(3), III-275(3), III-277, III-393 sentence 4, III-424 sentence 1 CT.

<sup>32</sup> Arts. III-124(1), III-129, III-223(2), III-274(1), III-330 CT.

<sup>33</sup> Arts. III-390(2), III-333 sentence 3, III-335(4) CT.

<sup>34</sup> Art. III-163 CT.

<sup>35</sup> CORBETT ET AL., *supra* note 26, 119.



in plenary. This allows a discussion in committee and plenary on the Commission's proposal. Moreover, the Commission undertook to comment in plenary on all amendments and to justify its opposition to any amendments proposed. In addition, it has been willing to modify its proposals in the light of the EP's amendments. Furthermore, the EP has to be re-consulted in case of significant changes to the proposal.<sup>36</sup> In contrast, the Council's presence in the EP is much more limited. At the parliamentary committee stage, a representative of the Council's secretariat might be present; and at times someone from the Presidency is present.<sup>37</sup> This means that the major player in the procedure, the Council, is not involved in the discussions at the committee stage. Also, at the plenary stage, though the Presidency is represented, it rarely engages in the discussion. Moreover, the fact that the Council sometimes *de facto*<sup>38</sup> decided on the proposal before it has received the EP's opinion, reflects the limited influence of the EP and that the discussions in plenary do not adequately reflect the legal text to be adopted. The Council is not forced to defend its decision and therefore need not to engage in a debate with the EP. The objection is not so much that the deliberations are not public, but that the presentation of the arguments for and against the act is only offered from the EP's point of view, which is not even binding on the Council. The Commission cannot adequately reflect the views of the Council either. Due to the limited impact by the EP and the consequent limitations on the public display of arguments, it is not possible to consider the consultation procedure as a legislative procedure. Consequently the procedures under the Constitutional Treaty which allow the Council to adopt acts after a consultation of the EP cannot be regarded as legislative.

The procedure, in which the consent of the EP is required before the Council can adopt an act, is similar to the assent procedure under the EC Treaty. Introduced by the Single European Act and extended by the Maastricht and Amsterdam Treaties, the assent procedure requires the explicit approval of the EP before the Council can adopt the act. Even though the EP can withhold its assent for an indefinite period of time, it cannot submit amendments.<sup>39</sup> This, nevertheless, gives the EP sufficient influence, as its assent can only be gained by accommodating its view. The assent procedure takes place in one single reading in the EP, which seems sufficient to provide a public forum for a discussion on the merits of the act. In that respect, the

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<sup>36</sup> See Case C-388/92, *European Parliament v. Council*, 1994 E.C.R. I-2067.

<sup>37</sup> CORBETT ET AL., *supra* note 26, 119.

<sup>38</sup> These are decisions "in principle" or "subject to Parliament's opinion," see CORBETT ET AL., *supra* note 26, 176.

<sup>39</sup> See CORBETT ET AL., *supra* note 26, at 199.

assent procedure can be distinguished from the consultation procedure, as it reflects the act in its final version. It is therefore justified to qualify the procedure, in which the consent of the EP is required by the Constitutional Treaty, as legislative. Similarly, the procedure in which the consent of the Council is mandatory before the EP can adopt the act should be regarded as legislative.

### *III. Substantive Limitations*

Article I-33 has limited the typology of legislative acts to European laws and European framework laws. European laws are defined as acts of general application,<sup>40</sup> binding in their entirety and directly applicable in all Member States. European framework laws are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Both legislative acts are therefore modelled on the existing legal instruments of regulation (European laws) and directive (European framework laws) as set forth in Article 249 ECT. The recourse in the Constitutional Treaty to existing legal instruments will also entail continuity in their legal treatment.

This more restrictive approach, which seems to exclude the adoption of legislative acts of individual application, is surprising when compared with the approach taken in national constitutional law, where legislative acts are defined by the procedure through which they are adopted and usually do not contain any limitations as to their addressees. However, this approach corresponds to the rationale on which the characterisation of legislation in substance is based: legislation should be adopted in general and abstract terms to ensure the equal treatment of those subjected to its rules.<sup>41</sup> It should therefore not be drafted with the intention of dealing with the particular situation of, and with exclusive application to, specific individuals. European laws therefore combine the notion of legislation in form, due to the procedure by which the act is adopted, and that of legislation in substance.

### *IV. Scope of Legislative Acts*

Article I-33(1) provides that to exercise the Union's competences the institutions shall use the legal instruments offered in this provision in accordance with Part III. This means that the institutions cannot adopt legislative acts as a matter of course, but only where the provisions in Part III so dictate. A closer scrutiny of those

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<sup>40</sup> For a discussion of the concept, see Türk, *supra* note 3, at 89-198.

<sup>41</sup> *Id.*

enabling provisions of Part III reveals that many competences are not exercised by use of legislative acts, but rather that they provide for the adoption of European regulations by the Council,<sup>42</sup> the Commission<sup>43</sup> and the European Central Bank.<sup>44</sup> Article I-33(1)(4) states that a European regulation is a non-legislative act of general application which can be adopted for the implementation of the Constitution. In accordance with the definition in Article I-33(1)(4), a European regulation can correspond to either what is now a regulation or what is a directive under Article 249 ECT. In substantive terms European Regulations are therefore indistinguishable from European laws and European framework laws.

The reservation by the Constitutional Treaty of European regulations to certain areas does not seem to follow any particular logic, but seems to be driven by the desire of Member States to remove certain areas from the ambit of legislative acts. Even though this leaves the Constitutional Treaty with a considerable “legislative gap”, the approach of reserving certain areas to the adoption of European regulations seems preferable to the technique of camouflaging certain European laws and European framework laws as legislative acts, when they are merely regulatory acts. For it remains unclear why in some instances the Constitutional Treaty has opted for a European law adopted by the Council in the consultation procedure<sup>45</sup> and in other instances for a European Regulation adopted in exactly the same procedure.<sup>46</sup>

#### *V. Legal Consequences of the Concept*

The relevance of identifying legal instruments which can be characterised as legislation due to the procedure by which they were adopted lies in the legal consequences which follow from such a finding. It is submitted that the finding, that the Union’s institutions adopt legislation in form, must find its legal expression in the effects which the Constitutional Treaty attaches to such acts. First, the position of legislative acts in form is highlighted in the legal systems of the Member

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<sup>42</sup> Arts. III-130(3), III-151(5), III-159, III-160(2), III-163, III-167(3)(e), III-169, III-183(2), III-184(13), III-186(2), III-187(4), III-190(3), III-198(3), III-201(2), III-212(2), III-230(2), III-231(3), III-232(2), III-240(3), III-253, III-260, III-263, III-266(3), III-400(1) and (2), III-424(1), III-433 CT.

<sup>43</sup> Arts. III-165, III-166(3) and III-168(4) CT.

<sup>44</sup> Art. III-190(1) CT.

<sup>45</sup> See, supra note 32.

<sup>46</sup> See, e.g., Art. III-163 CT.

States by their specific form, as *loi*, *Gesetz*, or Act of Parliament. In contrast to the EC Treaty, which currently does not make such a distinction in Article 249 ECT, the Constitutional Treaty in Articles I-33 and I-34 enables the identification of legislative acts by their specific form as European Laws and European Framework Laws. However, it has been shown above that such a label is not justified for legal instruments that are adopted in the consultation procedure.

Second, legislative acts are granted a limited hierarchical supremacy over other legal instruments. The adoption of delegated European regulations under Article I-36 and of European implementing regulations, or decisions under Article I-37, requires the conferral of such powers in a legislative act. This also means that implementing acts may not exceed their legislative authorisation and may not be contrary to the provisions of legislative acts. However, legislative acts only enjoy such hierarchical superiority in the area in which they can be validly adopted. As the institutions can only use legislative instruments where the Constitutional Treaty so provides, legislative acts cannot take precedence outside their area of competence. It is doubtful whether the application of legislative acts can be extended by reference to Article II-112 of the Constitutional Treaty, which provides that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by the law". It would be inconceivable that the reference to law includes only legislative acts, but not non-legislative acts adopted on the basis of the Constitutional Treaty.<sup>47</sup> All the same, the link between legislative acts and fundamental rights protection is considered essential in many constitutional systems and its limited realisation in the Constitutional Treaty has to be regretted.<sup>48</sup>

Third, most constitutional systems require legislative acts to contain a certain minimum amount of detail to avoid the adoption of essential matters in non-legislative procedures. Even though the Court has consistently required that in the Community legal order the "basic elements of the matter to be dealt with"<sup>49</sup> have to be contained in the basic act, it has not enforced this requirement with great rigour.<sup>50</sup> The Constitutional Treaty in Article I-36(1)(2)(2) makes it clear that the

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<sup>47</sup> See Armin von Bogdandy & Jürgen Bast, *La Loi Européenne: Promise and Pretence*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* (Deirdre Curtin et al., eds.) (forthcoming, 2005).

<sup>48</sup> *Id.*

<sup>49</sup> Case 25/70, *Einfuhrstelle v. Köster*, 1970 E.C.R. 1161, para. 6. See also Case C-240/90, *Germany v. Commission*, 1992 E.C.R. I-5383, para. 36, and Case C-104/97P, *Atlanta and Others v. Council and Commission*, 1999 E.C.R. I-6983, para. 76.

<sup>50</sup> See Alexander Türk, *The Role of the Court of Justice*, in *DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC* 217, 224-227 (Mads Andenas & Alexander Türk eds., 2000).

essential elements of an area shall be reserved for legislative acts and cannot be the subject of a delegation of power. The Constitutional Treaty also imposes stricter requirements for the delegation to the Commission of the power to supplement or amend certain non-essential elements of legislative acts.<sup>51</sup> Article I-36(1)(2)(1) stresses that the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative act. On the other hand, less stringent conditions are demanded for the conferral of other implementing powers.<sup>52</sup>

Fourth, the relevance of legislation also has to be considered for the solution of certain legal issues in the decision-making process, in particular for the right of individuals to participate in the decision-making process. The legislative procedure has been characterised in this section as being based on a functional representation of the relevant interests. The participation of individuals would upset this institutional balance.<sup>53</sup> Conversely, acts that cannot be regarded as legislation in form cannot claim the same functional representation of interests in the procedure by which they are adopted. The participation of individuals, which are specifically affected by such acts, even if they are based on the Constitutional Treaty, should therefore not be denied.<sup>54</sup>

Fifth, in the field of general principles of law, the concept of legislation will be relevant for the margin of review the Union's judiciary can exercise. It is submitted that the deference of the Court of Justice<sup>55</sup> to the political institutions, to which the Community Courts currently allot a generous portion of discretion in the exercise of their powers,<sup>56</sup> would continue to be justified in relation to legislation in form due to its specific procedural characteristics.

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<sup>51</sup> See Art. I-36 CT.

<sup>52</sup> See Art. I-37 CT.

<sup>53</sup> However, see Arts. I-46(1) and (2) CT..

<sup>54</sup> See Case C-104/97P, *Atlanta AG and Others v. Council and Commission*, 1999 E.C.R. I-6983, paras. 37 and 38 and Joined Cases C-48/90 and C-66/90, *Netherlands and Others v. Commission*, 1992 ECR I-565, in which the Court seemed to have accepted a right to be heard, where the individuals are directly and individually concerned.

<sup>55</sup> The term Court of Justice is used in the meaning of Article I-29(1) CT.

<sup>56</sup> The application of such marginal review is not entirely consistent. On the link between the nature of the act and the margin of review of the Community Courts, see on fundamental rights: PAUL CRAIG & GRÁINNE DEBÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 323 (2003). On proportionality: see Francis Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in *THE PRINCIPLE OF PROPORTIONALITY*, 20 (Evelyn Ellis, ed., 1999); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 89-123 (1999); Gráinne DeBúrca, *The Principle of Proportionality and its Application in EC Law*, 13 *YEARBOOK OF EUROPEAN LAW* 105, 111 (1993); on equality: TRIDIMAS (above), at 57.

Sixth, the concept of legislation is also relevant under Protocol 1, Article 2, which obliges the Union institutions to forward to the national parliaments draft legislative acts<sup>57</sup> originating from these institutions or Member States. This allows national parliaments to scrutinise such acts as to their compatibility with the principle of subsidiarity in accordance with the procedure laid down in Protocol 2. In addition Article 2 of Protocol 2 obliges the Commission to consult widely before proposing legislative acts.

Finally, the concept of legislation is also relevant in the field of judicial review. Article III-365(4) of the draft Constitution has taken into account the dichotomy between legislative acts and non-legislative acts by allowing private parties to challenge legislative acts only under the strict test of direct and individual concern, while at the same time relaxing the conditions for challenges to regulatory acts. It is submitted that the concept of regulatory act, which is not referred to elsewhere in the Constitutional Treaty, should be understood as a non-legislative act of general application. The view that regulatory acts should include any legal act of general application<sup>58</sup> is difficult to reconcile with the new nomenclature used in the Constitutional Treaty, which carefully distinguishes between legislative and non-legislative acts. However, a privileged position for Union acts seems justified only for those legislative acts that correspond to the notion of legislation in form, as discussed above. In accordance with the right to an effective remedy,<sup>59</sup> the concept of "regulatory" act has to be interpreted widely and should therefore also include those legislative acts that cannot be considered as legislation in form.

#### **D. Conclusion**

The Constitutional Treaty has not created a state, but operates within its provisions the vocabulary of the constitutional state. Its use of the language of the constitutional state is therefore to be regarded at best as ambitious, at worst as misguided. On the other hand, the language of the administrative state that pervades the Community legal system would have also been inadequate for a legal system that began to constitutionalise itself long before the Constitutional Treaty was adopted. The dilemma for the Constitutional Treaty to find language suitable for its nature is compounded by the fact that it attempts to combine areas that have

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<sup>57</sup> The definition in Article 2 of Protocol 1 and equally in Article 2 of Protocol 2 of a draft legislative act refers to proposals or initiatives that lead to the adoption of European legislative acts, a term that encompasses European laws and European Framework laws in accordance with Article I-33(1) CT.

<sup>58</sup> See von Bogdandy & Bast, *supra* note 47.

<sup>59</sup> Art. II-107 CT. See also the discussion in Case C-50/00P, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677 (opinion of AG Jacobs).

seen a different pace of integration. This fate is also shared by the concept most central to the constitutional state, that of legislation. It is not surprising that the Constitutional Treaty is not able to deliver on the expectations it raises in that respect. The Union is not a state which is based on the representation of its people in a parliament that makes the law. Instead, it constitutes an autonomous constitutional system, which is based on the principle of functional representation. It has been argued in this paper that this does not exclude the use of the concept of legislation within the Constitutional Treaty, merely that its foundations are not to be found in a representative parliament, but rather in the fact that the law-making process reflects the representation of the interests of the Union, its Member States and its citizens. This, it has been argued, has been realised in the ordinary legislative procedure and in the special procedure where either the Council or the EP must consent to the adoption of a legislative act. On the other hand, such considerations exclude the use of legislation for acts adopted in the special legislative procedure during which the EP is merely consulted and which cannot be distinguished from the many provisions that provide for the adoption of European regulations.

The diversity of areas in which the Union exercises its competences and the intention of Member States to limit the participation of the EP in certain areas to consultation, made it inevitable that the concept of legislation can create unity only to a limited extent. The Constitutional Treaty falls short of unity in this respect, as the concept of legislation cannot be legitimately employed for areas where the EP is merely consulted and is not used in the numerous areas, as where the Council adopts European regulations for no other reason than that to limit the role of the EP. Moreover, this also means that in various areas fundamental rights can still be limited by non-legislative acts, thereby failing to establish a link between Part II of the Constitutional Treaty and the concept of legislation. This also has as a consequence that legislative acts can only exercise their hierarchical supremacy over regulatory acts within their area of competence.

All the same, even though the definition of legislative acts is not entirely convincing and their exclusion in certain areas of Union law is regrettable, the distinction between legislative and non-legislative acts serves an important function. Legislative acts due to their special procedural characteristics ought to enjoy certain privileges, which come to the fore in the decision-making process and in relation to judicial review. The concept of legislation does fulfil a useful role, however, only if it is considered to be merely borrowed by the Constitutional Treaty from the constitutional state for the purposes of trans-national European governance and does not purport to serve as tool in a constitutional state.

## ***Comment on Alexander Türk - The Concept of the “Legislative Act”***

*By Barbara Mielnik\**

I would like to present some general remarks on the problem of the concept of a “legislative” act in the Treaty establishing a Constitution for Europe<sup>1</sup> presented by Alexander Türk. All of these opinions are connected with the presentation and the Constitutional Treaty as such.

First, there are questions on terminology. Is one allowed to use terminology connected with internal law when the problems of international law or European Union law are considered? Is it possible to describe different events (acts of law) by the same terms?

Community Law in general, as was stated by the European Court of Justice, is a specific legal order. That means that this international system possesses its own legal instruments which are characteristic (typical) for this legal order. Moreover, we cannot analyze those existing instruments, or those which will be provided in the future, in the manner we used to in internal and international law. Therefore, I contend that it is not the best solution to look for compatibility of the Constitutional Treaty with the national legal order, especially in the area of legal acts and legislative procedures. This would be allowed only if we found answers to the questions: what the European Union is and what will happen after the Constitutional Treaty enters into force.

Article I of the Constitutional Treaty points out that EU is created by the will of European citizens and the Member States. There are no general characteristics associated with this new body. For us it ought to be obvious: the European Union is nothing more than an international organization. We can add that this system undeniably possesses special prerogatives. However, it does not matter which

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<sup>1</sup> Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) (hereinafter Constitutional Treaty or CT).



theory we will develop, for even at this stage of integration the biggest influence on the existence of this organization remains in the hands of the Member States. Of course the European Union will possess, thanks to the creators of the Constitutional Treaty, its own identity, international personality and competencies, but what has been pointed out: the Member States are still the main actors in this system. The role played by other actors on this stage is very limited.

Member States also play a fundamental role in the legislative procedure: if a Member State says “no”, no legal act would be accepted. This could be crucial, especially in those “sensitive areas” where the interest of a Member State might be of great importance for the society. The influence on the legislation by the European Parliament is undeniable, but limited.

The Constitutional Treaty provides some changes in the legislative procedure. It changes some things to which we have been accustomed. Many people don't know why the Constitutional Treaty contains new names for legal acts proposed. What could be even more stressful: the catalogue of legal acts is supplemented by new acts which have the old names. Nevertheless, the aim of this reform was to create a more effective system. But during the initial period it could be the cause of unnecessary confusion – even for the Court of Justice. I just wonder if this is not a cosmetic reform which may cause problems, rather give than solutions.

The European Commission, as was pointed out in the presentation, will play the dominant role as the institution which initiates the legislative procedure. But even in this area there are some exceptions in favor of Member States, European Parliament, ECB and EIB (Art. 1-34(3) CT). So the position of the European Commission as the only body responsible for the initiation of legal procedure is somewhat weaker than in the past. But these changes are justified if we consider new areas of the European Cooperation introduced by the Constitutional Treaty.

The role of the European Parliament is almost the same as it was in the former treaties. Therefore, in my opinion, the EP is not a truly legislative body in the narrow or strict meaning of this term. First, the EP lacks legitimacy to do so (to legislate) and lacks competencies as well. Its functions are still mainly consultative and monitoring. Of course, its role is very important but ... sometimes I agree with the English lawyers that the EU would act the same without EP, because the final decisions belong to Member States.

Now I would like to analyze briefly the problem of whether it is necessary to change the place where these acts are adopted, especially the idea of making the entire procedure more “democratic”. In my opinion it is not becoming so. The European Parliament, as has been pointed out, is a forum of communication –

whatever that means. It is very difficult to define "demos" or something like European demos, especially if this idea is considered on the basis of common values, rights and interests. It is more a philosophical problem than a legal one. The establishment of the European Union Citizenship is a fact and could help to develop or create the "European Nation" in the future, but I have an impression that, at present, Union citizens are not thinking about the realization of common European interests or the introduction of the new dimension of the Union. Even the common action taken, occasionally in the forum of the European Parliament, often collapses when it is contrary to the national interests of deputies.

The last organ in this system is the Council of Ministers; the role of this organ is undeniable as a main factor which is responsible for the adoption of the European legal acts. The decision-making system in this institution was changed in favor of minority voting, which seems to be proper for the organization exercising its power mainly in economic areas. Nevertheless I think that in the Constitutional Treaty the idea of transparency goes too far. The introduction of public meetings of the Council could lead to many problems. I would not like to analyze the whole idea of transparency, nor the necessity of providing some form of public control over the work of the Council. But I think that at this level of cooperation, it could be simply dangerous for the effectiveness of the Union. It could even stop the work of the entire organization as such. Personally, I would like to see the British Minister agree on some limitation on fisheries, the French and German Ministers agree on the freedom to provide services, and the Polish Minister to agree on limitation of quotas for agriculture. I fear that very sensitive areas of national interest, which could be simply adopted behind closed doors, would be very rare and only occasionally accepted in public. Although we could hope that the European interest will win, but also we may sometimes be witness to a form of public political suicide committed by some politicians. This behavior by the Council could provide more political character to those meetings; especially during national elections. At the Union level it could lead to a lack of flexibility. This last condition was a very important factor provided by the Amsterdam Treaty.

Conclusion: the concept of legislative acts presented is quite different than that provided in national law, which appears obvious because the EU is still an international organization and a special international legal order. Unfortunately, the language used in the Constitutional Treaty is borrowed straight from internal legal orders, which could lead to some misunderstandings. We must stress that such terminology has differing meanings and dimensions. Some changes in this area could present a challenge for the theory of law as it is. Unfortunately, the creators of the Constitutional Treaty have created a special legal order without its own terminology.



## The Emperor's New Clothes: The ECB and the New Institutional Concept

By Timo Tohidipur\*

*"If your Imperial Majesty will be graciously pleased to take off your clothes, we will fit on the new suit, in front of the looking glass."\*\**

### A. Introduction

Taking a look at the ECB of today means, to a certain extent, rethinking the emperor's idea. The European Central Bank is independent and seems almost untouchable in its field of responsibility. Its self-image is stamped by its special status outside the institutional structure of the European Union. However, the indefeasibility and with it the self-conception of the ECB was finally questioned by the European Court of Justice. The Treaty establishing a Constitution for Europe designs a new institutional setting and possibly constitutes a new understanding. The question is to what extent does this new institutional setting redefine the special status of the ESCB and the ECB, and how does it affect questions of democratic accountability and legitimacy.

### B. Institutional Standing *de lege lata*

#### I. Monetary Union and its Institutional Framework

##### 1. Aspects of the System

While the original idea of a monetary union goes back to 1969,<sup>1</sup> the revival of the monetary union project in the second half of the 1980s finally resulted in the establishment of the European Monetary Union as laid down in the Maastricht

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\*\* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (1837).

<sup>1</sup> See MICHEL CLAPIÉ, INSTITUTIONS EUROPÉENNES 239 (2003); ANTHONY ARNULL ET.AL., EUROPEAN UNION LAW 522 (4th ed., 2000).

Treaty in 1991. On 1 January 1999, eleven European countries transferred their monetary sovereignty to the ECB, and since then the ECB has conducted the single monetary policy for the so-called "euro area."<sup>2</sup> Yet still, economic policy remains within national competence. The European Monetary Union itself is strongly connected to the idea of a single market in the European Union. Such a single market possibly requires a monetary union, and surely both require firm institutional foundations.<sup>3</sup> The institutional framework for the European Monetary Union is the European System of Central Banks (ESCB), as mentioned in Art. 8 and 107 EC. The ESCB is made up of the national central banks of the participating member states with the ECB itself at the center. The federal conception of the ESCB is obvious, constructed with the old German federal bank system as a role model,<sup>4</sup> but with a more decentralized approach.<sup>5</sup> The conceptual approach of the contracting parties - the member states of the euro area - was the creation of a composite institution with the ESCB as responsible actor of the monetary policy.<sup>6</sup> The execution and operation of monetary policy is broadly decentralized within the ESCB while the formulation of monetary policy is in fact centralized within the ECB.<sup>7</sup> This fact corresponds with Art. I-30(2) CT, whereby the ESCB "shall be governed" by the decision-making bodies of the ECB. Pursuant Art. 12(1) of the ECB-Statute the ECB shall have recourse to the national central banks to conduct operations, which form part of the duties of the NCBs such as open market operations or the production of EURO banknotes and coins. Meanwhile, the ESCB is the institutional framework, only the ECB (and the NCBs certainly) has its own

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<sup>2</sup> The EURO is not the common currency of the European Union but the mutual currency of the (now 12) member states that have joined the euro area, see Hugo J. Hahn & Ulrich Häde, *Die Zentralbank vor Gericht*, 165 ZEITSCHRIFT FÜR DAS GESAMT HANDELS- UND WIRTSCHAFTSRECHT 30, 32 (2001); EUROPEAN CENTRAL BANK (ED.), THE MONETARY POLICY OF THE ECB 9 (2004), <http://www.ecb.int/pub/pdf/other/monetarypolicy2004en.pdf>

<sup>3</sup> TOMMASO PADOA-SCHIOPPA, THE ROAD TO MONETARY UNION IN EUROPE 2 (2d ed., 2000).

<sup>4</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 695 (3<sup>rd</sup> edition, 2003); Paul Magonette, *Towards "Accountable Independence?" Parliamentary Control of the European Central Bank and the Rise of a New Democratic Model*, 4 EUROPEAN LAW JOURNAL 326, 328 (2000).

<sup>5</sup> Christian Seiler, *Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund: Systemgebundene Aufgabenerfüllung durch eigenständige Kompetenzträger*, 1 EUROPARECHT 52, 54 (2004).

<sup>6</sup> HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK - HISTORY, ROLE AND FUNCTIONS 42 (2004); Christian Seiler, *Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund: Systemgebundene Aufgabenerfüllung durch eigenständige Kompetenzträger*, 1 EUROPARECHT 52 (2004); Martin Seidel, *Im Kompetenzkonflikt: Europäisches System der Zentralbanken (ESZB) versus EZB*, 18 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 552 (2000).

<sup>7</sup> Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MKT. L. REV. 575, 589 (2004); DIETRICH RÜMKER, AUSWIRKUNGEN DES EURO AUF DEN EUROPÄISCHEN FINANZMARKT: WÄHRUNGSPOLITISCHE UND RECHTLICHE ASPEKTE 5 (1999); ARNULL ET. AL., *supra* note 1, at 534.

legal personality, Art. 107(2) EC. Therefore, the components of the ESCB are the legal persons and the real actors of the EURO-System.<sup>8</sup>

## *2. The Core of the System*

While the ESCB sets the institutional framework, the ECB is undoubtedly the core of the institutional system.<sup>9</sup> The ECB is an independent supranational “organization” with extensive powers and at first sight not embedded within a larger network of governing institutions.

In its Convergence Report of March 1998, the European Monetary Institute (EMI), the predecessor of the ECB, had further specified the concept of independence in the Treaty: “financial, personal and institutional independence” must be guaranteed.<sup>10</sup> The most notable feature of the institutional structure of the ECB is that its statute makes the ECB one of the most politically independent central banks in the world by granting full constitutional independence.<sup>11</sup> According to Art. 108 EC the ECB cannot “...seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body.”

The ECB has an Executive Board, composed of a President, a Vice-President, and four other members, who are experts in monetary and banking matters, together with a Governing Council, which consists of the Executive Board and the Governors of the national central banks of the euro area.

The institutional independence is reinforced by the guarantees of an entirely independent budget and personal independence of members of the Executive Board and of the Governing Council. However, the president of the ECB is appointed by the Heads of State and Government, thus every member state sends one delegate to the Governing Council – so the nomination exercise may be criticized as too close to the practice of International organizations.<sup>12</sup> But apart from that selective nomination, the Member States have no direct access to monetary policy of the ECB.

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<sup>8</sup> SCHELLER, *supra* note 6, at 41.

<sup>9</sup> Louis, *supra* note 7, at 41.

<sup>10</sup> *EMI Convergence Report required by Article 109j of the Treaty establishing the European Community*, 291-295 (1998); *see also* CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 41 (2005).

<sup>11</sup> Kathleen McNamara, *Managing the EURO: The European Central Bank*, in *THE INSTITUTIONS OF THE EUROPEAN UNION*, 164, 173 (John Peterson & Michael Shackleton eds., 2002); OTMAR ISSING, *THE ECB AND THE EURO: THE FIRST FIVE YEARS* 58 (2004).

<sup>12</sup> JÜRGEN HARTMANN, *DAS POLITISCHE SYSTEM DER EUROPÄISCHEN UNION* 38 (2001).

The modification of the ECB's statute would require an amendment to the EC-Treaty, which can only occur with the unanimous agreement of all Member States and ratification by all national parliaments.<sup>13</sup>

Nevertheless the separation of the ECB from the political process of the European Union is not complete, for the ECB is partially linked to political bodies of the EU. According to Art. 113 EC, the President of the Council and a member of the Commission may participate in the deliberations of the Governing Council of the ECB and may submit motions for considerations, but are unable to vote.

In return, "the President of the ECB shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB."<sup>14</sup> The ECB also has a right to be consulted by other legislative authorities, both at the community and the national level, on any draft measure in its field of competence,<sup>15</sup> which has been frequently practiced.

Furthermore, the ECB has to fulfill its obligations regarding the principle of transparency by issuing retrospective annual reports on its activities. The ECB president is obliged to give quarterly reports to the European Parliament, but the Parliament is not authorized to give instructions to the ECB. Moreover the President of the ECB or any member of the Executive Board may be heard by the relevant committee of the European Parliament if requested by the European Parliament or the ECB itself.

Given the absence of effective monitoring, one has to trust that the ECB will pursue policies in accordance with its mandate and that the outcome will benefit the European Union as a whole. While the ECB sets monetary policy for the entire euro area, there is no equivalent economic institution that may balance the policies pursued by the ECB. Budgetary and fiscal policies remain to be pursued by the governments of the Member States.

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<sup>13</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW*, 695 (3<sup>d</sup> ed., 2003); Amy Verdun, *Economic and Monetary Union*, in *EUROPEAN UNION POLITICS* 320, 326 (Michelle Cini ed., 2003)

<sup>14</sup> Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C340) 113(2) [hereinafter EC Treaty].

<sup>15</sup> EC Treaty art. 105(4).

## II. Self-conception of the ECB – the Emperor’s Story

Regarding its self-conception, the ECB could be seen as an organization *sui generis* – an “independent specialized organization of Community law,”<sup>16</sup> a kind of “new Community.” It has its own legal personality, broad independence from any other institution of the EU (even the EU itself), and sole responsibility of the EURO, including law-making responsibilities.

### 1. Formal Criteria

The *sui generis* idea has its basis in the specific status of the ECB in the Founding Treaties. The ECB is not listed in Art. 7 EC, the general provision regarding Community institutions, but has its own Art. 8 EC, which established the ESCB and the ECB. Furthermore, the ECB is again not listed in part five of the TEC which is entitled “Institutions of the Community.” The ECB is therefore omitted from the typical institutional structure of the European Community. The ECB is also not included in the so-called “single institutional framework” established through Art. 3 EU.<sup>17</sup>

Bearing in mind this special status, the ECB aims to position itself next to the European Community and not as a part of it. The separate legal personality of the ECB is a key difference between this institution and other entities, which are able to represent the European Union only by acting on the Union’s behalf and in its name. The ECB is thus in a position, *inter alia*, to conclude agreements under public international law and to participate in the work of international organizations such as the International Monetary Fund, the Organization for Economic Cooperation and Development (OECD), and the Bank for International Settlements. Furthermore, the ECB must be treated as a legal person in each Member State of the European Union and may acquire or dispose of movable and immovable property, as well as be party to any legal proceedings.

The ECB’s resources are provided exclusively by shareholder contributions from the national central banks and from income generated by the performance of the ECB’s and the national central banks’ business and allocated in accordance with Articles 32 and 33 of the Statute. The ECB receives no funds from the Community budget, meaning that its operating budget does not form part of the general budget

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<sup>16</sup> Chiara Zilioli & Martin Selmayr, *The European Central Bank: An independent specialized organization of Community law*, 37 COMMON MKT. L. REV. 591-644 (2000).

<sup>17</sup> Deirdre Curtin, *The constitutional structure of the European Union: a Europe of bits and pieces*, 30 COMMON MKT. L. REV. 17, 28 (1993); Emile Noël, *A new Institutional Balance?*, in EUROPE AFTER MAASTRICHT 16, 23 (Dehousse ed., 1994).



of the Community. The fact that the ECB is financially independent is also borne out by the fact that adoption of its budget and its annual accounts are exclusively a matter for its managing bodies.<sup>18</sup> No other boundaries of binding political expectations and responsibilities exist.

## 2. *Substantial Criteria*

The primary objective of the ESCB is price stability according to Art. 105(1) EC. According to Art. 4 EC, this mandate is a fundamental activity of particular importance. While the ESCB is also required to support the general economic policies of the Community, this must be achieved without prejudice to the overriding price stability objective. However, the Founding Treaties did not indicate the interpretation of the term "price stability" and therefore the ECB was required to define the term, thereby specifying its own mandate against the resistance of many economists.<sup>19</sup>

Another indicator of its special status is that the endowment of the ECB with extensive law making powers under Art. 110 EC, enables the ECB to formulate regulation as well as decisions, recommendations, and opinions.<sup>20</sup> This provision echoes Art. 249 EC, which defines the law-making power of the EC.<sup>21</sup> In addition the ECB may issue guidelines and instructions, which are binding acts internal to the ESCB.<sup>22</sup>

With this comprehensive power, the ECB is the invulnerable institution of the EURO-Zone, therefore a constitutive component of the economic constitution of the EU.<sup>23</sup>

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<sup>18</sup> See Article 26.2 of the ESCB Statute and Articles 15 and 16.4 of the Rules of Procedure of the ECB.

<sup>19</sup> Fabian Amtenbrink & Jakob De Haan, *The European Central Bank: An independent specialized organization of Community Law – A Comment*, 39 COMMON MKT. L. REV. 65, 67 (2002); Matthias Herdegen, *Price stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9 (1998); ISSING, *supra* note 11, at 43.

<sup>20</sup> CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 174 (2005).

<sup>21</sup> PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 690 (3d ed., 2003).

<sup>22</sup> ARNULL ET AL., *supra* note 1, at 533.

<sup>23</sup> For an in-depth look at the complex organization of the ECB, DAVID HOWARTH & PETER LOEDEL, *THE EUROPEAN CENTRAL BANK – THE NEW EUROPEAN LEVIATHAN ?* (2005).

*III. Bringing the Emperor "back home"*

The first and most important breach in the idea of indefeasibility of the ECB constitutes the OLAF-decision of the ECJ<sup>24</sup>, which brought the ECB back into the EU's system of institutional balance and constitutional accountabilities.

The European Anti-Fraud Office (OLAF) was established by the Commission in 1999 through regulation 1073/1999<sup>25</sup> with concretion in Decision 1999/352 and "shall exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions." (Art. 2 of Decision 1999/352).<sup>26</sup>

OLAF should be responsible for institutions, bodies, offices and agencies established by, or on the basis of, the treaties. On the foundation of its self-image the ECB regards itself as excluded from the scope of directive 1073/1999 because it is not part of the institutional system of the European Union and has resources distinct from the Community budget. The ECB sought to create its own anti-fraud committee through decision No. 1999/726/EG - which was adopted by the Governing Council of the ECB on the basis of Article 12.3 of the ESCB Statute. However, the Commission argued that the European Court of Justice should annul the contested decision and succeeded. The ECJ accentuates that the ECB is a creation of the TEC, apparent in Art. 8 EC.<sup>27</sup> Furthermore the ECJ deconstructs the idea that the ECB is the only independent institution of the European Union by pointing out that Community institutions such as the European Parliament, the Commission, or the ECJ itself enjoy independence and guarantees comparable in a number of respects to those afforded to the ECB.<sup>28</sup> But coevally the ECJ approves the specific task of the ECB and accentuated that Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks. After paying tribute to the special task of the ECB, the ECJ brings the ECB "back home" by concluding that, "By contrast, as the Commission and the interveners have rightly pointed out, recognition that the ECB has such independence does not have the consequence of separating it entirely

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<sup>24</sup> Case C-11/00, *Commission v. ECB*, 2003 ECR I-7147.

<sup>25</sup> Commission Regulation 1073/99, 1999, O.J. (*L 136*)1.

<sup>26</sup> Commission Regulation 1073/99, 1999, O.J. (*L 136*) 20.

<sup>27</sup> Case C-11/00, *Commission v. ECB*, 2003 ECR I- 7147, para. 64.

<sup>28</sup> *Id.* at para. 133.

from the European Community and exempting it from every rule of Community law.”<sup>29</sup>

Following the findings of the Court the ECB acts within the scope of the Founding Treaties, has to contribute to the achievement of the objectives of the European Community (Art. 105(1) EC), and has to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute (Art. 8 EC). Moreover, the ECB is subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors and it could not have been the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as has become apparent in Article 105(6) EC, Article 107(5) and (6) EC and Article 110(1), first indent, and 3 EC.<sup>30</sup>

### C. Institutional standing *de lege ferenda*

#### 1. *The ECB and the New Institutional Framework of the Constitutional Treaty*

##### 1. *The Convention Debate*

The Convention on the Treaty establishing a Constitution for Europe has raised “economic governance” as a subject to be discussed in a working group. The mandate should comprise monetary policy, economic policy and institutional issues. The ECB also monitored the debate closely and intervened in many ways.<sup>31</sup> The Working Group VI on “Economic Governance” recommended that the current structure of the Economic and Monetary Union be maintained,<sup>32</sup> which means that monetary policy has to remain an exclusive Community competence, exercised by the ECB, whereas the economic policies remain within national competence. The majority of members of the group considered that tasks, mandates, and statutes of the ECB should remain unchanged and would not be affected by any new treaty provision – although some members thought about widening the mandate of the ECB to include the objectives of growth and employment.<sup>33</sup> Besides questions of

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<sup>29</sup> *Id.* at para 135.

<sup>30</sup> *Id.* at para 135.

<sup>31</sup> For an overview of the ECB’s participation in the debate see *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 58.

<sup>32</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 2 (Oct. 21, 2002).

<sup>33</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 3 (Oct. 21, 2002).

informal consultation and cooperation amongst finance ministers,<sup>34</sup> institutional issues were not discussed extensively - with the exception of the potential improvement of accountability of the ECB through enhancing the ECB's reporting to the European Parliament, giving the European Parliament a greater role in the designation of ECB Board members, and providing for the obligatory publication of ECB minutes.<sup>35</sup> Fundamental changes in the institutional structure regarding the ECB itself were not discussed.

## *2. The Outcome of the Constitutional Treaty*

The Treaty establishing a Constitution for Europe was agreed upon by the Heads of State or Government of the European Union during their meeting on 17-18 June 2004 in Brussels and signed on 29 October 2004.<sup>36</sup> The ECB saw no need to adjust the monetary constitution.<sup>37</sup>

The term "Eurosystème" gets introduced by Art. I-30 CT following a suggestion of the ECB, which has been using the term for several years to indicate the ESCB as the ECB and the national central banks of the euro area.<sup>38</sup>

The Constitutional Treaty broadly maintains the balance between the institutions and leaves the current Treaty provisions governing the economic policy framework of the EMU fundamentally unchanged. Relating to the ECB, the new institutional structure set by the EU-Constitution is characterized by the "institutional framework" as defined in Art. I-19 CT and the specific provisions of Art. I-30 and III-188 CT. These provisions and the "Protocol on the Statute of the European System of Central Banks and of the European Central Bank" form the new statutory framework of the ECB.

Art. I-30(3) CT finally defines the ECB as a Union institution and incorporates the ECB unambiguously in the constitutional texture and its responsibilities although Art. I-19 CT leaves the ECB out of the so-called "institutional framework" of coherence, which comprises the European Parliament, the European Council, the

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<sup>34</sup> Now formally recognised by primary law in a brief protocol annexed to the European Constitution, Protocol No. 12 on the EURO-Group specifies that the finance ministers of the Member States whose currency is the EURO meet to discuss questions of shared responsibilities with regard to the single currency.

<sup>35</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 3 (Oct. 21, 2002).

<sup>36</sup> Treaty Establishing a Constitution for Europe, Dec. 16 2004, 2004 O.J. (C310) 1.

<sup>37</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 57.

<sup>38</sup> Tommaso Padoa-Schioppa, *Central Banks and Financial Stability: Exploring a Land in Between*, in *THE TRANSFORMATION OF THE EUROPEAN FINANCIAL SYSTEM* 269, 271 (Vitor Gaspar et al. eds., 2003).

Council of Ministers, the European Commission and the Court of Justice. But the definition as a Union institution does not alter the self-image of the ECB as an institution with a *sui generis* status although the ECB recognizes that there exists some kind of “broad principle” to bring the ECB more into line with certain aspects of other EU institutions.<sup>39</sup> Moreover the ECB seems to see its specific status underlined by the classification of the ECB as one of the “other Institutions and bodies of the EU” in Part I Chapter II of the Constitutional Treaty and the separation from the Union institutions listed in Art. I-19 CT.<sup>40</sup> The independence of the ECB was never in question<sup>41</sup> and is now guaranteed in Art. I-30(3) CT: “It [the ECB] shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.”

The procedure for the appointment of members of the Executive Board will be changed when the Constitutional Treaty comes into effect. From then on, the Executive Board members will be appointed by a qualified majority vote in the European Council and no longer by “common accord” of the national governments. This procedure is equivalent to the appointment procedure of the President of the Commission, the Union Minister of Foreign Affairs and the President of the European Council – which are all prominent political positions. The impact of that new procedure is uncertain and ambiguous. On the one hand, this procedural adjustment is consequent on the ECJ-ruling and the normative inclusion of the ECB in the institutional structure of the European Union. On the other hand, there is no apparent improvement regarding questions of democratic legitimacy, because the decision-makers remain the same.

Economic policy remains in the hands of the Member States. According to Art. III-177 CT the adoption of an economic policy is only based on the close coordination of Member States' economic policies and not an integral competence of the Union itself. And Art. III-178/179 CT confirms this concept of consultation and cooperation.

The ESCB remains the integral (institutional) concept of the EMU and has the primary objective of maintenance of price stability, Art. I-30(2) and Art. III-185(1) CT. The ESCB as a generic term for the collectivity of ECB and the national central banks shall conduct the monetary policy of the European Union, however, the ESCB is governed by the decision-making bodies of the ECB. Thus, the ECB

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<sup>39</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 62.

<sup>40</sup> *See The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61.

<sup>41</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61.

Council and the ECB Board as the two decision-making bodies of the Eurosystem remain unaffected.<sup>42</sup> The law-making competences are equally unaffected in Art. III-190 CT.

While the status of the ECB and its independence are fully anchored in the Constitutional Treaty, the ESCB - or better the national central banks - are facing a substantial change to their current status. The independence of the national central banks is only guaranteed in Art. III-188 CT. This Part III of the Constitutional Treaty could be revised in a simplified procedure as laid down in Art. IV-444 CT and is insofar open to simplified access to politics. The ECB sees the independence of the national central banks still "fully anchored" in the Constitutional Treaty<sup>43</sup> but the national banks like the German Federal Bank (Bundesbank) see their independence in danger.<sup>44</sup>

The relevance of this formulated danger of the National central banks can not simply be ignored especially if one looks at the Stability and Growth Pact and the political implications of its erosion.

## *II. Stability and Growth Pact and Political Decision-making*

In the mid-1990s, the idea of specified convergence criteria resulted in the formulation of rules which later took the form of the Stability and Growth Pact.<sup>45</sup> The Stability and Growth Pact aims to ensure that the member states continue their budgetary discipline efforts after the introduction of the euro.<sup>46</sup> The rules laid down in Article 104 EC are defined more precisely and strengthened by the Stability and Growth Pact, constituted, in particular, by the Resolution of the European Council of 17 June 1997 and Regulation No 1467/97. Economists and former members of the Executive Board of the ECB emphasized the importance of the clarity of the convergence criteria as laid down in the Stability and Growth Pact.<sup>47</sup> However, many have argued that the criteria are artificial and will be impossible to

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<sup>42</sup> TOMMASO PADOA-SCHIOPPA, *THE EURO AND ITS CENTRAL BANK* 27 (2004).

<sup>43</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61-63.

<sup>44</sup> Axel A. Weber, *Stabilität bewahren*, FRANKFURTER ALLGEMEINE ZEITUNG, June 16 2004, at 2.

<sup>45</sup> Verdun, *supra* note 13, at 320.

<sup>46</sup> See EC Treaty art. 104; See also Commission Regulation 1466-1467/97 O.J. (L209).

<sup>47</sup> ISSING, *supra* note 11, at 31; Bob Hancké et al., *Flexibilisierung des Stabilitätspaktes, Pro und Contra*, 1 ZEITSCHRIFT FÜR RECHTSPOLITIK 28 (2003); Otmar Issing, *Der Stabilitäts- und Wachstumspakt – unentbehrliches Korrelat zur einheitlichen Geldpolitik*, 1 KREDITWESEN 15-18 (2003).

implement.<sup>48</sup> The legal status of the Stability and Growth Pact was not definitely clarified at that time.<sup>49</sup>

If a participating Member State fails to act in compliance with the provisions of the Pact the Council may impose sanctions, Art. 104(7-11) EC. An excessive deficit procedure was initiated in relation to the Federal Republic of Germany in November 2002 and in relation to the French Republic in April 2003. In the subsequent legal dispute thereafter the ECJ stressed the binding character of the procedure laid down in Art. 104 EC and the provisions of the Stability and Growth Pact. The Court ruled that "In this context, marked by the importance that the framers of the Treaty attach to observance of budgetary discipline and by the aim of the rules laid down for applying budgetary discipline, those rules are to be given an interpretation which ensures that they are fully effective."<sup>50</sup> Thus the Stability and Growth Pact became "hard-law" in 2004.

But only some months later during the meeting of the European Council in Brussels in March 2005, the Heads of State or Government endorsed a report entitled "Improving the implementation of the Stability and Growth Pact" which should "update" and "complement" the Pact.<sup>51</sup> In the end, the provisions regarding budgetary discipline were softened and deprived of their inflexibility. The downfall of the Stability and Growth Pact gave an idea of how fast politically driven decisions regarding short-term economic implications can overcome any hard law.

### *III. Institutional Independence, Democratic Accountability and Transparency*

#### *1. Structural Requirements*

All institutions operate in a specific environment. The environment of the Treaties and the Constitutional Treaty contain certain principles constituting a number of requirements. In this respect Art. 6(1) EU states that the "Union is founded on the principles of ... democracy ... and the rule of law..." Following that clear statement, Art. I-2 CT declares democracy and the rule of law as Union values: "The Union is founded on the values of ... democracy ... [and]... the rule of law ..." And Art. I-46(1) CT amends "the functioning of the Union shall be founded on

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<sup>48</sup> Verdun, *supra* note 13, at 320.

<sup>49</sup> See HUGO J. HAHN, DER STABILITÄTSPAKT FÜR DIE EUROPÄISCHE WÄHRUNGSUNION – DAS EINHALTEN DER DEFIZITBERGRENZE ALS STETE RECHTSPFLICHT (1997).

<sup>50</sup> Case C-27/04, *Commission v. Council*, 2004 E.C.R.I-4829.

<sup>51</sup> Presidency Conclusions, Brussels European Council, (March 22-23, 2005).

representative democracy.” Thus democracy remains a central demand in the text of the European Constitution. But the principle of democracy contains not only the idea of the people as sovereign (in other words popular government and the idea that parliament should always hold the ultimate responsibility for any principal decision including monetary policy)<sup>52</sup> but also the idea of transparency as a mode of constituting democratic accountability (see Art. I-50 CT).<sup>53</sup> Accountability as a basic precondition for democratic legitimacy in general, means that institutions with the power to affect the lives of the people should be subject to the scrutiny of the elected representatives of the people.<sup>54</sup>

## 2. The Democratic Issue

The degree of independence of the ECB has raised many important issues about the desirability and functionality of the institutional structure. Independence and (democratic) accountability form a critical pair.<sup>55</sup> The much-debated status of the ECB is criticized as a contradiction to the common understanding of democracy. Independence does not imply the total absence of democratic control but the need for unambiguous definition of the limits and the way in which democratic control is exercised. The main political question confronting the ECB is how this institution can maintain independence and profit from the benefits of political autonomy and at the same time be viewed as legitimate and accountable to the European public.<sup>56</sup> The compatibility of efficiency and democracy, or in other words accountability and independence, is the lynchpin here.<sup>57</sup> To what extent should the ECB be under parliamentary control? The importance of unquestioned independence of the ECB to fulfill its tasks without political intervention is not simply acknowledged, especially in scholarly literature,<sup>58</sup> even if the importance of independent central

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<sup>52</sup> HANSPETER K. SCHELLER, *THE EUROPEAN CENTRAL BANK* 125 (2004).

<sup>53</sup> Armin von Bogdandy, *Europäische Prinzipienlehre*, in *EUROPÄISCHES VERFASSUNGSRECHT* 178 (Armin von Bogdandy ed., 2003).

<sup>54</sup> SCHIOPPA, *supra* note 42, at 32.

<sup>55</sup> *Id.*; SCHELLER, *supra* note 52; LAURENCE W. GORMLEY, *EUROPEAN MONETARY UNION AND THE DEMOCRATIC PRINCIPLE* (1997).

<sup>56</sup> Legitimacy claims are an inherent element of democratic rule, Christian Joerges, *Constitutionalism and Transnational Governance*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 339, 373 (Christian Joerges et al. eds., 2005).

<sup>57</sup> To follow the debate see Magnette, *supra* note 4; CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 199 (2005).

<sup>58</sup> Verdun, *supra* note 13, at 326; Laurence Gormley & Jakob de Haan, *The Democratic Deficit of the European Central Bank*, 21 *EUR. L. REP.* 95 (1996).



banks has been stated as early as the 1920s.<sup>59</sup> The formulation and management of monetary policy in the euro area has been taken out of the hands of politicians as entrusted to the technocrats of the ECB and the national central banks.<sup>60</sup> This technocratic approach is criticized for neglecting the question of democratic legitimacy<sup>61</sup> and may intensify the democratic deficit in the European Union.

Alternatively, it could be seen as a sensible and unavoidable strategy to shield monetary policy against short-term moods of national politics.<sup>62</sup> The “downfall” of the Stability and Growth Pact could have a deterrent effect in this respect. Furthermore the ESCB is regarded as a rule-based system that was conceived as depoliticized. The ECB is not a main political actor, more an economic agency with an admittedly strong influence on political issues. On the one side, the ECB is left out of the political decision-making process. On the other side the ECB should be implemented in the institutional structure of the EU. The integration of the ECB in the institutional structure of the European Union does not necessarily implement an intensified democratic accountability. The ECB is constructed as an institution, which is based on the idea of technocratic decision-making, comparable to the early High Authority of the European Coal and Steel Community back in 1952. But to draw a distinction on what is political or technical (and/or purely economic) seems to be impossible. Moreover, one has to deal with the rise of new forms of political participation focusing on the practice of (governing) power and the effects of intensified public debate – keeping in mind that legitimacy may be evoked not only through elections but through a broad public discussion about transparent decisions.<sup>63</sup> So the independence of the ECB and the need for transparency and accountability goes hand in hand.<sup>64</sup> Accountability is therefore essentially linked to transparency.

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<sup>59</sup> R. Ceasar, *Central banks and governments: issues, traditions, lessons*, 2 FINANCIAL HISTORY REVIEW 124 (1995). And regarding the historical role of central banks in general: Tommaso Padoa-Schioppa, *Central Banks and Financial Stability: Exploring a Land in Between*, in THE TRANSFORMATION OF THE EUROPEAN FINANCIAL SYSTEM, 269, 275 (Vitor Gaspar et al. eds., 2003).

<sup>60</sup> ARNULL ET AL., *supra* note 1, at 535.

<sup>61</sup> INES DERNEDDE, AUTONOMIE DER EUROPÄISCHEN ZENTRALBANK 197 (2002).

<sup>62</sup> Mathias Herdegen, *Price stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom*, 35 COMMON MKT. L. REV. 9 (1998).

<sup>63</sup> See Magnette, *supra* note 4, at 328.

<sup>64</sup> ISSING, *supra* note 11, at 58.

### 3. *Independence and Transparency*

The ECB and the National Currency banks exercise a public function.<sup>65</sup> The credibility of the ECB ultimately depends on its ability to make decisions that achieve the assigned objective of price stability. Furthermore the ECB has the interest to ensure that its decisions are properly explained, justified, and transparent. The ECB is accountable to the European public and its elected representatives in the European Parliament, which lead to the requirement of transparency in all areas relevant to the fulfillment of its mandate and the underlying decision-making process.

The Annual Accounts of the ECB and all the national central banks belonging to the Eurosystem are examined by independent external auditors. In addition the financial management is scrutinized by the European Court of Auditors and there are reporting commitments according to Art. 15 ESCB-Statute. Furthermore the Monthly Bulletin informs all actors about "research & occasional papers" and "publications by activity", all of which are available online. But taking the principle of transparency seriously, the decisions of the ECB must be open to public discussion which reminds of the idea of deliberative democracy and the transnational concept of deliberative supranationalism.

### IV. *Bridging the Gap – Democracy, Legitimacy and Deliberative Supranationalism*

The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from collective decisions of the members of a society who are governed by that power. Collective decision-making requires free public reasoning among equals.<sup>66</sup> The idea of deliberative democracy which had its "(re)birth" in the 80s as an American debate<sup>67</sup> and was intensively discussed during the last 20 years,<sup>68</sup> tries to construe a theoretical foundation for collective decision-

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<sup>65</sup> SCHELLER, *supra* note 6.

<sup>66</sup> Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE* 95, 99 (Seyla Benhabib ed., 1996).

<sup>67</sup> J. M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* (Robert Goldwin & William Shamba eds., 1980).

<sup>68</sup> *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (Seyla Benhabib ed., 1996); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997); *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); *DELIBERATIVE POLITICS, ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999); *DEBATING DELIBERATIVE DEMOCRACY* (James S. Fishkin & Peter Laslett eds., 2003); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* (1992).

making in a democracy using a procedural model of discursive decision-making.<sup>69</sup> Democracy, in the deliberative view, should be a framework of social and institutional conditions that facilitates free discussion for participation and evokes ideals of rational legislation, participatory politics, and civic self-governance.<sup>70</sup>

Christian Joerges and Jürgen Neyer transferred an abstract model of deliberative democracy to the supranational level by developing the principle of “deliberative supranationalism” based on an in-depth analysis of the comitology system of the Commission.<sup>71</sup> In search for normative justifications of supranationalism, this idea of deliberative supranationalism is intended to construe a new legitimate basis – following the assumption that the emergent legal structures on the level of the European Union do not fit any of the institutionalized national or supranational models.<sup>72</sup> European Law is supposed to have emancipated itself from its intergovernmental origins and set itself up as an autonomous system. Nevertheless the Member States still do play a central role in parts of the decision-making process at the European level.<sup>73</sup> Thus deliberative Supranationalism conceptualizes this European Law as a species of conflict of laws and as a part of a non-hierarchical legal structure, where actors of the European and the national level are included in the decision-making process.

The comitology is linked to the bureaucracies as well as to the policies of the Member States and has a complex internal structure in which government representatives, representatives of social interests, and parts of “the economy” interact.<sup>74</sup> It requires intensive exchange between national and European civil

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<sup>69</sup> For an in-depth view see Timo Tohidipur, *Deliberative Rechtstheorie*, in NEUE THEORIEN DES RECHTS (Ralph Christensen et al.eds., 2006).

<sup>70</sup> This idea was heavily criticized, see Michael Walzer, *Deliberation...and what else?*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 58-69 (Stephen Macedo ed., 1999); Frank I. Michelmann, *How can the People ever make the laws? A critique of deliberative democracy*, in DELIBERATIVE DEMOCRACY 145-171 (James Bohman & William Rehg eds., 1997).

<sup>71</sup> EU COMMITTEES: THE EVOLUTION OF UNFORESEEN INSTITUTIONAL ACTORS IN EUROPEAN PRODUCT REGULATION (Christian Joerges & Ellen Vos eds., 1999); DAS AUSCHÜßWESEN DER EUROPÄISCHEN UNION: PRAXIS DER RISIKOREGULIERUNG IM BINNENMARKT UND IHRE RECHTLICHE VERFASSUNG (Christian Joerges & Josef Falke eds., 2000); GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET (Christian Joerges ed., 2002).

<sup>72</sup> The critique of this model of deliberative supranationalism is verbalized by Rainer Schmalz-Bruns *Deliberativer Supranationalismus*, 6 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 185-242 (1999); *On the political theory of the Euro-polity*, in MAKING THE EUROPEAN POLITY 59-83 (Erik Oddvar Erikson ed., 2005) and to follow the ongoing debate Christian Joerges, *Deliberative Supranationalism – Two Defences*, 8 EUROPEAN L. J. 133-151 (2002).

<sup>73</sup> Oliver Gerstenberg, *Law's Polyarchy: A Comment on Cohen and Sabel*, in PRIVATE GOVERNANCE, DEMOCRATIC CONSTITUTIONALISM AND SUPRANATIONALISM, 31 (Christian Joerges and Oliver Gerstenberg eds., 1998).

<sup>74</sup> Joerges, *supra* note 72, at 142.

servants, therefore cooperation between different levels of government and bureaucratic actors.<sup>75</sup> If rational argumentation and collective decision-making are required to create a specific (and sufficient?) form of legitimacy in the decision-making process of the ESCB then this model of deliberative supranationalism could be adopted here. The complete ESCB is based on networking and not on the exercise of unilateral authority. This is obviously visible in the composition of the Governing Council, where there are more NCB Governors than Executive Board members and in the important role of the ESCB-Committees within the decision-making process of the ECB, composed of officials of the NCBs.<sup>76</sup> The Eurogroup meetings as well as the Economic and Financial Committee could be the “germ cell” of a horizontal and vertical dialogue. Such a regular dialogue provides an opportunity to explain the course of the monetary policy.<sup>77</sup> One possible remedy to the isolation of the monetary authority from political authorities is then based on an institutionalized but informal dialogue,<sup>78</sup> a kind of “monetary dialogue”.

The deliberative and argumentative processing of efficiency may be helpful to create a revised legitimacy scheme for a “new” political structure.<sup>79</sup> Thus, the deliberative supranationalism demands a certain degree of autonomy regarding the decision-making bodies – in some respects similar to the regulatory model.<sup>80</sup> This may be regarded as incompatible to the basic idea of the parliamentary model which regards parliamentary control over the administration as essential.<sup>81</sup> One could conclude that the relationship between legislature and the executive remains problematic even in the deliberative model. The deliberative model reformulates legitimacy but at the same time loses its connection to the idea of participation (of the citizens or political communities as addressees) as a dominant part of the democratic principle. While the European Union could then be well described as a

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<sup>75</sup> Christian Joerges & Jürgen Neyer, *From intergovernmental bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, 3 EUROPEAN L. J. 273-291 (1997).

<sup>76</sup> Louis, *supra* note 7, at 41.

<sup>77</sup> HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK – HISTORY, ROLE AND FUNCTIONS 130 (2004).

<sup>78</sup> Louis, *supra* note 7, at 41.

<sup>79</sup> Massimo La Torre, *Legitimacy for a Supranational European Political Order – Derivative, Regulatory or Deliberative?* 15 RATIO JURIS 63, 82 (2002).

<sup>80</sup> *Id.* at 64 who defines the deliberative idea as a reshaped regulatory model. *See also*: Christoph Knill & Andrea Lenschow, *Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation*, 7 EUROPEAN INTEGRATION ONLINE PAPERS 1 (2003).

<sup>81</sup> Renaud Dehousse, *European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?*, 35 COMMON MKT. L. REV. 595, 626 (1998); INES DERNEDDE, AUTONOMIE DER EUROPÄISCHEN ZENTRALBANK 313 (2002).

system of executive federalism, the inherent tension precludes the description of the European Union as a parliamentary democracy.<sup>82</sup>

### C. Concluding Remarks: Do the New Clothes Fit Well?

One could conclude that the Constitutional Treaty will not lead to substantial changes to the current monetary constitution. The ECB will be included in the institutional structure of the Union after the ratification of the Constitutional Treaty without corrupting the general mandate. The primary position of price stability in the mandate of the ECB and the ESCB is therefore preserved. But the gap between the self-conception of the ECB and the institutional surrounding has been heightened by the normative inclusion of the ECB in the institutional structure of the European Union through the Constitutional Treaty, which may signify the explicit end of the self-conception as an "independent specialized organization of Community Law." Although the ECB is no political institution in its origin its decisions have an undeniable political impact.

Accountability remains limited by the incompleteness of political union in the European Union. To fulfill the expectations of democratic accountability it is not necessary to nominate members of the ECB by election. Improving accountability may rest on improving communication and transparency.<sup>83</sup> The EC Treaty divides the policy responsibilities but at the same time it promotes dialogue, cooperation, and rational argumentation between and within the different policy-makers advancing the implementation of the deliberative model (deliberative supranationalism). Nevertheless the quest for legitimacy goes on.

The ECB does not stand naked in front of its upcoming challenges, but the principle of democracy as a value of the EU may stand naked before the ECB.

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<sup>82</sup> Philipp Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9 EUR. L. J. 551 (2003) (using the term "semi-parliamentary" democracy in this context).

<sup>83</sup> Kathleen McNamara, *Managing the EURO: The European Central Bank*, in THE INSTITUTIONS OF THE EUROPEAN UNION 164, 181 (John Peterson & Michael Shackleton ed., 2002).

## *Comment on Timo Tohidipur*

By Sylwia Majkowska\*

*“But he has nothing at all on!” at last cried out all the people. The Emperor was vexed, for he knew that the people were right; but he thought the procession must go on now! And the lords of the bedchamber took greater pains than ever, to appear to be holding up a train, although, in reality, there was no train to hold.”\*\**

### **A. Does the Emperor have New Clothes?**

The ECB presentation provides a good opportunity to develop some reflections on the unity of the European Constitutional Treaty. In a helpful introduction to the article, its author affirms that taking a look at the ECB of today means rethinking the emperor’s idea to a certain extent. In fact the ECB is so independent that it seems untouchable.<sup>1</sup> The author provides a very useful survey of *de lege lata*, pursuant to which, the institutional standing of the ECB becomes very clear. The most important change is that the Constitutional Treaty includes the ECB among the institutions of the European Union. At the same time we may not forget that the ECB is already considered a Community institution under the ECJ case law. Consequently, the example of ECB justifies a statement that the constitutional legal order of the EU was re-examined and worked out in the Constitutional Treaty.<sup>2</sup> The reference to the fairy tale “The Emperor’s New Clothes” may serve as a good source of reflections not only on the ECB, but also on the European Union and its Constitution in general.

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\*\* See HANS CHRISTIAN ANDERSEN, *THE COMPLETE FAIRY TALES AND STORIES* 77 (1983).

<sup>1</sup> See Paul Magnette, *Towards “Accountable Independence“? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model*, 6 *EUROPEAN LAW JOURNAL* 326, 327 (2000).

<sup>2</sup> See JOSEPH H. H. WEILER, *THE CONSTITUTION FOR EUROPE, “DO THE NEW CLOTHES HAVE AN EMPEROR?“ AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 8-9 (1999).

## B. Is the Emperor Wearing Anything at All?

### *I. Autonomisation of European Integration Law*

In order to analyze the constitutional legal order of the EU, it is necessary to define the concept of European law. The Constitutional Treaty declares the transformation of the two European Communities into a unitary governing structure that is the European Union. Is it already justified to consider law of European integration an autonomous legal order? At present, there are mainly two approaches to defining the law of European Communities. One of them is represented by those authors who consider EC law an autonomous legal order that differs both from international law and from legal orders of Member States although exhibiting some of the characteristics found in both legal orders in question. The other approach is represented by so called internationalist lawyers who are of the opinion that the community law should be classified as international law or simply as its part.

On one hand, following the doctrine of the peculiarity of the community law, the European Community has its own institutional apparatus based on the principle of the institutional balance. Decision rules applied within the Community assume that decisions are made by a majority of votes, and not solely by unanimity. The Community also has its own system of legal sources and a specific hierarchy of norms. Legality control is available not only for Member States and Community institutions but also for individuals. Specific methods are used for the interpretation of the founding treaties. On the other hand, one can mention two options describing the legal nature of the European Community. The first one applies to "supranationality" of the EC law. The second applies to the identification of the EC law as the "law of integration."<sup>3</sup>

However, according to the "trivial understanding thesis," European Communities "remain" within other international organizations. The reason for this is the conventional form of the founding treaties of European Communities as well as international requirements associated with their change. It is worth mentioning that international institutions occupy the central place in the institutional European Communities system. Moreover, the procedure of the amendment of the founding treaties results in requirements of international kind.<sup>4</sup> The significance of the principle of competence division between the Community and Member States, together with the subsidiarity principle, proves the international character of the

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<sup>3</sup> See ZDZISŁAW BRODECKI, *PRAWO INTEGRACJI Z EUROPEJSKIEJ PERSPEKTYWY* 9 (2005).

<sup>4</sup> Denys Simon, *Les fondements de l'autonomie du droit communautaire*, in Science Conference General Report: International and Community Law Present Perspectives, 5-6 (1999).

European Community law. In the internationalists' opinion, the decentralized application of law is very characteristic of international law. Finally, they emphasize the use (particularly by the ECJ) of the interpretative methods outlined by Arts. 31 and 32 of the Vienna Convention while interpreting the law of the treaties. In the opinion of some of the internationalists, mechanisms perceived as describing peculiarity of the EC law-- for instance limitation of reciprocity principle, direct effect, or primacy, were the foundations of the present international law.

This is not about the reconciliation between the two above mentioned theses in the spirit of ecumenism. This is about the real understanding - even more - real comprehension of the change which took place between the "rise" of Treaties of Rome and the present condition of the European integration. The time is "the master" of the new look at the legal landscape which came into being from the founding treaties.<sup>5</sup> This means that the real progress of the European integration law is undisputed. The development of the three Communities into a unitary governing structure and the evolution of its law into a unitary legal order should be reflected in a uniform act such as the European Constitutional Treaty.<sup>6</sup>

Trends of this real progress lead us to the settlement of its autonomy. It is possible only by proving the existence of "the law of the internal composition in one piece" in which different law elements are connected according to their own logic.<sup>7</sup> Founding treaties are the proper law (*droit propre*) of the European Community. This "builds" the statement that the EC law system is so distinct from other systems of laws.

We can define this system "the integrity in which elements are not connected with each other accidentally but they form a special "order" in the way they are connected with each other using particular connectors. It is important to understand that we must not take into account only one element and analyze it, while at the same time not taking into consideration its environment.<sup>8</sup> According to "Kelsen logic" unity and autonomy of the legal order results from the fact that all of the legal rules which form particular system may be "referred" ("*zurückgeführt*") to

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<sup>5</sup> *Id.* at 7.

<sup>6</sup> See Armin von Bogdandy, *A Bird's Eye View on the Science of European Law: Structures, Debates and Development*, 6 EUROPEAN LAW JOURNAL 208, 230 (2000).

<sup>7</sup> Simon, *supra* note 4, at 9.

<sup>8</sup> Jean Combacau, *Le droit international, bric-à-bras au système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85, 86 (1986).



the basic norm. This basic norm makes it legally valid and very compact.<sup>9</sup> It is obvious that the recognition of the existence of some fundamental norm does not imply that the given system is not in relation with other legal systems.<sup>10</sup>

Taking into account all that is mentioned above, whatever the extent of the autonomy of the community legal order is going to be, the legal order itself will never be “waterproof in its international environment”. This is a very significant conclusion as taking over or borrowing of some principles or techniques from the international law is sometimes perceived as the actual lack of autonomy of the community law. For this reason, the theory of the autonomy leads to accepting the “hermetic nature” of the community legal system in relation to ideas derived from the international law. Additionally, the autonomy of the community law is not an indication of the system being neither self-sufficient nor authentic.<sup>11</sup>

One should ask the question: why should the community law be treated in a specific manner so different from the one guaranteed for the international law in the internal constitutional rules? The Constitutional Treaty declares that powers are conferred by Member States and the EU will exercise those powers in the communitarian way. Theoretical proofs of the autonomy of the community law are to be searched for in the “communitarists” doctrine, as shown above, but also, and first of all, in the judgments of the ECJ.<sup>12</sup>

Neither the Treaty of Paris nor the Treaties of Rome include such terms as “a new legal order” or anything similar. They are not included in the Maastricht Treaty, the Amsterdam Treaty or the Nice Treaty either. However, the theory of the European Community as “the new specific legal order” has been confirmed in the case law of the ECJ. The analysis of the ECJ’s position on community law autonomy leads to a conclusion of “an autonomy gaining process” of the European construction. In 1963 the ECJ held in 26/62 *Van Gend & Loos v. Nederlandse Administratie der Belastingen*<sup>13</sup> that the European Community constitutes a new specific legal order of international law (or: a new specific international-legal order), for the benefit of which Member States limited a part of their sovereign rights, and the subjects of

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<sup>9</sup> Hans Kelsen, *Les rapports de système entre le droit interne et le droit international public*, IV RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 227, 264 (1926).

<sup>10</sup> Simon, *supra* note 4, at 8-10.

<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> CASE 26/62, *N. V. Algemene Transport - en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

which comprise not only Member States and community institutions but also their nationals. While following strictly Kelsen's doctrine of law and his classical definition of legal order, it should be concluded that community law either constitutes the new legal order or is integrated with the international legal order. Therefore, from the theoretical point of view the solution adopted by the ECJ in 26/62 *Van Gend & Loos v. Nederlandse Administratie der Belastingen* seems inadmissible. Perhaps the above ruling resulted from the compromise worked out at any secret session. On the other hand, perhaps it illustrates the jurisdiction strategy aiming at the gradual extension of community law.<sup>14</sup> From the perspective of the year 2005, the answer to the second question seems to be obvious. In the course of time, the ECJ has omitted the word before the last one in the following term: "the new specific order of international law". The necessity to confirm the specific nature of community law by the ECJ arose together with the application of community law directly to individuals since the jurisdiction of the ECJ covers the whole community law, including the legal provisions having direct effect on legal situation of individuals. In other words, confirmation of the specific nature of community law was on the one hand necessary to enable a community judge *sensu stricto* to decide on European subjects under its jurisdiction, including citizens of Member States. On the other hand though, it was necessary to enable individuals to invoke community law before a domestic judge.

The next stage of the development of European integration law, considered as breaking the link, previously connecting community law and international law, completely,<sup>15</sup> was the ECJ's ruling in the 6/64 *Flaminio Costa v. E.N.E.L.*<sup>16</sup> case where the Court held clearly and unequivocally: "By contrast with ordinary international treaties the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."<sup>17</sup> In this way the ECJ validated the birth of an autonomous legal order. Since that time the „magical” formula has created a real myth concerning the European construction. It is certain that proclamation of the specific nature of community law is one thing and proving and justifying it is another one. Together with the increasing role of community law in individuals' lives, the ECJ found more and more extensive justification for the

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<sup>14</sup> Simon, *supra* note 4, at 13-14.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 1141.

<sup>17</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 1141, in *PRAWO WSPÓLNOT EUROPEJSKICH - ORZECZNICTWO*, 119 (WŁADYSŁAW CZAPLIŃSKI, RUDOLF OSTRICHANSKY, PRZEMYSŁAW SAGANEK, ANNA WYROZUMSKA EDS., 2001).

specific nature of European integration law and confirmed it in its case law as having an impact on development of the new legal order in question.

One of the ways of proving the autonomy of community law is the indication of the process of the common market progress towards the single market or the process of the completion of the monetary union. The achievement of the above objectives was possible due to introduction of common regulations.

The uniformity of law applied in the community economic zone has become the necessity. Otherwise, the lack of common rules applied in a uniform way would expose the single market to unfair competition, breach of trade, or lack of location of economic or financial activities. That would undoubtedly cause reconstruction of market barriers and consequently "disintegration" of the Communities. Therefore, even the economic dimension of the European construction itself requires the preferential position of community law in the internal legal order. Moreover, the specific nature of community law is manifested by the requirement of equality and solidarity of the Member States. These features impose an obligation of the direct, uniform, integrated and effective application of the European integration law over the whole territory of the European Union under threat of being "excavated" down to the foundations of the community legal order.<sup>18</sup> What is meant here is certainly the principle of the Member States' liability for failure to fulfill obligations under the treaty, established under the case law of the ECJ.

## *II. Constitutionalisation of European Integration Law*

One of the ways of manifesting the specific nature of community law is the analysis of the "constitutionalisation process". This process covers the gradual recognition of the constitutional dimension of the European construction. In 1972 the ECJ held in the case 48/71 *Commission v. Italy*<sup>19</sup>, that the transfer of rights and powers, reflecting the provisions of the treaty to the Community results in definite limitation of sovereign rights of the Member States. It is not possible to invoke any provisions whatsoever of national law to override this limitation. The ECJ went even further in 294/83 *Parti Écologiste "Les Verts" v. Parliament*.<sup>20</sup> The European construction may be described to a substantial extent with the application of vocabulary characteristic for constitutional law. It is confirmed by attempts to distinguish constitutional authorities (the principle of institutional balance).<sup>21</sup>

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<sup>18</sup> Simon, *supra* note 4, at 16-22.

<sup>19</sup> Case 48/71, *Commission v. Italy*, 1972 E.C.R. 529.

<sup>20</sup> Case 294/83, *Parti Écologiste „Les Verts“ v. European Parliament*, 1986 E.C.R. 1339.

<sup>21</sup> Simon, *supra* note 4, at 23.

Today, in light of the ratification process of the Constitutional Treaty, the constitutional nature of the founding treaties gives rise to no more doubts. The development of community law has led the European construction to the stage at which arranging the treaties of the Community and the European Union in order seems to be desired or even necessary. Community law is continuously adapted to the changing social and economic conditions of the united Europe.<sup>22</sup> As the above examples proved it happened to a large extent due to the case law of the ECJ.

With reference to the above, one recalls the words of President W. Hallstein, who indicated that, by creating the Community, the Member States have subjected themselves to the new legal system in question.<sup>23</sup> It could also be added that by confirming the absolute supremacy of community law, the ECJ imposed on Member States nothing more than what they had accepted themselves in advance. In this way we reach the conclusion that the legal order in question is necessary to achieve the equally necessary unification of community law.<sup>24</sup> The ECJ's rulings in the 26/62 *Van Gend & Loos v. Nederlandse Administratie der Belastingen*<sup>25</sup> and 6/64 *Flaminio Costa v. E.N.E.L.*<sup>26</sup> cases undoubtedly provide the manifestation of law making, although that is a consequence of prior arrangements among the Member States creating the European Community.

The community legal order, as any autonomous legal order, has an effective system of court protection in case of infringement of the European integration law or its application. The ECJ as the jurisdictional authority of the European Community makes a foundation of the above mentioned court protection. The role of the ECJ's judges is to ensure that the European integration law maintains its community nature and that it is uniform under all circumstances and towards all of its subjects. In order to achieve this, the ECJ has been granted powers of trying cases the parties to which may be individuals, Member States and the EC institutions.

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<sup>22</sup> See Koen Lenaerts, Marlies Desomer, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, 27 *EUROPEAN LAW REVIEW* 377-407 (2002).

<sup>23</sup> Walter Hallstein, President of the European Movement, Speech before the European Parliament on the report of F. Dehousse: The European Parliament, July 18, 1965.

<sup>24</sup> Simon, *supra* note 4, at 16.

<sup>25</sup> Case 26/62, *N. V. Algemene Transport - en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

<sup>26</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 1141.

### C. Where are the Emperor's Clothes?

The ECB has been considered a Community institution just under the ECJ case law, although the EC Treaty has not provided it with such a rank. The Constitutional Treaty, by including the ECB among the institutions of the Union, takes into consideration only the stage of the European Integration development. Although it is considerably important from the formal point of view, from the substantial point of view, the Constitutional Treaty introduces no changes with reference to the role of the ECB as the element of the institutional balance in the EU. In conclusion, even if, thanks to some European nations who rejected the Constitutional Treaty in a referendum, the Constitutional Treaty does not enter into force, "the procession" will go on. It would be only a pity that the European Union would not have "new clothes" that are already certainly sewn and that the European Union desires so much.

## The Right to an Effective Remedy Pursuant to Article II-107 Paragraph 1 of the Constitutional Treaty

By Katharina Pabel\*

### A. Introduction

The fundamental right to an effective remedy as guaranteed in Art. II-107(1) of the 'Treaty establishing a Constitution for Europe' (CT)<sup>1</sup> is part of a comprehensive guarantee of effective legal protection and procedural guarantees. In the following, this fundamental right and how it relates to Parts I and III of the CT will be investigated in detail. First, the scope of Art. II-107(1) CT will be identified in Part B. Part C comments on the binding effect of this right. Finally, in Part D, some aspects of the Union's system of legal protection will be investigated in the light of Art. II-107(1) CT, and it will be discussed whether this right could be an instrument to close gaps in the legal protection of individuals against measures of the European Union.

### B. The Content of the Right to an Effective Remedy

#### I. The Foundations of the Right to an Effective Remedy

The right to an effective remedy as guaranteed by Art. II-107(1) CT is based on two legal sources. Both are mentioned in the explanations to Art. 47 of the Charter of Fundamental Rights,<sup>2</sup> which corresponds to Art. II-107(1) CT. On one hand, this right is based on the principle of "Effective Legal Protection" which has been developed by the European Court of Justice (ECJ). In this respect, the explanations refer to the decisions of the ECJ with regard to the cases of *Johnston*, *Heylens* and

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<sup>1</sup> Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 53 [hereinafter CT].

<sup>2</sup> The Declarations concerning the explanations related to the Charter of Fundamental Rights are part of the Declarations concerning provisions of the Constitution (No. 12). They are published as Annex A after the text of the Constitutional Treaty, *see* CT 2004 O.J. (C 310) 420, 424.

*Borelli*, in which this principle was developed.<sup>3</sup> On the other hand, Art. II-107(1) CT is clearly based on Art. 13 of the European Convention for the Protection of Human Rights (ECHR), which is reflected in the similar wording of the two articles. The formulations of Art. II-107(1) CT and Art. 13 ECHR are, despite some deviations,<sup>4</sup> almost identical. These foundations have to be considered in interpreting Art. II-107(1) CT to determine its content.

## *II. The Consideration of Article 13 ECHR in the Interpretation of Article II-107(1) CT*

The European Constitution explicitly refers to the human rights and fundamental freedoms laid down in the ECHR. According to Art. II-112(3) CT, rights guaranteed by the Union's Charter of Fundamental Rights, which correspond to those set out in the ECHR, have the same meaning and scope as provided by the ECHR. In addition to that, Art. II-113 CT stipulates that none of the Charter's provisions are to be interpreted as restricting rights which are recognized by Union law, international law or international agreements, especially by the ECHR. The rules of interpretation aim to achieve the utmost coherence between the protection of fundamental rights of the European Union, the ECHR and the national constitutions of the Member States.<sup>5</sup> A comparison is required between the norms of the Union's fundamental rights and the rights guaranteed by the ECHR. If a correspondence can be established, the interpretation of the respective fundamental right provided for by the Union needs to be based on the relevant fundamental right specified in the ECHR with regard to the scope of its application and its limits<sup>6</sup> as interpreted by the European Court of Human Rights (ECtHR).<sup>7</sup>

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<sup>3</sup> Case C-222/84, *Johnston*, 1986 E.C.R. 01651; Case C-222/86, *Heylens*, 1987 E.C.R. 04097; Case C-97/91, *Borelli v. Commission*, 1992 E.C.R. 06313.

<sup>4</sup> *Infra* A. II in this article.

<sup>5</sup> Martin Borowsky, Art. 52 para. 8, in *KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION* (Jürgen Meyer ed., 2003); Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, in *GRUNDRECHTE FÜR EUROPA - DIE EUROPÄISCHE UNION NACH NIZZA* 131, 157 (Alfred Duchanek & Stefan Griller eds., 2002).

<sup>6</sup> Christoph Grabenwarter, *Die Charta der Grundrechte für die Europäische Union*, 116 *DEUTSCHES VERWALTUNGSBLATT* 1, 2 (2001); Yvonne Dorf, *Zur Interpretation der Grundrechtscharta*, 60 *JURISTENZEITUNG* 126, 128 (2005); Franz Matscher, *Der Europäische Gerichtshof für Menschenrechte und seine Bedeutung mit Blick auf eine Europäische Grundrechtscharta*, in *TOWARDS A EUROPEAN CONSTITUTION* 255, 265 (Michael Gehler et al. eds., 2005).

<sup>7</sup> See *supra* note 2, at 456. For the question of the specific role of case-law developed by the European Court of Human Rights, see Christoph Grabenwarter, *Die EMRK in der europäischen Verfassungsentwicklung*, in *TRADITION UND WELTOFFENHEIT DES RECHTS. STUDIES IN HONOUR OF HELMUT STEINBERGER* 1129, 1143 (Hans-Joachim Cremer et al. eds., 2002).

In analyzing the right to an effective remedy in detail one should note that the scope of application as well as the content of this right have been extended in comparison to Art. 13 ECHR.

Article II-107(1) CT guarantees a right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union law are violated. The bodies obliged to protect fundamental rights are required to provide a legal remedy in case of a violation of fundamental rights as laid down in Part II of the Constitution and of other rights and fundamental freedoms guaranteed by the European Constitution. But Art. II-107(1) CT is also applicable to potential infringements upon rights which derive from the remaining Union law, that is secondary law. This literal interpretation of Art. II-107(1) CT is confirmed by the explanations related to the Charter, according to which this fundamental right applies to **all rights** guaranteed by Union law.<sup>8</sup> Thus, the scope of application of the right to an effective remedy has been considerably extended in view of Art. 13 ECHR, which guarantees remedies for the violation of rights as set out in the Convention.<sup>9</sup> Art. 13 ECHR exclusively aims to implement the fundamental rights guaranteed by the ECHR, while Art. II-107(1) CT provides for a judicial implementation of all rights guaranteed by Union law.

Also, the scope of guarantees deriving from Art. II-107(1) CT is more comprehensive than that of Art. 13 ECHR. While Art. 13 ECHR requires a remedy before an independent and impartial organ that is not necessarily a tribunal (in the sense of Art. 6 ECHR), Art. II-107(1) CT guarantees an effective remedy before a tribunal.

In the light of the extended scope of application as well as if the extended content of the right to an effective remedy it cannot be assumed that Art. II-107(1) CT “corresponds” to the right laid down in Art. 13 ECHR.<sup>10</sup> Consequently, there is no

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<sup>8</sup> *Charter of Fundamental Rights of the European Union, Explanations Relating to the Complete Text of the Charter*, Art. 47 at 65 [hereinafter *Charter Explanation*]. According to Art. 112 para. 7 CT the explanations constitute guidelines for the interpretation of the Charter and they shall be given due regard by the courts of the Union and of the Member States. They explicitly indicate that they have no legal status and function as mere support of interpretation. Thus, they help to identify the meaning and scope of the Union’s fundamental rights but have no binding force as to the interpretation of the Union’s human rights provisions; see Dorf, *supra* note 6, at 130.

<sup>9</sup> For the ambit of Art. 13 ECHR see CHRISTOPH GRABENWARTER, *EUROPÄISCHE MENSCHENRECHTSKONVENTION* 351 (2d ed. 2005).

<sup>10</sup> Moreover Art. 107-I CT does not form part of the list, which is provided in the explanations on Art. 52, see *Charter Explanation, supra* note 8, at 74 (which contains those fundamental rights, whose meaning and scope is the same as that of corresponding Articles of the ECHR). Admittedly, this list is not a binding



obligation according to Art. II-112(3) CT to grant the Union's right to an effective remedy the same meaning and scope as provided by Art. 13 ECHR and the related case-law developed by the European Court of Human Rights.

However, there are strong arguments for taking recourse to the judicature of the European Court of Human Rights with respect to Arts. 13 and 6 ECHR in interpreting elements of the Union's right to an effective remedy (e.g. the terms "effectiveness" or "tribunal"). As a matter of fact, sophisticated judicature exists with regard to the human rights specified in the ECHR, which for pragmatic reasons, the Union's courts will probably take into consideration in their interpretation of fundamental rights guaranteed by the European Constitution. By this, the judicature of the Union's courts will be continued; Art. 6(2) EU already refers to the Convention and the case-law of the European Court of Human Rights.<sup>11</sup> Furthermore, a systematic approach to the individual rules of interpretation of Articles II-112 and II-113 CT would suggest that they aim at the utmost coherence between the different systems protecting fundamental rights in Europe.<sup>12</sup> That coherence can best be provided by taking recourse to the judicature of the European Court of Human Rights. Finally, the preamble to the Charter generically refers to the case-law of the European Court of Human Rights.<sup>13</sup>

The described deviations of Art. II-107(1) CT from Art. 13 ECHR show that this right has been considerably modified. Article 13 ECHR aims to secure the Convention's rights in its Member States. The Member States are obliged to secure the observation of the rights and freedoms defined in the Convention to everyone within their jurisdiction (See Art. 1 ECHR) and to provide for legal remedy in case of violations. This constitutes a relationship of subsidiarity between the system of legal protection of the Convention and the national protection of human rights. Art.

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guideline of interpretation. As to the other statements of the explanations the list can only be considered as a valuable tool for interpretation, but it cannot anticipate the result of the interpretation.

<sup>11</sup> The ECJ already refers to the ECHR and the case-law of the Strasbourg Court of Human Rights. See, e.g., Case C-465/00, Rechnungshof, 2003 E.C.R. I-04989, para. 71; Case C-245/01, RTL Television GmbH, 2003 E.C.R. I-12489, para. 68; Case C-112/00, Schmidberger, 2003 E.C.R. I-05659, para. 79; see Antonio Vitorino, *La Cour de justice et les droits fondamentaux depuis la proclamation de la Charte*, in UNE COMMUNAUTE DE DROIT. STUDIES IN HONOUR OF GIL CARLOS RODRÍGUEZ IGLESIAS 111, 119 (Ninon Colneric et al. eds., 2003); Stefan Kadelbach & Niels Petersen, *Europäische Grundrechte als Schranken der Grundfreiheiten*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 693, 695 (2003).

<sup>12</sup> See Borowsky, *supra* note 5.

<sup>13</sup> See CT, *supra* note 2; see also Dorf, *supra* note 6, at 131. By way of a historical interpretation of the Charter's fundamental rights it is possible to draw conclusions from a comparison of these norms with their judicially developed foundations.

13 ECHR is the material aspect of this principle of subsidiarity.<sup>14</sup> The right of Art. II-107(1) CT whose scope of application has been extended to all Union rights as well as to the guarantee of a remedy before a tribunal, adopts the character of a general and comprehensive guarantee of legal protection provided by a tribunal.<sup>15</sup> In this respect, this article is comparable to Art. 19(4) German Basic Law.<sup>16</sup> However, the principle of subsidiarity does not underlie the latter guarantee.

A systematic analysis of Art. II-107(2), (3) CT supports the idea of a general guarantee of legal protection. These paragraphs provide, similarly to Art. 6 ECHR, for two procedural guarantees. One, these guarantees refer to the organization of a judicial body, and two, ensure a fair judicial procedure to be carried out within a reasonable time. According to the explanations related to this right, its content corresponds to that of Art. 6(1) ECHR.<sup>17</sup> The scope of application has, however, been extended in contrast to Art. 6(1) ECHR. The procedural rights of Art. II-107(2) CT apply to any dispute and are no longer limited to civil and criminal affairs.<sup>18</sup> Thus, Art. II-107 CT altogether constitutes a more well-rounded version of Art. 6 ECHR. It opens up far reaching access to a tribunal and guarantees a fair trial according to Art. 6 ECHR.

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<sup>14</sup> GRABENWARTER, *supra* note 9, at 350; José Antonio Pastor Ridruejo, *Le principe de subsidiarité dans la Convention européenne des droits de l'homme*, in INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE. STUDIES IN HONOUR OF RESS 1077, 1081 (Jürgen Bröhmer et al. eds., 2005); with regard to procedural requirements, the obligation to exhaust remedies according to Art. 35 ECHR is the counterpart of the material guarantee stipulated in Art. 13 ECHR.

<sup>15</sup> Eser, *Art. 47*, in KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION para. 11 (Jürgen Meyer ed., 2002); HANS-WERNER RENGELING & PETER SZCZEKALLA, GRUNDRECHTE IN DER EUROPÄISCHEN UNION para. 1156 (2004).

<sup>16</sup> For the scope of protection guaranteed by Art. 19(4) *Grundgesetz* (German Basic Law) in comparison to Art. 6 ECHR see Christoph Grabenwarter & Katharina Pabel, *Der Grundsatz des fairen Verfahrens*, in KONKORDANZKOMMENTAR ZUM EUROPÄISCHEN UND DEUTSCHEN GRUNDRECHTSSCHUTZ para. 77 (Rainer Grote & Thilo Marauhn eds., 2005).

<sup>17</sup> Only developments of the guarantee of a fair trial resulting from the jurisdiction of the ECHR, which contributes to the concretisation of rights resulting from this principle, have been included in Art. II-107 CT. This pertains especially to the right to receive legal aid according to Art. II-107(3) CT; see Eser, *supra* note 15, at para. 38; Eckhard Pache, *Das europäische Grundrecht auf einen fairen Prozess*, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1342, 1344 (2001).

<sup>18</sup> As a consequence of the autonomous interpretation of the terms “civil rights” and “criminal charge” carried out by the European Court of Human Rights a couple of proceedings fall in the ambit of Art. 6 ECHR which in the legal systems of the Member States would be qualified as public-law matters. See GRABENWARTER, *supra* note 9, at 283 (with references to comprehensive case-law).

### C. The Addressee of the Right to an Effective Remedy

The interdependence of the different parts of the Constitution becomes apparent when asking who is addressed by the right to an effective remedy. In the European Union as a supranational organization, two levels can basically be distinguished: the level of the Union on which acts are carried out by its bodies and institutions, and the level of the Member States on which national organs carry out their respective functions. The question arises on which level an effective remedy in accordance with the application of Art. II-107(1) CT must be provided.

According to Art. II-111 CT, the fundamental rights set out in the European Constitution are binding on both the organs of the European Union, and on its Member States in the implementation of Union law.<sup>19</sup> In their *status negativus* the fundamental rights oblige the organs of the European Union and of the Member States not to violate the guaranteed rights. Procedural guarantees which include the right to an effective remedy lead primarily to positive obligations. In this case, the obligation to establish and organize tribunals and to make provisions for an adequate exercise of procedural rights. As to the dimension of fundamental rights as positive obligations, Art. II-111 CT does not fully answer the question on which level the required measures need to be taken.

If we assume, which is debatable, that all parts of the Constitution are of equal legal value (same hierarchical level),<sup>20</sup> the provisions which define and separate the competences of the Union from those of the Member States need to be considered as well. Only through their application can it be determined whether there exists an obligation to guarantee a fundamental right on the side of the Union or on the side of a Member State. In this context, the structure of the European Union<sup>21</sup> is comparable to a federal state, as the fundamental rights refer to bodies and institutions on two levels. In a federal state, fundamental rights are binding on the federation and its constituent states (*Bund* and *Länder*); the fundamental rights of the European Constitution are binding on the institutions and bodies of the Union and of its constituent Member States. The fundamental rights are binding on the respective level in the framework of its competences.<sup>22</sup> Positive obligations resulting from fundamental rights are to be fulfilled by the level that is competent

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<sup>19</sup> For the scope of the binding effect of the European Union's fundamental rights on the Member States, see Griller *supra* note 5, at 139.

<sup>20</sup> *Infra* sec. C II 3 in this article.

<sup>21</sup> While disregarding the question of whether it has the quality of a state or of a federal state.

<sup>22</sup> See, e.g., PETER PERNTHALER, *ÖSTERREICHISCHES BUNDESSTAATSRECHT* 645 (2004).

to do so (according to constitutional provisions); with regard to the right to an effective remedy, it must be determined whether the Union or the Member States are competent to establish the necessary remedies.

As to the European Constitution, it can be noted that it offers certain legal remedies by allocating competences to the European courts,<sup>23</sup> and by determining the procedures and admission requirements of proceedings before these courts. These remedies partly fulfill the obligation stipulated in Art. II-107(1) CT to provide remedies, in particular with regard to violations of subjective rights committed by institutions and bodies of the European Union. A conferral of jurisdiction to the courts of the Union beyond the European Constitution does not exist (Art. I-29(3) CT). New competences can only be introduced through revision of the Constitution according to Arts. IV-443 and IV-444 CT.

Furthermore, Art. I-29(1), subpara. 2 CT needs to be considered in this context.<sup>24</sup> According to this article, Member States are obliged to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. Thus, the European Constitution imposes the obligation on Member States to create remedies apart from those provided by the courts of the Union, necessary to guarantee the fundamental right to an effective remedy.<sup>25</sup> In consideration of Art. I-29(1), subpara. 2 CT it cannot be assumed that the European courts are primarily responsible to secure effective legal protection vis-à-vis measures of the EU institutions and organs. Also, a responsibility "in reserve" (*Auffangverantwortung*)<sup>26</sup> has to be rejected. Referring to a formulation in the judicature of the ECJ, Art. I-29(1) CT specifies the Member States' obligation to provide an effective remedy in order to guarantee the enforcement of Community law, which derives from the general obligation of the loyalty of Member States (Art. 10 EC Treaty).<sup>27</sup> The Member States,

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<sup>23</sup> Specialised courts, the General Court, the Court of Justice, see CT Art. I-29(1).

<sup>24</sup> See Ulrich Everling, *Rechtsschutz im europäischen Wirtschaftsrecht auf der Grundlage der Konventsregelungen*, in *DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS* 363, 370 (Jürgen Schwarze ed., 2004).

<sup>25</sup> See Wolfram Cremer, *Gemeinschaftsrecht und deutsches Verwaltungsprozessrecht – zum dezentralen Rechtsschutz gegenüber EG-Sekundärrecht*, 37 *DIE VERWALTUNG* 165, 172 (2004).

<sup>26</sup> For that, see Christian Calliess, *Kohärenz und Konvergenz beim europäischen Individualrechtsschutz*, 55 *NEUE JURISTISCHE WOCHENSCHRIFT* 3577, 3582 (2002); Martin Nettesheim, *Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes*, 57 *JURISTENZEITUNG* 928, 934 (2002).

<sup>27</sup> Martin Borowski, *Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV*, 39 *EUROPARECHT* 879, 909 (2004). See the respective postulation in Nettesheim, *supra* note 26, at 934. Concerning the principle of effective legal protection according to the case-law of the ECJ see, e.g., MICHAEL TONNE, *EFFEKTIVER RECHTSSCHUTZ DURCH STAATLICHE GERICHTE ALS FORDERUNG DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS* 248 (1997);

thus, have to establish provisions within their rules of procedure which provide effective remedy for potential violations of subjective rights and freedoms conferred by Union law. Since the Member States cannot confer new competences to the courts of the Union within their legal orders, they have to create new competences in the courts of the Member States.

#### **D. The System of Legal Protection in the Light of Article II-107 CT**

As the fundamental right to an effective remedy obligates both the Union and its Member States to provide for the necessary remedies, the following question arises: whether the system of individual legal protection is incomplete and therefore, beyond specific constellations of individual cases, structurally leads to violations of the right ensured by Art. II-107(1) CT.

##### *I. Centralized and Decentralized Individual Legal Protection*

The Union's system differentiates between the individual's legal protection against measures taken by the Union (its institutions and bodies), and legal protection against measures taken by Member States or private parties which violate European law. The former are addressed to the courts of the Union (central legal protection), while the latter are referred to the courts of the Member States (decentralized legal protection).<sup>28</sup> Whether legal protection against violations of European law caused by organs of the Member States or by private parties is guaranteed in an adequate and effective manner as set out in Art. II-107(1) CT needs to be examined for each Member State. In this respect, Union law already provides for an obligation to establish effective remedies to ensure the enforcement of subjective rights which are conferred by Union law.<sup>29</sup> Only in some specific

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STEFAN FRANK, *GEMEINSCHAFTSRECHT UND STAATLICHE VERWALTUNG* 122 (2000); Christoph Grabenwarter, *Die Europäische Union und die Gerichtsbarkeit des öffentlichen Rechts*, in *VERHANDLUNGEN DES 14. ÖSTERREICHISCHEN JURISTENTAGES, VOL. I/2 VERFASSUNGSRECHT* 15, 26 (Österreichische Juristenkommission ed., 2001); Jörg Gundel, *Rechtsschutzlücken im Gemeinschaftsrecht?*, 93 *VERWALTUNGSARCHIV* 81 (2001); Bernhard Wegener, *Art. 220 EG-Vertrag*, in *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG*, para. 29 (Christian Calliess & Matthias Ruffert eds., 2nd ed. 2002); Rudolf Streinz, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, 61 *VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRICHTSLEHRER* 300, 340 (2002).

<sup>28</sup> See e.g. Wolfram Cremer, *Art. 230 EG-Vertrag*, in *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG*, para. 9 (Christian Calliess & Matthias Ruffert eds., 2nd ed. 2002); Carsten Nowak, *Zentraler und dezentraler Individualrechtsschutz in der EG im Lichte des gemeinschaftsrechtlichen Rechtsgrundsatzes effektiven Rechtsschutzes*, in *INDIVIDUALRECHTSSCHUTZ IN DER EG UND DER WTO* 47 (Carsten Nowak & Wolfram Cremer eds., 2002).

<sup>29</sup> See *supra* notes 3, 27.

constellations, therefore, might it be necessary to provide further possibilities of legal protection.

## II. Action for Annulment According to Article III-365(4) CT

### 1. The Problem: Gaps in the Legal Protection Against Legislative Acts

Concerning the legal protection provided by courts of the European Union, an individual has the possibility to address the Court of Justice under the conditions of Art. 230(4) EC Treaty. According to this article, any person (natural or legal) can bring an action against decisions addressed to that person. Additionally, a person can bring an action against acts which are of direct and individual concern to that person, even though they have been addressed to another person or issued in the form of a regulation.<sup>30</sup> While legal protection is guaranteed against decisions which are individual acts, gaps in legal protection can be discovered with regard to regulations and directives as normative acts of the Union. These gaps are widely discussed in literature and are considered to be problematic with respect to the guarantee of effective legal protection.<sup>31</sup> The gap results from a restrictive interpretation of the right to bring an action pursuant to Art. 230(4) EC Treaty by the Court of Justice. According to existing jurisdiction an action for annulment against regulations is, in principle, not admissible due to a lack of individualization of those concerned by the regulation. In reaction to respective rulings by the Court of First Instance,<sup>32</sup> in the most recent case-law the ECJ has held on to the so-called *Plaumann*-formula;<sup>33</sup> accordingly, individual legal protection against regulations or directives can only be reached in exceptional cases via Art. 230(4) EC Treaty.

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<sup>30</sup> Apart from that, individuals have the possibility to bring actions for failure to act (Art. 232 EC) and actions for damages (Art. 235, 288(2) EC) before the European courts.

<sup>31</sup> From the wealth of literature see, e.g., Calliess, *supra* note 26, at 3579; Wolfram Cremer, *Individualrechtsschutz gegen Rechtsakte der Gemeinschaft: Grundlagen und neuere Entwicklungen*, in *INDIVIDUALRECHTSSCHUTZ IN DER EG UND DER WTO 27* (Carsten Nowak & Wolfram Cremer eds., 2002); Nettesheim, *supra* note 26, at 932; Borowski, *supra* note 27, at 894; Franz C. Mayer, *Individualrechtsschutz im Europäischen Verfassungsrecht*, 59 *DEUTSCHES VERWALTUNGSBLATT* 606 (2004); Eckhard Pache, *Rechtsschutzdefizite im europäischen Gemeinschaftsrecht*, in *GRUNDRECHTSSCHUTZ FÜR UNTERNEHMEN IM EUROPÄISCHEN BINNENMARKT 199* (Thomas Bruha, Carsten Nowak, & Hans Arno Petzold eds., 2004).

<sup>32</sup> See Case T-177/01, *Jégo-Quéré v. The Commission*, 2002 E.C.R. II-02365, para. 41. See also the Opinion of the Advocate-General Jacobs concerning Case C-50/00, *Union de Pequeños Agricultores*, 2002, E.C.R. I-06677, para. 43 (which was adopted previously).

<sup>33</sup> Case C-50/00, *Union de Pequeños Agricultores*, 2002, E.C.R. I-06677, para. 39; Case C-263-02 P, *The Commission v. Jégo-Quéré*, 2004 E.C.R., para. 29. see Daniel Dittert, *Effektiver Rechtsschutz gegen EG-Verordnungen: Zwischen Fischfangnetzen, Olivenöl und kleinen Landwirten*, 37 *EUROPARECHT* 708 (2002); Christian Calliess & Martina Lais, *Anmerkung*, 14 *ZEITSCHRIFT FÜR UMWELTRECHT* 344 (2002).

In the context of the European Constitution, the possibilities for individuals to bring actions of annulment before the Union's courts have been modified and extended by Art. III-365(4) CT (in contrast to Art. 230(4) EC Treaty). According to the third alternative of Art. 365(4) CT, persons who are directly affected by a regulatory act which does not entail implementing measures are entitled to bring an action. On certain conditions, this article, in contrast to Art. 230(4) EC Treaty, does not require a person to be directly affected according to the restrictive interpretation of the Court of Justice. This leads to an extension of the right to institute proceedings.<sup>34</sup> This extension is, however, of little extent and of subordinate importance.<sup>35</sup>

In fact, this extended possibility of instituting legal proceedings merely applies to regulatory acts which seem to include European regulations and European decisions, the new forms of legal acts which both constitute non-legislative acts.<sup>36</sup> Art. III-365(4) CT lists the conditions of individual legal protection without direct reference to the new types of legal acts which are defined in Arts. I-33 and I-34 CT. In fact, in its first and second alternative the nonspecific term "act" is used. But only for some of the conceivable acts, the so called "regulatory acts" which do not entail implementing measures, is an individual action for annulment admissible even if the requirement of individual concern is not met. The wording of Art. III-365(4) CT indicates that legislative acts should be excluded by the term "regulatory acts." According to a systematic approach with regard to Arts. I-33 and I-34 CT, it is rather unclear whether "regulatory acts" implies the same as "non-legislative acts" as used in Arts. I-33 and I-35 CT. It seems doubtful that two different terms should be used for the same category of legal acts. But it must be assumed that the term "regulatory acts" does not include "legislative acts" as defined in Art. I-33 CT.<sup>37</sup>

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<sup>34</sup> See Thomas von Danwitz, *Grundfragen einer Verfassungsbindung der Europäischen Union*, in *EINE VERFASSUNG FÜR EUROPA* 251, 258 (Klaus Beckmann, Jürgen Dieringer, & Ulrich Hufeld eds., 2004).

<sup>35</sup> See deviating statements in Jürgen Bast, *Legal Instruments*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (Armin von Bogdandy & Jürgen Bast eds., 2005, forthcoming); Jürgen Gündisch, *Grundrechte und Rechtsschutz*, in *EINE VERFASSUNG FÜR EUROPA* 270, 287 (Klaus Beckmann, Jürgen Dieringer, & Ulrich Hufeld eds., 2004); Pache, *supra* note 31, at 208.

<sup>36</sup> See Wolfram Cremer, *Der Rechtsschutz des Einzelnen gegen Sekundärrechtsakte der Union gem. II-270 Abs. 4 Konventsentwurf des Vertrags über eine Verfassung für Europa*, 31 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 577, 579 (2004); Mayer, *supra* note 31, at 610. Legislative acts (see Art. I-33(1) subpara. 2, 3 CT, European laws and European framework laws) correspond to directives and regulations according to the types of legal acts effective under current European law.

<sup>37</sup> Cremer, *supra* note 36, at 579; John Temple Lang, *Declarations, regional authorities, subsidiarity, regional policy measures, and the Constitutional Treaty*, 29 *EUR. L. REV.* 94, 102 (2004); deviating statements by Bast *supra* note 35.

This understanding of the term “regulatory act” is confirmed by a teleological argument: individual legal protection against legislative acts has not been provided in the European system of legal protection so far. A turning away from this legal position, which was discussed controversially in the European Convention,<sup>38</sup> should be more obvious in the wording of the modified provision of Art. III-365(4) CT.

The amelioration of individual legal protection relates, thus, only to non-legislative acts.<sup>39</sup> As a result, an action of annulment against European law and European framework law as types of legislative acts is only admissible if brought by individuals who are directly and individually affected according to the restrictive interpretation by the Court of Justice.<sup>40</sup> Thus, the mentioned gap in legal protection is marginally diminished but is far from being closed.<sup>41</sup>

## *2. The Answer of Article 107(1) CT*

In view of the guarantee of an effective remedy, a legislative act requiring an act of implementation by the Member States is not problematic. Legal remedy can be sought against the implementing measure before the courts of the Member States, and judicial scrutiny of the legal act can be carried out by way of a preliminary ruling.<sup>42</sup> In general, this possibility is not available if a legislative act is effective without an implementing measure or if the adoption of an implementing measure seems unreasonable. In such a case, a request for legal protection can only be satisfied by judicial scrutiny of the legislative act itself by an individual’s application, which is usually not provided.

If we consider the gap in the legal protection in the light of Art. II-107(1) CT, the first question arises whether this guarantee also requires direct remedies against legislative acts. This question has not been completely answered in the case-law of the European Court of Human Rights with regard to Art. 13 ECHR. An obligation

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<sup>38</sup> The relating documents show that the possibility of an individual action against legislative acts should not be introduced by the re-formulation of Art. 230(4) EC Treaty. See CONV (03) 734, 2 May 2003, 20. See Hans Arno Petzold, *Lückenhafter Rechtsschutz gegen EG-Verordnungen in der Arbeit des Europäischen Konvents*, in GRUNDRECHTSSCHUTZ FÜR UNTERNEHMEN IM EUROPÄISCHEN BINNENMARKT 247, 252 (Thomas Bruha et al eds., 2004).

<sup>39</sup> Everling, *supra* note 24, at 81.

<sup>40</sup> Mayer, *supra* note 31, at 610.

<sup>41</sup> Cremer, *supra* note 36, at 583.

<sup>42</sup> See Cremer, *supra* note 36, at 583.



to introduce a procedure reviewing legislative acts on the basis of the Convention has not been deducted from Art. 13 ECHR as yet.<sup>43</sup> But, the existing jurisdiction on measures of general application without legislative character requires a possibility of reviewing an infringement of the Convention.<sup>44</sup>

A literal interpretation of the Union's fundamental right to an effective remedy leads, first of all, to the conclusion that the ambit of this subjective right is not limited to violations of law committed by the executive and/or the legislative. For the applicability of Art. II-107(1) CT it is irrelevant what type of legal act caused the violation of a subjective right.

In consideration of the updated explanations to the Charter of Fundamental Rights, we can find the reference that the fundamental right to an effective remedy does not aim to change the system of legal protection laid down by the Treaties, and particularly, the rules related to the admissibility of direct actions brought before the Court of Justice.<sup>45</sup> However, this explanation does not lead to a clear-cut answer to the issue in question. It can be assumed that the European Convention considered the system of legal protection provided for in the Constitution to be sufficient and that the mentioned gap in legal protection does not constitute a violation of the right to an effective remedy. It can be assumed that this fundamental right conversely does not oblige to establish the possibility of judicial scrutiny of legislative acts upon an individual's application. However, it seems doubtful whether this can be considered a compulsive conclusion.

The explanation to the Charter of Fundamental Rights could also be interpreted differently. It could mean that no changes of the provisions on the admissibility of direct actions brought before the Court of Justice can be derived from Art. II-107(1) CT. Moreover, from this reference it could be deducted that the Convention acted on the assumption of a continuation of the (restrictive) jurisdiction by the Court of Justice with regard to direct actions brought before the Court and didn't assume that an obligation to change its jurisdiction derives from this fundamental right. Whether the Member States are possibly expected to fulfill all obligations resulting from an exhaustive guarantee of the fundamental right pursuant to Art. I-29(1) CT

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<sup>43</sup> James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at para. 85 (1986); Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) at para. 206 (1986); Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at para. 76 (1991). See Grabenwarter, *supra* note 9, at 353.

<sup>44</sup> Silver v. United Kingdom, 61 Eur. Ct. H.R. (ser. A) at para. 118 (1983); Campbell and Fell v. United Kingdom, 80 Eur. Ct. H.R. (ser. A) at para. 127 (1984).

<sup>45</sup> Explanation on Art. 47 of the Charter on Fundamental Rights, 2004 O.J. (C 310) 420, 450.

cannot be answered according to this understanding of the explanations, but could be assumed as a consequence of the judicature of the Court of Justice.<sup>46</sup>

In this context the method of teleological interpretation seems to constitute an appropriate approach. In order to grant an effective remedy for any potential violation of a subjective right, it seems necessary to also provide a remedy if a violation derives from a legislative act which can only be directly contested due to the lack of an implementing measure or due to a lack of reasonability. In such constellations the fundamental rights guaranteed in the European Constitution as well as the fundamental freedoms can only be effectively enforced by way of direct judicial scrutiny of the legislative act.<sup>47</sup> Although individual actions against legislative acts do not form part of a common European standard of legal protection,<sup>48</sup> a remedy must be admissible if no other possibility of legal protection is available in order to effectively enforce the right to an effective remedy. Therefore, it needs to be assumed that the right to an effective remedy requires the establishment of a direct legal remedy against legislative acts if there is no other possibility of legal protection. The conditions of admissibility in respect of such a remedy could, indeed, be narrowly defined and its applicability could be limited to such cases for which no legal protection can be achieved otherwise.<sup>49</sup>

### *3. The Consequences*

As a result of the aforementioned it can be recapitulated: the right to an effective remedy requires the possibility of an individual action against legislative acts if legal protection cannot be achieved otherwise. However, the modified conditions concerning the admissibility of actions of annulment according to Art. III-365(4) CT do not provide remedies against legislative acts without direct and individual concern. To draw the consequences from these considerations, the relationship between the fundamental right as guaranteed in Art. II-107(1) CT on the one hand and Art. III-365(4) CT on the other hand must be clarified.

My considerations emanate from the premise that all parts of the European Constitution and all its provisions are of the same legal hierarchy. It is true that

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<sup>46</sup> Case C-50/00, *Union de Pequeños Agricultores*, 2002 E.C.R. I-06677, para. 45.

<sup>47</sup> Nettesheim, *supra* note 26, 933; Pache, *supra* note 31, at 202; Jürgen Schwarze, *Der Rechtsschutz Privater vor dem Europäischen Gerichtshof: Grundlagen, Entwicklungen und Perspektiven des Individualrechtsschutzes im Gemeinschaftsrecht*, 117 *Deutsches Verwaltungsblatt* 1297, 1313 (2002).

<sup>48</sup> Von Danwitz, *supra* note 34, at 259; Everling, *supra* note 24, at 381.

<sup>49</sup> Everling, *supra* note 24, at 381.

Parts I and II contain provisions of rather “constitutional nature” whereas Part III is in many respects very technical. Principles announced in Part I of the Constitution are sometimes specified in detail in Part III. The constitutional nature of provisions can, however, not be the relevant criterion to decide if one part takes precedence over another. Especially in Part III, the “constitutional quality” differs from provision to provision which makes it impossible to decide on what hierarchical level this Part can be placed. The Constitution itself remains silent on this issue. Therefore, there is no evidence that certain Parts of the Constitution, and in particular the fundamental rights of Part II, take precedence over other Parts.<sup>50</sup>

Consequently, the right of Art. 107 CT cannot be considered as a standard for the examination of whether the possibilities of legal protection before the Court of Justice, as they are provided for by Art. III-365(4) CT, correspond to the right to an effective remedy. Similarly, it is impossible to overrule the conditions of admissibility for an action of annulment by an individual through an interpretation of these conditions in the light of the right to an effective remedy.<sup>51</sup> This would also require a superiority of fundamental rights *vis-à-vis* the provisions in Part III of the Constitution.

The claim has sometimes been raised that *praktische Konkordanz* (an adequate balance) needs to be established between the right to an effective remedy and the conditions of admissibility to an action for annulment by an individual. But it is doubtful in what methodological way such an “adequate balance” can be reached. In its jurisdiction the Court of Justice has *de lege lata* ruled out an interpretation of the conditions of admissibility laid down in Art. 230(4) EC Treaty, which excludes an entitlement to institute proceedings in the above mentioned cases.<sup>52</sup> In my view, the above mentioned reference in the explanations seems to constitute an answer to this jurisdiction: the integration of the Charter into the Union’s Constitution is not meant to modify the system of legal protection; the provisions on the admissibility of procedures before the Union’s courts are laid down in the Constitution.<sup>53</sup> This also means that the jurisdiction of the Court of Justice can be continued insofar as it is not affected by changes in the conditions of admissibility.

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<sup>50</sup> Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf – Analyse und Bewertung des vom Europäischen Verfassungskonvent vorgelegten Entwurfs eines Vertrags über eine Verfassung für Europa*, 38 *EUROPARECHT* 535, 536 (2003). In this respect the legal basis has changed after the integration of the Charter of Fundamental Rights into the Constitution. Before that, the Charter existed parallelly to primary law; in this context a superiority of fundamental rights could be assumed.

<sup>51</sup> Bast, *supra* note 35.

<sup>52</sup> Case C-50/00, *Union de Pequeños Agricultores*, 2002 E.C.R. I-06677, para. 44.

<sup>53</sup> For another interpretation of this reference, see Eser, *supra* note 15, at para. 12.

Therefore, in application of Art. I-29 CT the Member States are obligated to provide for the necessary remedies.<sup>54</sup> This means that they have to introduce remedies in the rules of procedure which allow access to a court if a legislative act of the Union infringes upon rights or freedoms guaranteed by Union law. Legal protection also needs to be possible if no implementing measure by a national authority has been set or if such a measure cannot be claimed due to considerations of reasonability.<sup>55</sup> In case of justified doubts, the courts of the Member States at least need to be obligated to submit a legislative act to the Court of Justice by way of a preliminary ruling. Such regulations in the national rules of procedure would be possible. However, it also needs to be considered that such constellations would lead to the risk of national courts adopting the function of preliminary examiners or mere intermediaries.<sup>56</sup> This might appear to be an awkward organization of legal protection which is prone to lead to delays.<sup>57</sup> Its effectiveness claimed by Art. II-107(1) CT can not be considered as being *a priori* affected.<sup>58</sup>

### III. An Individual's Right to Initiate a Preliminary Ruling?

The preliminary ruling forms an essential part of the European system of legal protection. Its special importance is to interlock centralized and decentralized courts and to provide for a uniform application of European law.<sup>59</sup> It also serves as an element of individual legal protection.<sup>60</sup> With regard to an amelioration of the individuals' legal protection, some critics call for the possibility for an individual to initiate a preliminary ruling.<sup>61</sup> Despite arguments *de lege ferenda* it has to be considered if the right to an effective remedy requires the right to initiate preliminary rulings.

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<sup>54</sup> Temple Lang, *supra* note 37, at 104.

<sup>55</sup> See Cremer, *supra* note 25, at 172.

<sup>56</sup> Borowski, *supra* note 27, at 896.

<sup>57</sup> See, e.g., Bruno De Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS 877* (Philip Alston ed., 1999); Pache, *supra* note 31, 207.

<sup>58</sup> See Calliess, *supra* note 26, at 3581.

<sup>59</sup> HANS-WERNER RENGELING ET AL., *HANDBUCH DES RECHTSSCHUTZES IN DER EUROPÄISCHEN UNION* 208 (2003).

<sup>60</sup> *Id.* at 210; BERNHARD SCHIMA, *DAS VORABENTSCHEIDUNGSVERFAHREN*, 4 (2nd ed. 2004).

<sup>61</sup> See, e.g., LUDWIG ALLKEMPER, *DER RECHTSSCHUTZ DES EINZELNEN NACH DEM EG-VERTRAG* 171 (1995). *Contra* Pache, *supra* note 31, at 219; Schwarze, *supra* note 47, at 1314.

Effective legal protection requires, first, that every possible violation of a subjective right is considered by a court, and second, that this court can come to a binding decision.<sup>62</sup> Both are available, as any addressee of an act in the field of application of European law has the possibility to bring an action before a court of a Member State. The court decides whether to make a preliminary reference or not. In case of a preliminary ruling, legal protection is provided through cooperation of the courts involved. If the Member State's court refuses to make a preliminary reference, the national court gives at the same time a binding judgment on an alleged violation of a right. There is no right to a successful remedy. Consequently, the right to an effective remedy does not benefit individuals in respect of preliminary rulings. However, if a court arbitrarily refuses to make a preliminary reference, a violation of the right to a fair trial or to access to a court according to Art. II-107(2) CT could be assumed.<sup>63</sup>

#### **E. Conclusion**

Art. I-29 CT lays the burden of providing sufficient possibilities of legal protection largely upon the Member States. Whether this leads to a system of legal protection which, guaranteed by the courts of the Union and the Member States, allocates the competences to different courts in a meaningful way remains doubtful. The right to an effective remedy can be useful to close gaps in the legal protection of individuals in certain cases. However, it does not constitute an adequate instrument to reform the system of legal protection of individuals under Union law.

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<sup>62</sup> GRABENWARTER, *supra* note 9, at 356 (with reference to the case-law of the ECHR).

<sup>63</sup> For the corresponding jurisprudence of the *Bundesverfassungsgericht* (German Constitutional Court), see BVerfGE 73, 339, 366; BVerfGE 75, 223, 233.

## ***Comment on Katharina Pabel – The Right to an Effective Remedy in a Polycentric Legal System***

*By Adam Bodnar\**

### **A. Introduction**

The right to an effective remedy should not be interpreted and analysed individually, but rather in a broader context of the general right to a fair trial. The notion of an effective remedy is closely connected with the right to a fair trial and one should agree that Art. II-107 of the “Treaty establishing a Constitution for Europe” (CT) “constitutes a more rounded-off version of Article 6 ECHR.” Consequently, this comment focuses on Art. II-107(1) CT in a more general context.

### **B. The Theory of a Polycentric Legal System**

It should be noted that recently the new theory was proposed in Poland to consider the place of EU law in the Polish legal system; the theory bears primarily on the relations between the systems, their impact on the protection of fundamental rights as well as the role that judges should fulfil in this system.<sup>1</sup> According to Prof. Łętowska, Member States no longer enjoy monopoly over what laws are binding within their territories. Consequently, individuals do not have a single set of legal instruments and legal remedies to enforce their subjective rights; they are rather subject to and benefit from a legal system which has many centers (the national center, the EU center, and ECHR center). An individual has a set of rights granted under every of these centers and enjoys correlate remedies to enforce them. However, the existence of different sets of rights and remedies does not mean that the individual is better protected, because remedies have different value for an

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<sup>1</sup> Ewa Łętowska, *Multicentryczność współczesnego systemu prawnego i jej konsekwencje (Multicentrism of the contemporary legal system and its consequences)*, 4 PAŃSTWO I PRAWO 3-10 (2005).

individual and different scope of operation. Furthermore, the operation of the whole system is not fully clear and transparent to any individual concerned.

### C. Effective Remedy in a Polycentric Legal System

The right to an effective remedy granted at the EU level is a natural consequence of this legal multi-centrism. An individual must have a remedy to enforce its subjective Union rights. However, although guarantees of subjective rights and remedies are on the same hierarchical level, the responsibility for their enforcement is on both the EU level and the national level. The question is whether an individual is in fact sufficiently equipped with effective remedies to claim its subjective rights and whether there are some gaps in the system of legal protection. The polycentric legal system will only work properly when at the end it will lead to the ultimate one and single solution of a particular litigation. However, on the EU level it seems that it might not necessarily be the case. In this context the existing lacunas in the legal protection should be mentioned. In particular, the scope of the action for annulment is of special concern.

I cannot agree with the comparison of the EU legal system to the federal systems as regards protection of fundamental rights.<sup>2</sup> In my opinion, the system of fundamental rights' protection in Europe cannot be compared to that of a federation because of its system of judicial remedies and the scope of application of fundamental rights. The primary judicial guarantor of the subjective rights on the EU level are national courts (and not courts on the EU level). The ECJ and CFI act only as a form of constitutional court to determine the compliance of laws with EU primary law. However, they are not hierarchically higher than the national courts. Furthermore, the fundamental rights guaranteed on the federal level do not have general application on both levels of government, but are applicable only when EU authorities act or insofar as the Member State is implementing EU law. Surely, the Charter of Fundamental Rights will have an impact on the national legal systems, but nevertheless the EU has its *Sonderweg* with respect to fundamental rights and does not resemble other federations.<sup>3</sup>

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<sup>2</sup> See Pabel, in this volume.

<sup>3</sup> Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 946 (2002).

#### D. Is The Right to an Effective Remedy Really “Effective?”

I think that in Poland the most important problem with ensuring the right to an effective remedy will be the attitude of Polish courts towards application of the Community law. In fact, national courts (and not ECJ) will be the primary guarantor of the right to an effective remedy as their obligation will be to apply Community law, and in case of doubts as to its interpretation, to refer preliminary questions to ECJ. However, one may note the following problems in ensuring real effectiveness of Art. II-107(1) CT by Polish courts:

- Scarcity of competencies in interpreting and applying EU law as being part of the polycentric legal system;<sup>4</sup>
- Lack of ability to use and to apply the principles of the EU law and methods of interpretation specific to this system of law;<sup>5</sup>
- Lack of the legal means regulating the specific use of the preliminary reference procedure under Polish law<sup>6</sup> as well as enabling parties to compel Polish courts to refer the case to the ECJ;
- Technical problems with accessibility to the EU law.<sup>7</sup>

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<sup>4</sup>See the judgment of the District Court in Lubartów, Poland, Case IC 260/03, (2004) (Where the court applied the EU customs classification to analyze the issues related to the liability for damages. This was an example of the courage of Polish courts in using the Community law, but unfortunately, this use was grossly flawed). See also Ewa Łętowska, *Między Scyllą a Charybdą czyli polski sędzia między Strasburgiem I Luksemburgiem (Between Scylla and Charybda – the Polish judge between Strasbourg and Luxembourg)*, paper presented at the Council of Europe Information Office Conference, Nov. 2005.

<sup>5</sup>See the judgment of the Supreme Court on the “golden share,” Case IV CK 713/03, (2004). On this decision for Sept. 30, 2004, the court referred to jurisprudence of the ECJ in this area, but could not apply and interpret the principles stemming from this judgment.

<sup>6</sup>See Maciej Szpunar, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo – zagadnienia wybrane (The Impact of the Poland's membership in the EU on the judiciary – selected issues)*, in PRZYSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ. TRAKTAT AKCESYJNY I JEGO SKUTKI (*Accession of Poland to the EU. The Accession Treaty and its Consequences*) 277-302 (Biernat et al. eds., 2003). See also Aleksandra Wentkowska, *Sądownictwo polskie w przeddzień przystąpienia do Unii Europejskiej – uwagi de lege ferenda (The Polish judiciary before Poland's accession to the EU)*, in PRZYSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ. TRAKTAT AKCESYJNY I JEGO SKUTKI, 277-302 (Biernat et al. eds., 2003).

<sup>7</sup> See Agnieszka Frąckowiak, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo polskie – spojrzenie ze strony praktycznej (Impact of Poland's membership in the EU on the Polish judiciary – a practical view)*, in PRZYSTĄPIENIE, *supra*, note 6.



The Polish example indicates that the Art. II-107(1) CT may not be sufficiently guaranteed due to lack of abilities, technical and structural problems. In such a case we may have a real example of the asymmetry of legal systems concerned: on the one hand Polish courts not being highly effective in application of Community law and – on the other hand – German or French courts, competent and professional in applying Community law. Of course, individuals may seek relief in such a situation by claiming from the state liability for damages, even if such damages were caused by courts (as the *Köbler* case indicates<sup>8</sup>). But such a possibility is not equivalent to the right to an effective remedy under CT. It only alleviates the problem in certain exceptional cases or circumstances – and underlines the need for changes – but does not resolve the problem alone.

### **E. Potential of the Right to an Effective Remedy in Reforming of the Polish Judicial System**

Despite the above criticism, there is some potential for rights enshrined in Art. II-107 CT in reforming the Polish judicial system. It should be noted that there is some dissatisfaction in Poland with the Strasbourg system of human rights' protection, in particular with guarantees of Article 6 ECHR. Following the *Kudła* judgment,<sup>9</sup> Poland has adopted the so-called Polish Pinto Act,<sup>10</sup> introducing into the Polish law the complaint on the prolongation of proceedings. However, the jurisprudence of the Supreme Court under this new law indicates that there is some reluctance in providing individuals with effective remedy against the prolongation of proceedings and the new law may dissatisfy Polish individuals and will not lead towards the rapid enhancements in the judicial system in Poland. Furthermore, although first steps were taken to change this,<sup>11</sup> Poland still has an ineffective system of legal aid.<sup>12</sup> One may hope that the right to an effective remedy as guaranteed under Art. II-107 CT will help in further reforms of the Polish judicial system in these two areas.

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<sup>8</sup> Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239.

<sup>9</sup> *Kudła v. Poland*, App. No. 30210/96, 2000-XII Eur. Ct. H.R. 512 (2000).

<sup>10</sup> Act of June 17, 2004 on the complaint of a party to proceedings on their right to determine a case in court proceedings within reasonable time (Journal of Laws of 2004, No. 179, item 1843).

<sup>11</sup> The Polish government has prepared a draft law of March 7, 2005 on the access to free legal aid granted by the state to individuals. It is interesting to note that the grounds for this law refer to the Polish obligations stemming from Art. 6 ECHR and Art. 47 para. 1 of the Charter of Fundamental Rights.

<sup>12</sup> See ŁUKASZ BOJARSKI, ACCESS TO LEGAL AID IN POLAND – MONITORING REPORT, HELSINKI FOUND. HUM. RTS. (2003).

Polish courts are in fact “Community” courts, when they use or apply the Community law. Therefore, it is obvious that the standards of the Polish courts' functioning should correspond to the requirements stemming from Art. II-107 CT. Accordingly, the EU may require Poland to introduce similar standards of protection as exist in other EU countries, in order to secure the effective implementation and application of EU law in the Member State. Therefore, the EU may be stronger in compelling Poland to reform its judicial system than currently the ECHR is. One example would be by publication of the reports of independent experts. One may also imagine a complaint of an individual claiming that he cannot enforce his EU law subjective rights because proceedings in his case were prolonged or s/he was not provided legal aid (in breach of Art. II-107 CT).



## Developments in the Area of Freedom, Security and Justice brought about by the Constitutional Treaty

By *Dagmara Kornobis-Romanowska\**

### A. Introduction

The main purpose of this paper is to consider the impact of the Treaty establishing the Constitution for Europe<sup>1</sup> (hereinafter: the Constitutional Treaty or CT) on the realization of the Area of Freedom, Security and Justice (hereinafter: the Area or AFSJ). The paper has two parts. The first part deals with the Area in current law, whereas the second part focuses on the provisions of the Constitutional Treaty concerning the Area.<sup>2</sup>

Focussing on the AFSJ and on the reforms agreed in this field in the Constitutional Treaty, the general purpose of this paper is to try to answer the question of what the Area will be under the CT and to what extent it will be re-organized therein. In order to find an answer, this article examines the scope of changes, the significance of the accomplishment and the ability of the EU to build the Area as envisaged in the CT. It seeks to find a conclusion about the appraisal of the reorganization of the Area and its potential evolutionary character.

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<sup>1</sup> Treaty Establishing the Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1, 47 [hereinafter CT].

<sup>2</sup> The CT was initially scheduled to enter into force on 1 November 2006, provided that it would be ratified by all Member States. However, in May and June 2005, France and Netherlands rejected it in referenda and in effect other EU countries had to postpone their ratification procedures. On 17 June 2005 at the meeting of the European Council in Brussels, the Heads of State and Government of the EU have adopted a Declaration on the ratification of the CT (Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, Brussels European Council (June 18, 2005)),

[http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/85325.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf)), according to which they have agreed to come back to the CT matter in the first half of 2006. Thus, the future of the CT depends on their assessment of the respective national debates and on the political agreement of Member States on how to proceed.

## B. The Area of Freedom, Security and Justice in Current Law

### I. *The Nature and Rationale of the Area*

The AFSJ is the continuation and further development of the original concept of cooperation in Justice and Home Affairs (JHA) as introduced to the law of European Union (EU) by the Treaty of Maastricht, which entered into force on 1 November 1993. This treaty created the three-pillar structure of the EU, in which the European Community and its law forms the first pillar, Common Foreign and Security Policy (CFSP) are dealt with in a second pillar and JHA are regulated and organized in a third pillar. The next treaty reforming the EU, signed in Amsterdam in 1997 and in force since 1999, brought basic amendments and reformed the architecture of JHA. This treaty brought about the current structure of the EU and especially its third pillar, which since covers only police and judicial cooperation in criminal matters in the place of the former JHA, whereas other topics were transferred to Title IV of the Treaty on European Communities (TEC). It also introduced a new objective in Art. 2 TEU, which is to maintain and to develop the Union as an "Area of freedom, security and justice." Art. 2 TEU states that in the Area the free movement of persons is assured in conjunction with appropriate measures with respect to the external border controls, asylum, immigration and the prevention and combating of crime. Art. 29 TEU confers on the Union the responsibility to provide citizens with a high level of safety within this Area by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

Hence, until now provisions on the AFSJ are found in the first as well as the third pillar of the EU. One part of the Area, that is Title IV of the TEC, concerning visas, asylum, immigration and other policies related to free movement of persons, external border controls and civil law matters, belongs to the European Community and it is related to the legal achievement of the internal market. Legal acts are adopted here by using the community instruments, like regulation, directive and decision and procedures. Nevertheless, within the supranational legal order, strong intergovernmental features can be seen. These features are, for instance, the predominance of unanimity voting, limits to the elsewhere exclusive right of initiative of the European Commission, the very limited role of the European Parliament, and the number of limitation imposed on the role of ECJ.<sup>3</sup>

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<sup>3</sup> Jörg Monar, *The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs*, 39 J. COMMON MKT. STUDIES 747, 763 (2001).

Another part of the Area is dealt with in the TEU. Title VI concerns the provisions on police and judicial cooperation in criminal matters and constitutes the intergovernmental part of the Area. New legal instruments have been introduced to reach its goals in this rather intergovernmental dimension, like the framework decisions, the decisions or the conventions (Art. 34 TEU). But, then again, here some Community law elements can be noticed, such as the quite extensive powers of the ECJ, the obligatory consultation of EP or the strong legal and political links with the areas under Title IV TEC.<sup>4</sup>

How to implement the provisions of the Amsterdam Treaty concerning the Area was not obvious and there was still the need of more detailed policy orientations and clarification of the nature of its innovations. The answer for this need was given on one hand by the Vienna Action Plan on how best to implement the provisions of the Treaty<sup>5</sup> and on the other hand, by the conclusions of the European Council Meeting in Tampere in October 1999.<sup>6</sup> The latter conclusions for the new Area were in fact a five-year agenda that came to an end in 2004. After this period, a Communication from the Commission to the Council and the European Parliament<sup>7</sup> was issued. It pointed out the realization of the programme as well as its future orientations. In this document, the Commission concluded that considerable work had been done, even though much still remained to be done. In the view of the Commission, the final adoption of the CT and its rapid entry into force are becoming essential, in order to meet expectations of the citizens to enhance their freedoms. In realization of these ambitions, the Union must continue to show the same degree of determination as it did for the completion of the internal market<sup>8</sup> but the actions should be taken in practical form, with detailed priorities and a precise timetable. As a result, five years after the European Council's meeting in Tampere a new program has been approved by the Presidency Conclusions of Brussels,<sup>9</sup> known as the Hague Program. This is a five-year program for closer co-operation in justice and home affairs at EU level from 2005 to 2010. It

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<sup>4</sup> *Id.*

<sup>5</sup> Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, 1999 O.J. (C 19) 1.

<sup>6</sup> Presidency Conclusions, Tampere European Council, (Oct. 15-16, 1999), [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm).

<sup>7</sup> *Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, COM (2004) 4002 final (June 2, 2004).

<sup>8</sup> *Id.* at para. 3.

<sup>9</sup> *The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice*, COM (2005) 184 final (Nov. 4-5, 2004).

aims to make Europe a more homogeneous Area and is focussed on setting up a common immigration and asylum policy for the enlarged Union of 25 Member States. In security and justice matters, the Hague program highlights, among others, the key measures directed to make greater use of Europol and Eurojust, to ensure greater access to justice, more judicial co-operation and the full application of the principle of mutual recognition.

## *II. Material and Geographical Dimension: the Asymmetry of the ASFJ*

It must be considered that the form in which the Area presents itself today is not only the effect of the evolution within the European Communities and the Union themselves. Although in transition, the Area remains also the result of different and specific actors having an impact on the Community from the outside.<sup>10</sup> These actors gave the external inspiration and an impetus to pave the way to the establishment of the fundamental elements of the Area within the EU, such as judicial cooperation, free movement of persons, the fight against the international terrorism, together with all related compensatory measures. Although certain domains, such as border controls or policing, have always belonged to the domain of states,<sup>11</sup> it became clear that the Member States acting individually had lost their ability to control international crimes and migration, and that these questions cannot any longer be dealt with effectively by States acting autonomously on their own, national level.<sup>12</sup> This was the reason why the Member States were interested in the "Europeanization," as says Monar, of certain national problems<sup>13</sup> and reaching for forms of co-operation in Europe, outside the European Community.<sup>14</sup>

For the purpose of the analysis of the present material and geographical scope of the Area, one of these international factors deserves, it seems, special attention, which is the Schengen co-operation.<sup>15</sup> Its objective is the gradual abolition of checks

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<sup>10</sup> These driving forces are: Council of Europe, Trevi and Schengen. See Monar, *supra* note 3, at 763.

<sup>11</sup> Monar, *supra* note 3, at 760.

<sup>12</sup> Chairman of Working Group X, *Final report of Working Group X "Freedom, Security and Justice," delivered to the European Convention*, CONV 426/02, WG X 14 (Dec. 2, 2002), available at <http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf>.

<sup>13</sup> Monar, *supra* note 3.

<sup>14</sup> Monar, *supra* note 3, at 763; WŁADYSŁAW CZAPLIŃSKI, *OBZAR WOLNOŚCI, BEZPIECZEŃSTWA I SPRAWIEDLIWOŚCI, WSPÓLPRACA W ZAKRESIE WYMIARU SPRAWIEDLIWOŚCI I SPRAW WEWNĘTRZNYCH 5* (2005) (about the foundings of the co-operation in justice and home affairs).

<sup>15</sup> The Agreement signed in Schengen, Luxembourg, ('Schengen Agreement') on 14 June 1985 by the three States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, and the Convention implementing that Agreement, signed on 19 June 1990 by the same contracting

on internal common borders, the strengthening of external borders, and to provide a list of the necessary compensatory measures, which would minimize the possible lack of security that might result from the abolition of internal border controls.<sup>16</sup> Without any doubt, it has been a precursor and played an important supporting role for the EU in matters of immigration, asylum, visa policies and police cooperation.<sup>17</sup> Formally brought within the framework of *acquis communautaire*<sup>18</sup> by the Amsterdam Treaty, the Schengen *acquis* is aimed at enhancing European integration and, in particular, at enabling the EU to develop more rapidly into an AFSJ. It covers all but two Member States and functions, depending on the matter concerned, within the institutional framework of the first or of the third pillar. United Kingdom and Ireland do not formally belong to Schengen and have not sought to participate in the external border measures. Nevertheless, they participate in the judicial and police co-operation elements of the Schengen *acquis*. Another Member State, Denmark, has a special status in this field, since Schengen measures are applicable to it by virtue of public international law and not by community law, what means this is not a part of its obligations from supranational law for this Member State. A special, international character of co-operation in the AFSJ is also well illustrated by the third countries association with Schengen *acquis* in the area of police and judicial co-operation in criminal matters. Iceland and Norway participate in Schengen as non-EU countries by virtue of an Association Agreement.<sup>19</sup>

Although the participation of the United Kingdom and Ireland, as well as Denmark in the Schengen *acquis*, is based on different provisions, all new Member States after

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parties; the Schengen *Acquis* also includes the accession protocols and agreements, both to the Agreement of 1985 and to the Convention implementing it, of other Member States of EU, the decisions and declarations adopted by the Executive Committee set up by the latter Convention, as well as the acts adopted by the organs on which the above mentioned Committee has conferred decision-making powers. A list of the elements which make up the *Acquis*, setting out the corresponding legal basis for each in TEC or TEU can be found in Council Directives. Council Directive 1999/439 1999 O.J. (L 176) 35 (EC); Corrigendum Jan. 12, 2000, 2000 O.J. (L 9).

<sup>16</sup> See Robert Rybicki, *Schengen and Poland*, 25 POLISH Y.B. INT'L L. 97 (2001).

<sup>17</sup> Monar, *supra* note 3, at 763.

<sup>18</sup> Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Art. 1.

<sup>19</sup> Council Decision 1999/438, 1999 O.J. (L 176) 42 (EC) (on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*).



the 2004 enlargement of the EU were obliged to accept fully the Schengen *acquis*.<sup>20</sup> Consequently, the Protocol integrating this *acquis* annexed to the Treaty of Amsterdam stipulated that it must be accepted without any derogation or exception by all candidate States, although existing Member States are not bound by this obligation.<sup>21</sup> This is an example of the differentiation of the “old” and “new” Member States and their legal situation within the Union.<sup>22</sup> It is important since this differentiation will be maintained by the CT.

### III. Conclusions

The process of constructing and developing an AFSJ was started by the Amsterdam Treaty and it was considered one of the most remarkable concepts of this treaty. In order to come to a conclusion as to what the AFSJ is today, and to compare it with what it is going to be under the CT, it must be kept in mind that since the moment of its establishment the Area, as the Union as such, is in fact a kind of schedule; it is designed as a process of gradual creation of an area, in which the free movement of persons is assured. This design ensures to evaluate consistently, even today, how far the Area has developed within the non-homogenous structure the EU. The Area's scope presently covers the Community part enshrined in the TEC and an intergovernmental part of co-operation within the TEU. Nevertheless, there are many strong legal and political links between both parts and a growing number of common measures taken by the Member States to achieve their common goals.

The differentiation of the Area and the mixture of rather supranational Community and rather intergovernmental Union measures without any doubt reduce the transparency of its structure. But the lack of transparency is not just a negative aspect of the Area. In practice, such complexity can be also seen as having a positive impact on its gradual realization.<sup>23</sup> The Area is furthermore criticized for

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<sup>20</sup> See European Union Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community Protocol 2, Dec. 24, 2002, 2002 O.J. (C 325) 1 (integrating the Schengen *acquis* into the framework of EU); see also Antonio Vitorino, European Commissioner for Justice and Home Affairs, Address to the Royal Institute for International Affairs/ National Bank of Belgium: Models of Co-operation within an enlarged European Union (Jan. 28, 2003), available at <http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/31&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>21</sup> See Vitorino, *supra* note 20.

<sup>22</sup> CZAPLIŃSKI, *supra* note 14, at 39.

<sup>23</sup> Its gradual realization is illustrated by the very broad list of *acquis* of the EU, accepted under the Title IV TEC and Title VI TEU, and consolidated by the European Commission into a complete list. European Commission, DG Justice, Freedom, and Security, *Acquis of the European Union* (Dec. 2004), [http://www.europa.eu.int/comm/justice\\_home/doc\\_centre/intro/docs/jha\\_acquis\\_1204\\_en.pdf](http://www.europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf).

having adverse effects because of the need to adopt parallel legislative acts in different pillars with cross-pillar implications,<sup>24</sup> too little involvement of national parliaments or a deficit in judicial control.<sup>25</sup> The opt-outs of certain Member States on one hand and the participation of non-EC countries in Schengen on the other hand, conjure a picture of complexity and fragmentation, shows a tendency towards restriction and exclusion,<sup>26</sup> rather than towards unity, homogeneity and transparency. One might ask whether the envisaged CT is going to solve these problems. To answer this questions is the task for the next part of this paper.

### **C. Structure of the Area of Freedom, Security and Justice under the Constitutional Treaty**

#### *I. The New Architecture of the Area*

An agreement on the CT was reached by the Heads of States and Governments at the European Council on 18 June 2004, and it was signed on 29 October 2004. The CT provides a new legal basis and framework for the EU, it merges the existing treaties into one single text, that encompasses all the powers, rights and duties of the EU. To put it briefly, the task of the CT is to restructure and consolidate the present constitutional arrangements to make them more transparent and efficient.

The first and most visible step towards the consolidation of the Union within the CT is the formal abolition the three pillar structure. This means the abolition of the current dichotomy between Community and the intergovernmental method and the formal achievement of textual unity. This operation provided by the CT results in the application of the same principles, the same sources of law and procedures to decision-making in justice and home affairs and other European polices. In this field, by virtue of the Art. I-42 CT, the relevant parts of Title VI TEU and Title IV of Part Three TEC are summarized and revised to produce a new framework for action in the Area.<sup>27</sup> In consequence, with the CT, third Pillar's activities are moved from being essentially intergovernmental to ones in which Member States act in accordance to the community procedure.

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<sup>24</sup> Final report of Working Group X "Freedom, Security and Justice," CONV 426/02 (Dec. 12, 2002).

<sup>25</sup> Treaty on European Union, 1992 O.J. (C 191) 1 [hereinafter TEU]. For the system of opt-outs from ECJ preliminary ruling under TEU art. 35 (2); *see infra* Part C IV this piece.

<sup>26</sup> Monar, *supra* note 3, at 763.

<sup>27</sup> Arts. III-257, 277 CT (set out legal basis for EU action in this area).

According to the CT, the Union's aim is to promote peace, the furtherance of its values and the well-being of its citizens. To reach these goals, two fundamental objectives of the Union are to be accomplished. One of them is the Area, an objective introduced by the Treaty of Amsterdam and now, under the current legislation, included in the fourth paragraph of Art. 2 TEU and referred to in the TEU's Preamble and Art. 29 TEU. For the future, Art. I-3 CT states that the European Union offers its citizens an AFSJ without internal frontiers, and an internal market where competition is free and undistorted.<sup>28</sup> This provision is wider, because it states not only the single market, which has been a Community objective from the beginning,<sup>29</sup> but another fundamental objective, which is the free movement of all persons within the Area even without economic goals.

The CT also defines the Area and its aims. It first states that the AFSJ falls within the sphere of the shared competences of the Union,<sup>30</sup> which means that the Union acts in the Area within the limits of the competences conferred upon it by the Member States. This is a consequence of a wider rule that the CT makes clear, that the EU has only those powers that Member States have agreed to confer upon it. Competences not conferred upon the Union remain with the Member States which may act to the extent that the Union has not acted, or has decided to cease exercising its competence.<sup>31</sup>

According to Art. III-257 CT, the Union constitutes an AFSJ with respect for fundamental rights and the different legal systems and traditions of the Member States.<sup>32</sup> The "Area of freedom" means here the space without internal border controls for persons and frame of a common policy on asylum, immigration and external border control,<sup>33</sup> based on solidarity between Member States, which is fair towards third-country nationals. Also stateless persons, upon the CT, shall be treated as third-country nationals.<sup>34</sup> The central point of the Area is therefore the individual and his fundamental rights guaranteed not only by the Union but also

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<sup>28</sup> Art. I-3 CT.

<sup>29</sup> Commentary to the Constitutional Treaty, *available at* [http://www.fco.gov.uk/Files/kfile/Commentary\\_Part2\\_Parts1-4.pdf](http://www.fco.gov.uk/Files/kfile/Commentary_Part2_Parts1-4.pdf).

<sup>30</sup> Art. I-14(2j) CT.

<sup>31</sup> Art. I-11(2) CT.

<sup>32</sup> Art. 29 TEU; Art. II-61 CT.

<sup>33</sup> The aspiration of the Member States already acknowledged under the Tampere and The Hague programmes.

<sup>34</sup> Art. III-257(2) CT.

by the Member States and their legal systems and traditions. The next factor, “security,” has two aspects here, internal and external, and it should be ensured through the measures to prevent and combat crime, racism and xenophobia. As far as the aspect of “justice” is concerned, it is defined through the full access to the judicial systems and the measures for coordination and cooperation between competent authorities, police, judicial and others,<sup>35</sup> as well as through the mutual recognition of judgments in criminal matters<sup>36</sup> and, if necessary, through the approximation of criminal laws.<sup>37</sup>

Formally, the provisions concerning the AFSJ are placed within the CT in its Chapter IV, divided into five sections: general provisions, policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, police cooperation. Originally, the new approach in the CT is to eliminate the adverse effects of the Area and the mean to safeguard its efficiency through the coherence, transparency and judicial oversight. It should reduce the potential for controversy over the appropriate legal basis and no need to adopt parallel legislative acts in different pillars and facilitate the negotiation and conclusion of agreements with third countries on cross-pillars matters.<sup>38</sup> It marks new policy making objectives, like the formal provision for an integrated management system for external borders, a common asylum policy and the uniform status of asylum (Art. III-266-268 CT), a common policy in the immigration domain – the possibility of adoption of framework laws on minimum rules regarding the mutual admissibility of evidence, the rights of individuals in criminal procedure, the rights of victims of crime and other specific aspects of criminal procedure, authorization for EU action in field of crime prevention, possibility of the establishment of a European Public Prosecutor’s Office.<sup>39</sup> Also, aspects of criminal law fall into the scope of the CT. A common approach by the Member States to jurisdiction in criminal matters is enshrined in Art. III-270(1) CT and is broadly illustrated by the Charter of Fundamental Rights, formally incorporated to the CT in order to strengthen the formal protection of the rights of individuals.<sup>40</sup>

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<sup>35</sup> It corresponds to Art. 29 TEU.

<sup>36</sup> Art. 31(1a) TEU.

<sup>37</sup> It has been widened: under the existing Treaties these powers applied only to minimum rules regarding constituent elements of crimes and sanctions and only referred to the fields of organized crime, terrorism and drug trafficking; Arts. 29, 31(1e) TEU.

<sup>38</sup> Jörg Monar, *Justice and Home Affairs*, 42 J. COMMON MKT. STUD. 117, 129 (2004).

<sup>39</sup> *Id.*

<sup>40</sup> The Charter however makes no change to the redress procedures provided for by the Treaties, since it opens up no new procedures for seeking redress in the courts of the EU. The problem of the Charter of

## II. *New Principles*

According to the CT, an Area is built on the common policy of Member States in general matters such as border controls, asylum, immigration, but also in the specific questions, like common instruments to protect democratic institutions and civilian population from any terrorist attack and in the event of a natural or man-made disaster.<sup>41</sup> The basis for this common approach lies in the solidarity among these States, which is newly emphasized and placed on Member States and on the Union to act jointly and to request assistance in action, Art. I-43 CT. This solidarity clause is a part of the ASJF and does not only cover the obligation to act, but also a fair sharing of responsibility, including the financing of measures and the military resources.<sup>42</sup> The arrangements implementing the solidarity clause should be adopted under Art. III-329 CT. They apply when a Member State that becomes a victim of an attack should request assistance from the other Member States under the arrangements defined to it by the Council. Regular assessments of the threats facing the Union are to be undertaken by the European Council. There is nevertheless the reservation that these provisions do not affect the right of a Member State to choose the most appropriate means to comply with the solidarity obligation towards another Member State.<sup>43</sup> The latter provision of the CT is very important for the general framework of the Area when taking into consideration an opt-out of the United Kingdom and Ireland.<sup>44</sup>

Another principle that appears in the CT in a broader context than in the treaties so far is the principle of mutual recognition. This holds that judgments in one Member State are recognized by the authorities of another for the reason of mutual trust in the adequacy of other Member State's rules and their correct application.<sup>45</sup> Under the current Title VI of the TEU it is provided that common action in criminal matters includes facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to

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Fundamental Rights of the EU is very broad and its scope reaches much further beyond the topic of this paper. This is the reason why the Charter, although mentioned, is not discussed in this article.

<sup>41</sup> Art. I-43 CT.

<sup>42</sup> Monar, *supra* note 38, at 129.

<sup>43</sup> CT Declaration 9.

<sup>44</sup> See Monar, *supra* note 38, at 130; see also David Phinnemore, *The Treaty establishing a constitution for Europe: An Overview*, Royal Institute for International Affairs (Chatham house), June 2004, available at: <http://www.riia.org/pdf/research/europe/BN-DPJun04.pdf>

<sup>45</sup> See the opinion of Advocate General Ruiz-Jarabo Colomer in Case C-187/01 Gözütok and Brügge, 2003 E.C.R. I-1345, para. 6.

proceedings and the enforcement of decisions. As it was observed, this goal cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true common area of fundamental rights.<sup>46</sup> This observation of the Advocate General have been shared and expressed by the Judges of the ECJ in the first judgment concerning the third pillar, in the *Gözütok and Brügge* case.<sup>47</sup> The ECJ stated that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States, even if the outcome would be different according to its own national law.<sup>48</sup>

The CT distinctly requires in this field that the Union promotes mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extra-judicial decisions.<sup>49</sup> It can be noticed that from this perspective, the mutual recognition, based on mutual trust, serves as a factor preserving a high degree of autonomy of the Member States.<sup>50</sup> It is most important in police and criminal matters,<sup>51</sup> where the EU's competences are expressly limited to minimum standards and the horizontal co-operation between Member States is required.

### *III. Decision-Making*

#### *1. Legislative Initiative*

The ordinary procedure for the adoption of acts which are legislative in character (i.e. laws and framework laws) under the CT is the co-decision procedure, as stated in Art. I-34(1) CT<sup>52</sup> and spelled out by Art. III-396 CT.<sup>53</sup> According to this

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<sup>46</sup> *Id.* at para. 124.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at para. 33.

<sup>49</sup> Art. I-42(1b) CT.

<sup>50</sup> Daniel Thym, *The Area of Freedom, Security and Justice in the Treaty Establishing a Constitution for Europe*, WALTER-HALLSTEIN-INSTITUT FÜR EUROPÄISCHES VERFASSUNGSRECHT, Dec. 2004, <http://www.rewi.hu-berlin.de/WHI/deutsch/papers/whipapers1204/index.htm>.

<sup>51</sup> Program of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, 2001 O.J. (C 12) 2, para. 3.

<sup>52</sup> Art. I-34(1) CT.

<sup>53</sup> It corresponds to the co-decision procedure in Art. 251 TEU.

procedure, the European Parliament and the Council are equal co-legislators which means that if for any reasons an agreement between them cannot be reached, an act shall not be adopted.

The Commission is the institution that “normally” has the power to initiate legislative acts and the Member States in the Council in cooperation with the European Parliament act on the basis of its submitted proposals. The CT introduces special provisions in the CFSP and AFSJ, which have no equivalent in the existing Treaties. These provisions allow that in specific circumstances the proposals for laws or framework laws can be submitted by a group of Member States or the European Parliament.<sup>54</sup> In the field of co-operation in criminal matters and for the administrative cooperation in related areas, Art. III-264 (b) CT further provides that one quarter of Member States can retain the right to make proposals.<sup>55</sup> The European Council, according to Art. III-258 CT, defines the strategic guidelines for legislative and operational planning within the AFSJ.

In addition, the CT provides further guarantees for a compliance with the law in fundamental rights legislation. One example is the pre-eminent role of the European Council to define the strategic guidelines for legislative and operational planning within the Area.<sup>56</sup> It must be pointed out that this is to be regarded as a very important procedure since the measures taken in the field of justice and home affairs can have a broad direct effect and many serious implications for the rights of individuals.<sup>57</sup>

The mechanism of decision-making proposed by the Constitutional Treaty seems to fulfil the essential requirements of transparency and democracy. The role of the European Parliament as co-legislator and for the national parliaments is expanded. The new task for the latter is to ensure that proposals and legislative initiatives regarding the AFSJ comply with the principle of subsidiarity and proportionality.<sup>58</sup> There are also new provisions to allow the European Parliament and national parliaments to have a role in the evaluation and political monitoring of Eurojust's and Europol's activities, as well as of the Member States' authorities.<sup>59</sup> The voting

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<sup>54</sup> Art. I-34(3) CT; Art. III-396(15) CT.

<sup>55</sup> Art. 34(2) TEU (any Member State can make a proposal); Thym, *supra* note 50.

<sup>56</sup> Art. III-258 CT. An example of this role can be seen in the measures of the European Council taken in Tampere (1999) and Brussels (2004).

<sup>57</sup> Monar, *supra* note 3, at 760 (on the evaluation of the parliamentary control under the current EU law).

<sup>58</sup> So called subsidiarity mechanism.

<sup>59</sup> Arts. III-260, III-273, III-276 CT.

requirement in these matters has moved from unanimity to Qualified Majority Voting (QMV) and co-decision.<sup>60</sup>

The analysis of the new legislative procedure, including the right of legislative initiative shared between the Commission and Member States within the ASFJ, brings also to mind the risk, that the proposals from Member States may not represent the common interest or do not take into account the specific position of Member States.<sup>61</sup> From this point of view, the deficiency of the exclusive right of initiative of the Commission accepted in the CT is a compromise and another remnant of the international character of the AFSJ.

## 2. *Qualified Majority Voting*

Co-decision by the European Parliament and the Council, which applies QMV, is the standard decision-making procedure within the AFSJ. QMV will be applied to a majority of areas, including the areas of asylum, immigration and judicial co-operation in criminal matters.<sup>62</sup> However, there are a number of exceptions when QMV in the Council is replaced by a unanimity requirement and co-decision by mere consent of the European Parliament. These special rules relate, for example, to the measures of family law with cross-border dimension, the extension of Union competences in substantive criminal law and criminal procedure, or for operational cooperation between national law enforcement authorities.<sup>63</sup> Unanimity will also apply to the adoption of European law on the establishment of the office of the European Public Prosecutor.<sup>64</sup> In fact, within the Area a vast number of decisions needed for its creation are to be taken unanimously by the Council after consulting the European Parliament.

This shows the conservative approach of the CT, since the special decision-making procedures render the abolition of pillars and the unity of the EU a mere formal façade.<sup>65</sup> The unanimity requirement in particular makes it very difficult to take

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<sup>60</sup> Arts. III-273, III-276(2) CT.

<sup>61</sup> Vitorino, *supra* note 20.

<sup>62</sup> Protocol 34 states that these provisions will only enter into force on 1 November 2009. Before then, the Council will act under the system of weighted majority, as set out in its Art. 2 which is the same as that currently in force under the Art. 205(2) TEC. A definition of a qualified majority within the European Council and the Council is given by the Art. I-25 CT.

<sup>63</sup> Arts. III-269, III-270, III-277 CT; Monar, *supra* note 38, at 130; Thym, *supra* note 50.

<sup>64</sup> Art. III-274 CT.

<sup>65</sup> Monar, *supra* note 38, at 130 ; Vitorino, *supra* note 20.



binding decisions<sup>66</sup> and in result can lead to delays in decision-making. In extreme cases it can be used as a veto of a Member State to postpone and block the adoption of the measure. There are opinions, that in the context of an enlarged Union such a situation is untenable because it undercuts efficiency, and that it is essential to make a substantial move in favour of a greater use of qualified majority voting in this Area.<sup>67</sup> For all these reasons, the co-decision procedure and the QMV are certainly the instruments of the CT that enhance the legitimacy of the AFSJ, and by using them the CT will significantly reduce the intergovernmental character of judicial cooperation in criminal matters and police co-operation.

#### *IV. Judicial Control*

Pursuant to the CT, judicial control of EU measures is conferred upon the judicial organs. Their jurisdiction is extended to almost all areas of EU law<sup>68</sup> and in result also to the AFSJ. AFSJ actions thus become subjects of legal review by the ECJ. Hence the restrictions imposed by Art. 35 TEU and the Art. 68(2) TEC in the fields of visas, asylum and immigration are no longer maintained.<sup>69</sup>

The construction of the preliminary reference procedure, however, deserves special attention here. Under current law, Art. 35 TEU provides the jurisdiction of the Court of Justice to give preliminary rulings on EU third pillar measures - at the request of the national courts on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions adopted for police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them.<sup>70</sup> According to this provision, a Member State which accepts that new jurisdiction of the Court of Justice may choose between

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<sup>66</sup> Working document presented by Jean Louis Bourlanges, *Working on the conditions for strengthening the effectiveness of the area of freedom, security and justice Committee on Civil Liberties, Justice and Home Affairs*, Aug. 18, 2004, available at [http://www.europarl.eu.int/meetdocs/2004\\_2009/documents/DI/539/539389/539389en.pdf](http://www.europarl.eu.int/meetdocs/2004_2009/documents/DI/539/539389/539389en.pdf).

<sup>67</sup> Vitorino, *supra* note 20.

<sup>68</sup> Art. III-376 CT imposes limitations on the jurisdiction of the ECJ in relation to CFSP, equivalently to the current Art. 46 TEU. However, the ECJ has the jurisdiction to monitor compliance with Art. III-308 CT and to rule on proceedings, brought in accordance with the conditions laid down in Art. III-365(4) CT, reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V (Exercise of Union competence).

<sup>69</sup> See Takis Tridimas, *CFSP and Freedom, Security and Justice*, UNIVERSITY OF SOUTHAMPTON COLLEGE OF EUROPE, Mar. 2004, [http://www.fedtrust.co.uk/uploads/constitution/05\\_04.pdf](http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf); Thym, *supra* note 50.

<sup>70</sup> Art. 35 TEU.

granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals, or only to those courts or tribunals which give a final decision against which there is no further judicial remedy. Therefore, currently the ECJ has limited jurisdiction in police and in criminal matters of co-operation; but its jurisdiction here rather resembles the jurisdiction of international courts.<sup>71</sup> In this optional procedure, the ECJ gives preliminary rulings on legal acts which, although prepared by the Council, are in fact the international agreements, as laid down in Art. 34(2d) TEU. For the reason of their special character and the jurisdiction of the ECJ, it can be noticed that, although the direct effect of such legal instruments is expressly excluded by Art. 34(2) TEU, they are brought closer to Community law through present legislation.<sup>72</sup>

This unclear construction and the fragmentation of the procedure causes problems and compromises the right to judicial protection,<sup>73</sup> as it leaves open its binding force *erga omnes* or just *inter partes*.<sup>74</sup> The envisaged CT formally solves these problems because it abolishes this specific division of preliminary reference procedures provided by Art. 68 TEC for matters concerning visa, asylum, immigration and other policies related to the free movement of persons, and by Art. 35 TEU. In consequence, this means the abolition of the system of opt-outs from ECJ preliminary rulings under Art. 35(2) TEU, which is currently strongly criticized, because it leads to further intransparency within the EC's legal system.<sup>75</sup>

Therefore, under the CT, in police and judicial co-operation in criminal matters, the ECJ would have the jurisdiction to give preliminary rulings on the interpretation of the CT or the validity and interpretation of acts of the institutions of the Union, at the request of Member State's courts, on the interpretation of Union law or the validity of acts adopted by the institutions and would also rule on the other cases provided for in the CT.<sup>76</sup> However, according to Art. III-377 CT, the ECJ in exercising its powers regarding the judicial co-operation in criminal matters and police cooperation would have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement

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<sup>71</sup> CZAPLIŃSKI, *supra* note 14, at 76.

<sup>72</sup> Thym, *supra* note 50.

<sup>73</sup> Thym, *supra* note 50, at 4.

<sup>74</sup> OBSZAR WOLNOŚCI, BEZPIECZEŃSTWA I SPRAWIEDLIWOŚCI, WSPÓŁPRACA W ZAKRESIE WYMIARU SPRAWIEDLIWOŚCI I SPRAW WEWNĘTRZNYCH 53 (2005).

<sup>75</sup> *Id.* at 76.

<sup>76</sup> *Id.*

services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. In substance, this drafted provision is equal to the present Art. 35(5) TEU and the jurisdiction of the Court currently provided in relation to third pillar matters still stays restricted. It seems that the restriction of the ECJ's jurisdiction to review the validity and proportionality of police operations by virtue of mentioned above Art. III-377 CT and, at the same time, the securing of the national courts' competence is a clear manifestation of the protection of the procedural autonomy of the Member States.<sup>77</sup>

#### **D. Conclusions**

The Area of Freedom, Security and Justice is a concept and a purpose of the Union which has being established and developed progressively in a politically very sensitive field and in one, which contains very essential questions for every Member State. The truth is, nevertheless, that the Member States acting individually cannot tackle any longer on its own the questions of the cross-border issues, such as migration or international crime and terrorism. For this reason they were condemned, and still are, to seek co-operation. The Union is thus a forum in which the European States decided to establish the Area as a field of Union's activity and their co-operation.

The Area according to the CT is integrated into the new architecture of the Union and it appears as a single project with a coherent structure. But it does not mean absolute homogeneity and the complete abolition of material differences within the specific sphere. Having a single legal and institutional framework does not necessarily mean that the Union procedures need to be applied in an identical way. In fact, the ASFJ procedures in the CT vary according to the action envisaged at Union level and are in fact the combination of the elements of the former Community method with other mechanisms allowing in some cases for reinforced co-ordination between the Member States within the Union. The general principles of application of Union law are here the bases and the conditions for the common approach, together with principles, like solidarity or that of mutual trust in the adequacy of other Member State's rules and their correct application.

The constitutional revision of the foundations of the AFSJ also concerns the problems of legitimacy and democracy within the Union. For example, the CT expands the role of the European Parliament and national parliaments, which enhances without doubt the democratic legitimacy of the Union. Also the co-

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<sup>77</sup> Thym, *supra* note 50.

decision procedure and the QMV are certainly instruments that have an influence on the legitimacy of the AFSJ. It seems that thanks to the procedure of the QMV, the decision-making process can be more effective too, because it is faster and more coherent. The strengthening of the rule of law at EU level justifies also the expansion of the ECJ's jurisdiction to justice and home affairs. This is, however, not to say under the CT that the ECJ will acquire full jurisdiction in the Area, since in the realm of judicial cooperation in criminal matters its judicial powers, like today, keep an exceptional character and its jurisdiction stays restricted.

To summarize the developments of the Area as proposed by the CT, it can be observed that the Area will continue to be a field of co-operation between Member States, based rather on the international agreements, typical for the present third pillar of the EU, than on the secondary law sources. For this reason, subsequent measures and further steps will still be needed. Also, the geographical asymmetry will be continued, since the United Kingdom and Ireland declared to stay out of the Schengen *acquis*. All these arguments lead to the final conclusion that the Constitutional Treaty largely preserves the existing treaties. However, this consistency justifies the new motto of the Union: *United in diversity*, recognized by the Preamble and Art. I-8 CT. But not only the provisions of the CT relating to the Area make this motto very neat, it is also very accurate when taking into consideration the will of the Member States expressed in the ratification procedures.



*Comment on Dagmara Kornobis-Romanowska –  
Conceptual Changes in the Area of Freedom, Security and  
Justice through the Constitutional Treaty*

*By Stephan Bitter\**

**A. Introduction**

Dr. Dagmara Kornobis-Romanowska has analysed the developments in the Area of Freedom, Security and Justice (AFSJ) by comparing the present state of law with the future law under the Constitutional Treaty. She convincingly highlights the changes this area of law undergoes momentarily. In this comment I will concentrate on the question whether the current fragmentation of the law of the AFSJ (Section B) is reduced by the Constitutional Treaty (CT), and if there are guiding principles which allow for an evaluation of the law in this Area (Section C). The conclusion will be a short assessment of whether the Constitutional Treaty brings with it a conceptual change in the AFSJ (Section D).

**B. The Area of Freedom, Security and Justice in the Present Treaties: “A Europe of Bits and Pieces?”<sup>1</sup>**

Dr. Kornobis-Romanowska summarises the current status of the law of the AFSJ and concludes that the supranational EC Treaty establishes strong intergovernmental features whereas the intergovernmental EU Treaty has some supranational elements. The supranational elements in Police and Judicial Cooperation in Criminal Matters are mainly the relatively extensive powers of the European Court of Justice (ECJ) and the obligatory consultation of the Parliament. The intergovernmental features of the policies related to the free movement of persons in Title IV EC Treaty are the predominance of unanimity voting, the non-

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<sup>1</sup> Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17 (1993).

exclusive right of initiative of the Commission and the limited role of Parliament and ECJ.

Notwithstanding some possible critique concerning this classification,<sup>2</sup> it is submitted that it is exactly this complex distribution of rules and procedures which makes it all the more necessary to precisely define the Area of Freedom, Security and Justice. Because thereby we could identify an overall concept which establishes principles to be realised in and through the respective provisions in the Treaties.<sup>3</sup> This would allow for an evaluation of the law as it stands with a view to the question whether it complies with this concept of the Area.

Following the Vienna Action Plan and the Tampere conclusions,<sup>4</sup> Dr. Kornobis-Romanowska takes freedom as the free movement of persons, fettered by the guarantee of human rights; security as the right to live in a law-abiding environment protected by effective action of public authorities; and justice as full access to justice and cooperation in civil and criminal law matters. When we thus place free movement of persons at the heart of the AFSJ, this Area becomes something similar to the single market. Free movement is complemented by security and justice allowing for the exercise of this freedom. Thereby, the AFSJ is understood as a policy field rather than as an overarching concept. In this respect, the Constitutional Treaty takes some interesting - but probably not always sufficient - steps.

### **C. The Area According to the Constitutional Treaty: The Individual at the Heart of the Union's Activities?**

#### *I. Loyalty and Mutual Recognition as Guiding Principles*

The main aspect of the changes in the AFSJ brought by the Constitutional Treaty is the abolition of the pillar structure leading to a structural unity with a common framework for action in this area.<sup>5</sup> At the core of this concept, Dr. Kornobis-

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<sup>2</sup> For example, if obligatory consultation really is a characteristic of supranational law-making.

<sup>3</sup> See Peter-Christian Müller-Graff, *Der "Raum der Freiheit, der Sicherheit und des Rechts" im neuen Verfassungsvertrag für Europa*, in *EUROPA UND SEINE VERFASSUNG. FESTSCHRIFT FÜR MANFRED ZULEEG* 605, 610-611 (Charlotte Gaitanides, Stefan Kadelbach & Gil Carlos Rodriguez Iglesias eds., 2005).

<sup>4</sup> See The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, 1999 O.J. (C 19) 1; Presidency Conclusions, Tampere European Council, (Oct. 15-16, 1999), available at [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm).

<sup>5</sup> See Simone White, *European Constitution: What is new in the Area of Judicial Co-operation in Criminal Matters and Police Co-operation*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, July 2004, at 5, available

Romanowska finds the “individual and his fundamental rights.” This assertion is in compliance with the internal preamble to the Fundamental Rights Charter, where it is stated that the Union “places the individual at the heart of its activities ... by creating an area of freedom, security and justice.”

Two principles can be found by which this objective shall be achieved: Solidarity between the Member States and the principle of mutual recognition.

Compared to Dr. Kornobis-Romanowska’s assumption, I would not think that it is the principle of solidarity as enshrined in Arts. I-43, III-329 CT which is instrumental for creating the AFSJ. I suggest it is rather the principle of loyalty as provided for in Art. I-5(2) CT (or Art. 10 EC Treaty respectively) which fulfils this function. With the police and judicial cooperation in criminal matters now drawn under the common constitutional framework by the Constitutional Treaty, the duty to cooperate loyally eventually applies beyond doubt not only to the law which is at present governed by the EC Treaty but also to the law under the EU Treaty. For the current law, this has only recently been explicitly recognised by the ECJ in its *Pupino* judgment.<sup>6</sup> Starting from the principle of solidarity thus understood as the duty to cooperate loyally, one can see that the other guiding principle is closely related to solidarity.

With the principle of mutual recognition we actually find an old principle in new clothes. Based on mutual trust, the Member States shall respect and recognise decisions made by the authorities of their fellow Member States so that these decisions may be applied throughout the Union. We know this concept from the law of the internal market,<sup>7</sup> and see it now being applied to criminal law.<sup>8</sup> This is

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at [http://www.fedtrust.co.uk/uploads/constitution/07\\_04.pdf](http://www.fedtrust.co.uk/uploads/constitution/07_04.pdf); Daniel Thym, *The Area of Freedom, Security and Justice in the Treaty Establishing a Constitution for Europe*, WALTER-HALLSTEIN-INSTITUT FÜR EUROPÄISCHES VERFASSUNGSRECHT, Dec. 2004, at 4, available at <http://www.rewi.hu-berlin.de/WHI/deutsch/papers/whipapers1204/index.htm>.

<sup>6</sup> Case C-105/03, *Pupino*, 2005 E.C.R. I-0000, paras. 39-42, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62003J0105](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62003J0105).

<sup>7</sup> Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 (concerning free movement of goods). The application of this principle was later extended in secondary law to the free movement of persons. See Council Directive 89/48, 1989 O.J. (L 19) 16 (on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration).

<sup>8</sup> Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, 2003 E.C.R. I-1345, para. 33 (The ECJ already applies the concept of mutual trust in criminal matters).



indeed something very innovative.<sup>9</sup> A Community of law is to a good part based on mutual trust between its members rather than on mere coercion.<sup>10</sup> From the free market jurisprudence we have learned that mutual recognition is a means to further the freedom of the market citizen. Yet, in criminal law matters, the European legislator<sup>11</sup> still has to show its willingness to further individual instead of executive freedom.<sup>12</sup> The main recent example is the European Arrest Warrant,<sup>13</sup> which the *Trybunał Konstytucyjny* (Polish Constitutional Tribunal) and the *Bundesverfassungsgericht* (German Federal Constitutional Court) have just dealt with.<sup>14</sup> As an instrument of the proper functioning of the administration of justice, the Arrest Warrant is rather an element of loyal cooperation between the Member States than a tool to further individual rights.<sup>15</sup> The same applies to the most recent example of mutual recognition in criminal law: the Framework Decision on the mutual recognition of financial penalties.<sup>16</sup> The general statement in Art. 3 of this Framework Decision that it shall “not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles,” does not lead to a fully-fledged protection of the individual against possible infringements of his or her rights.<sup>17</sup>

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<sup>9</sup> But see Steve Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 COMMON MKT. L. REV. 5 (2004).

<sup>10</sup> See Stephan Bitter, *Zwangsmittel im Recht der Europäischen Union: Geteilte Rechtsmacht in Europa, in EUROPA ALS RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS* (Rainer Hofmann & Stefan Kadelbach eds., forthcoming 2005).

<sup>11</sup> Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, 2003 E.C.R. I-1345, para. 34 (The European judicature applied the principle of mutual recognition for the benefit of the individual).

<sup>12</sup> Peter-Alexis Albrecht & Stefan Braum, *Deficiencies in the Development of European Criminal Law*, 5 EUR. L. J. 293, 294 (1999); EUROPEAN UNION COMMITTEE, *THE HAGUE PROGRAMME: A FIVE YEAR AGENDA FOR EU JUSTICE AND HOME AFFAIRS*, 2004-5, H.L. 24, at paras.10-11, available at <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/84/84.pdf>.

<sup>13</sup> Council Framework Decision 2002/584, 2002 O.J. (L 190) 1 (JHA) (on the European arrest warrant and the surrender procedures between Member States).

<sup>14</sup> Judgment of the Polish Constitutional Tribunal of April 27, 2005, P 1/05, available at [http://www.trybunal.gov.pl/eng/summaries/documents/P\\_1\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf); BVerfG, 2 BvR 2236/04 of July 18, 2005, available at [http://www.bverfg.de/entscheidungen/rs20050718\\_2bvr223604.html](http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html).

<sup>15</sup> Peers, *supra* note 9, at 24.

<sup>16</sup> Council Framework Decision 2005/214, 2005 O.J. (L 76) 16 (JHA) (on the application of the principle of mutual recognition to financial penalties).

<sup>17</sup> See Sionaidh Douglas-Scott, *The Rule of Law in the European Union - Putting the Security into the “Area of Freedom, Security and Justice,”* 29 EUR. L. REV. 219, 226-227 (2004). Concerning the European Arrest Warrant, these concerns appear to be at least partially justified as recent Austrian-German cases seem to illustrate. See DER SPIEGEL No. 23/2005, 106, 118-119.

On the other hand, a Framework Decision on procedural rights in criminal proceedings is currently being negotiated.<sup>18</sup> This instrument may prove helpful in the construction of a European criminal law which is effectively concerned with the individual's rights.<sup>19</sup> Yet, it is still too restricted in its scope to be hailed as a powerful instrument to defend the freedom of European citizens. To this end, the inclusion of the Fundamental Rights Charter in the Constitutional Treaty with the consequence of its then legally binding character and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms will be the more effective means.<sup>20</sup> For future developments, it is important to note the creative, yet not less welcome, approach of the *Oberlandesgericht* (Higher Regional Court) Stuttgart to the first European Arrest Warrant in Germany, which issued a surrendering order only after scrutinising the request on the basis of a "European *ordre public*"-reservation as found in § 73 of the *Gesetz über die Internationale Rechtshilfe in Strafsachen* (Law on International Legal Assistance in Criminal Matters)<sup>21</sup> in connection with Art. 1(3) of the Framework Decision.<sup>22</sup>

Thus, it can be concluded that the principles of loyalty and mutual recognition may and will show their effectiveness to further the judicial cooperation in these matters. However, it still remains to be seen if the individual can truly be found at the heart of the Union's activities.

## II. *Applying the Constitutional Standard Case in the Area and the Justification of Deviations*

The Constitutional Treaty takes the most innovative step by introducing as a general rule the ordinary legislative procedure in this area - the "constitutional

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<sup>18</sup> *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union*, COM (2004) 328 final (April 28, 2004).

<sup>19</sup> Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals*, 41 COMMON MKT. L. REV. 909, 924-925 (2004).

<sup>20</sup> Maria Kaiafa-Gbandi, *Europäisches Strafrecht - Die Perspektive des Grundrechtsschutzes nach dem Verfassungsentwurf für Europa*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 3, 20-22 (2004).

<sup>21</sup> *Gesetz über die internationale Rechtshilfe in Strafsachen*, Aug. 24, 2004 BGBl I 1748, 1749, available at <http://bundesrecht.juris.de/bundesrecht/irg/inhalt.html>.

<sup>22</sup> *Oberlandesgericht [OLG] Stuttgart*, NEUE JURISTISCHE WOCHENSCHRIFT 57 (2004), 3437, 3439; Nicola Vennemann, *The European Arrest Warrant and Its Human Rights Implications*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 103, 115 (2003) (suggesting this approach).

standard case.”<sup>23</sup> The most important deviations from this standard are the several provisions which differ in voting requirements: For action in the fields of family law and most aspects of criminal law, the Council has to decide unanimously after consulting the European Parliament. For the sake of the unity of the Constitution, the transparency of the Union’s decision-making procedure and the democratic accountability in this area, it would be preferable that the ordinary legislative procedure be introduced for all these areas. However, one has to accept, that the areas still under the unanimity-rule are highly sensitive in the Member States and take part in what might be described as the “national identity” of the States, where they fear the loss of competences crucial to their essential functions.<sup>24</sup>

An interesting means to attenuate those fears in the judicial cooperation in criminal matters are the innovative provisions of Arts. III-270(3),(4) and III-271(3),(4) CT allowing for the European Council to be seized of the matter if a Member State thinks that a measure would affect fundamental aspects of its criminal justice system. If this does not lead to a new proposal, Member States are authorised to proceed with an enhanced cooperation in this area. Although we have to notice the obvious deviation from both the ordinary legislative procedure and the ordinary procedure for initialising enhanced cooperation, we may also conclude that this might be a workable compromise to meet the concerns of the respective Member States.

The same may hold for the future participation of national Parliaments - together with the European Parliament - in the evaluation and control of Europol and Eurojust. Although the participation of national Parliaments is not foreseen with the constitutional standard case, the democratic control of these institutions is imperative and finally found its way in the European legal order (Arts. III-273(1), III-276(2) CT).

#### **D. Conclusion: Persisting Fragmentation and the Need for a Consistent Concept**

With the concept of reflexive constitution we do have a means to appreciate these deviations as interim solutions which stand under higher pressure of justification for resisting change.<sup>25</sup> In some cases like the European Prosecutor we might see the

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<sup>23</sup> See Jürgen Bast, *The Constitutional Treaty as a Reflexive Constitution*, in this volume.

<sup>24</sup> JEAN PRADEL & GEERT CORSTENS, *DROIT PÉNAL EUROPÉEN* 3-5 (1999); Albrecht & Braum, *supra* note 12, at 297-299; EUROPEAN UNION COMMITTEE, *supra* note 12, at para. 40.

<sup>25</sup> See Bast, *supra* note 23.

“not here” rationale at work.<sup>26</sup> In other cases, we will hopefully see the “not yet” rationale being applied, above all concerning the position of the European Parliament in the decision-making process in criminal matters. Its future participation in the control of Europol and Eurojust is but one important step.<sup>27</sup>

To sum up, we can still see a difference between the policies concerning asylum and immigration, as well as judicial cooperation in civil law matters on the one hand, and judicial and police cooperation in criminal law matters on the other. The former is almost completely drawn in the field of application of the general rules, i.e. the constitutional standard case. The latter still keeps some of the more traditional instruments of intergovernmental cooperation. For now, these will be justified by the need to recognise national interests in the protection of their identity and autonomy in these highly sensitive areas. We will see which rationale future constitutional amendments will follow.

What we can conclude from the still persisting fragmentation is that the Constitutional Treaty still has no real underlying concept of the Area of Freedom, Security and Justice. It rather follows an eclectic approach thereby rendering the Area another Union policy instead of a conceptual idea to be realised throughout the Union in the interest of the individual’s freedoms.<sup>28</sup> The idea of an Area of mutual trust, however, may take us some steps forward in the right direction.

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<sup>26</sup> See Thym, *supra* note 5, at 13-14.

<sup>27</sup> See Peter-Alexis Albrecht, *11 Propositions Toward the Development of Legal Foundations for European Criminal Law*, 84 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 269, 275 (2001).

<sup>28</sup> Müller-Graff, *supra* note 3, at 610-611.



## Constitutionalization of the Common Foreign and Security Policy of the European Union: Implications of the Constitutional Treaty

By Ireneusz Pawel Karolewski\*

### A. Introduction

Many scholars of European integration have treated the Common Foreign and Security Policy (CFSP) as a specific area of the EU.<sup>1</sup> This is due to the fact that CFSP, and before it the European Political Cooperation (which was a nucleus of CFSP), have remained primarily an intergovernmental framework, although other EC pillars evolved to a much higher supranational degree over the years. For some theorists of European integration it was a clear sign that foreign and security policy would always remain the realm of national governments, which occasionally were willing to coordinate their national interests.<sup>2</sup> According to the old dictum of Stanley Hoffmann, this area of state activity belongs to so-called “high politics,” meaning that advanced integration in this field, in the sense of a creation of supranational institutions, will never materialize.<sup>3</sup> This train of thought, called neo-realism in the discipline of International Relations, regards foreign policy as a highly controversial area guarded by national governments. This is so because foreign policy is essential to the survival of states and their citizens. It is also

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<sup>1</sup> See WOLFGANG WAGNER, *DIE KONSTRUKTION EINER EUROPÄISCHEN AUßENPOLITIK - DEUTSCHE, FRANZÖSISCHE UND BRITISCHE ANSÄTZE IM VERGLEICH* (2001). For other analytical approaches to CFSP, see also Michael E. Smith, *The Framing of European foreign and security Policy: towards a post-modern policy framework?*, 10 *JOURNAL OF EUROPEAN PUBLIC POLICY* 556 (2003); Helene Sjursen, *Understanding the Common Foreign and Security Policy: Analytical Building Blocs*, 9 *ARENA WORKING PAPER* (2003), [http://www.arena.uio.no/publications/wp\\_03\\_9\\_sjursen.pdf](http://www.arena.uio.no/publications/wp_03_9_sjursen.pdf).

<sup>2</sup> Wolfgang Wagner, *Why the EU's Common Foreign and Security Policy Will Remain Intergovernmental: A Rationalist Institutional Choice Analysis of European Crisis Management Policy*, 10 *JOURNAL OF EUROPEAN PUBLIC POLICY* 576 (2003).

<sup>3</sup> Stanley Hoffmann, *Obstinate or Obsolete: The Fate of the Nation-State and Case of Western Europe*, 85 *DEADALUS* 865 (1966).

claimed that sovereign foreign policy is crucial for democracy, since civil and political rights can only be safeguarded by nation-states. Thus, national governments regard the issues of foreign and security policy in terms of relative gains, that is, states define the utility of political decisions with regard to gains of other states (other states should not be allowed to gain more from cooperative arrangements than oneself because they may abuse their lead).<sup>4</sup> Other areas of external relations that allow for absolute gains (governments are equally interested in asymmetric gains achieved from cooperation, as long as they realize gains), such as trade policy, by definition do not belong to the area of foreign and security policy. In other words, not every area of external relations qualifies as foreign and security policy. With regard to the EU, trade policy is conducted by the Commission because it does not belong to "high politics"; governments do not care enough to keep it within the authority of state. Comparatively, CFSP will always remain a sensitive area of state activity.

In order to test this proposition, one can use the version of the Draft Constitutional Treaty (DCT) drafted by the European Convention (2002-2003) and the final Constitutional Treaty (CT) supplemented and delivered by the Intergovernmental Conference (IGC, October 2003-June 2004)<sup>5</sup> as a touchstone with regard to the question whether CFSP still shows signs of intergovernmental peculiarity or whether it perhaps developed supranational features contrary to academic expectations. However, it is not the goal of this article to test tenets of neo-realism, but rather to use it as a litmus test of the constitutionalization of CFSP. The assumption of a stable intergovernmental character of CFSP poses a challenge to the concept of the constitutionalization of CFSP.

## B. What is Constitutionalization?

Even though the term constitutionalization has been widely used in legal and political debates, no explicit theory of constitutionalization has been developed.

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<sup>4</sup> For the works of the leading neo-realist, see Joseph Grieco, *The Maastricht Treaty. Economic and Monetary Union and the Neo-Realist Research Programme*, 21 REVIEW OF INTERNATIONAL STUDIES 21 (1995).

<sup>5</sup> The numbering and the wording of the Articles correspond to the final version of the Treaty establishing a Constitution for Europe as delivered by the IGC. I will use the name *Constitutional Treaty* (CT), whenever referring to it. The final document was signed in Rome on 29 October 2004. See Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 53. With regard to the earlier version of the Constitutional Treaty, as delivered by the European Convention, I will use the name *Draft Constitutional Treaty* (DCT) to underline that the European Convention has proposed the provisions. The Draft Treaty Establishing a Constitution for Europe was adopted by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome.

Various theories of the constitution as well as constitutionalism exist,<sup>6</sup> but there has been little scholarly attention to constitutionalization. If considered at all, scholars regard it implicitly as a form of process, through which something becomes a constitution or a part of it. Thus, constitutionalization means simply “transition to constitution.” However, this process-oriented definition of constitutionalization does not contain any information on the final product of the process nor on the quality of the process itself. This is so because the final product depends on the expected functions of the constitution, and it is therefore a normative variable. Since constitutionalization is a derivative of the concept of the resulting constitution, it may indicate many things depending on our understanding of what “constitution” is supposed to mean. According to a narrow concept, in which “constitution” means a single document consisting of regulations of political process, constitutionalization would indicate a mere codification or a formal regulation of political process either within a single document or a greater number of documents with a supreme, hard-to-change status. In this sense, the constitutionalization of CFSP could merely mean that this policy field has been integrated into the Constitutional Treaty.

Against this background, I suggest a more ambitious understanding of constitutionalization that draws on a functional understanding of the constitution.<sup>7</sup> First, if one speaks of a European constitution, the new document must offer some value added to the supranationalism of the policy field in question, since supranational decision-making is *prima facie* of the European Union. There have been a great number of claims that CFSP must be made more supranational,<sup>8</sup> that is either to *delegate* its field of activity to a supranational institution or to *pool* the decision-making system<sup>9</sup> by introducing qualified majority voting (QMV). In contrast, the European constitution would only adopt the already existing regulations, whereby it will not differ in its content from previous treaties, even if the regulations concerning a given field have been integrated in a single document

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<sup>6</sup> See, e.g., INTEGRATION DURCH VERFASSUNG (Hans Vorländer ed., 2002), GARY S. SCHAAL, VERTRAUEN, VERFASSUNG UND DEMOKRATIE (2004), PETRA DOBNER, KONSTITUTIONALISMUS ALS POLITIKFORM (2002).

<sup>7</sup> Ireneusz Pawel Karolewski, *Konstytucjonalizacja Unii Europejskiej a jej rozszerzenie na wschód* (Constitutionalization of the European Union and its Eastern Enlargement), 1 NOWA EUROPA 171 (2005).

<sup>8</sup> Many critics of CFSP saw the reluctance of the member states to permit the delegation of sovereignty to centralized institutions as a main problem and thus the main source of failure of CFSP, which has been diagnosed with an inability to be “[...] an effective international actor, in terms both of its capacity to produce collective decisions and its impact on events”. See Christopher Hill, *The Capability-expectations gap, or conceptualising Europe’s international role*, 31 JOURNAL OF COMMON MARKET STUDIES 305 (1993). See also Philip H. Gordon, *Europe’s Uncommon Foreign Policy*, 22 INTERNATIONAL SECURITY 74 (1997).

<sup>9</sup> For the conceptualization of delegating versus pooling, see ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* 67 (1998).



called the Constitutional Treaty. Therefore, *as the initial step* in my approach, I will look at the institutional changes brought about by the European Convention in July 2003<sup>10</sup> and the IGC (October 2003 – June 2004). I argue that CFSP remains largely intergovernmental, which suggests that constitutionalization of this policy field has not been significantly advanced.

*Second*, constitutions are expected to structure the political process in their role as the supreme law and not just adopt regulations that have existed previously. Thus, if the Constitutional Treaty merely organizes old treaties anew, without adding new substance, it does not deserve the title “constitution.” In order to see how far the Constitutional Treaty newly structures the political process, I shall therefore examine whether there are extra-constitutional developments, which will show the relevance of the constitutional text to the political process. If there are developments that proceed despite the constitution and which are likely to supersede it, one can assume a limited constitutionalization at best. I argue that many developments, particularly in the field of the Common Security and Defense Policy (CSDP), take place outside of the constitutional framework, which suggests that the process of constitutionalization of CSDP is quite limited, as the Constitutional Treaty only integrates some previous developments. Also, constitutions of multinational regimes, consociations or hybrid regimes like the European Union (notions that all evade the nation-state label, however, are associated with statehood) are supposed to promote collective identity.<sup>11</sup> This promotion of collective identity can be found for instance in a constitutional obligation to solidarity, which may consist of different mechanisms of distributional justice, but establishes in any case solidarity of collective defense. Therefore, I will discuss the solidarity clause provided for in the Draft Treaty delivered by the European Convention<sup>12</sup> and in addenda proposed by the subsequent IGC. It is also necessary to mention that there seems to be no real solidarity clause in the Constitutional Treaty. However, such a clause should be regarded as a basis for solidarity in the multinational EU. Furthermore, I will discuss the provisions allowing for flexible cooperation in military matters, which might present an even bigger strain on solidarity within the EU. The primary goal

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<sup>10</sup> See HEINZ KLEGER ET AL., *EUROPÄISCHE VERFASSUNG - ZUM STAND DER EUROPÄISCHEN DEMOKRATIE IM ZUGE DER OSTERWEITERUNG* (2004).

<sup>11</sup> With regard to the EU, see Jürgen Habermas, *Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm*, in *DIE EINBEZIEHUNG DES ANDEREN* (1996). For the general relationship between constitution and identity, see ANDRÉ BRODOZ, *DIE SYMBOLISCHE DIMENSION DER VERFASSUNG* (2003).

<sup>12</sup> I will not examine the debates and controversies in the European Convention itself. For this purpose, see *DER KONVENT ALS LABOR - TEXTE UND DOKUMENTE ZUM EUROPÄISCHEN VERFASSUNGSPROZESS* (Heinz Kleger ed., 2004).

of new provisions and changes brought about by the European Convention was to make CFSP and its subset, CSDP, more efficient.<sup>13</sup> However the notion of efficiency could conflict with the obligation to solidarity.

*Third*, constitutionalization implies democratization, since modern constitutions (as opposed to the medieval *Magna Charta Libertatum* that limited royal power) are about democracy. Constitutions are intended to be the institutionalized general will of the people, although they not only express it, but also establish democratic control of the political process. In studies on the transition to democracy, the democratization process seems to be inextricably connected to constitutionalization.<sup>14</sup> This connection also applies conversely. Particularly if one analyzes political systems with that claim to be democracies, as is the case with the EU, constitutionalization can hardly be separated from democratization.<sup>15</sup> Therefore, *as the final step*, I will proceed to examine the issue of democratic control of CFSP.

### C. How Supranational is CFSP?

#### I. Foreign Minister and European President

The establishment of the post of a Union Minister for Foreign Affairs (Article I-28) is probably the most innovative proposal of the Constitutional Treaty (CT). The Minister will have the responsibility of conducting the Union's common foreign and security policy, covering legislative proposals in that field as well as the supervision of their implementation. The new position merges the roles of High Representative for CFSP with that of the Commissioner for External Relations. The Foreign Minister (FM) will be one of the vice-presidents of the Commission as well as the chairman of the Foreign Affairs Council. The FM is to be appointed by the European Council, acting on qualified majority, with the agreement of the President of the Commission.

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<sup>13</sup> See Simon Duke, *The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its international role*, EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION, 2003/W/2 WORKING PAPER (2003), <http://www.eipa.nl/Publications/Summaries/03/WorkingPaper/2003w02.pdf>.

<sup>14</sup> See, e.g., Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUBLIC ADMINISTRATION 169 (1993).

<sup>15</sup> See Erik O. Eriksen et al., *The Charter of Fundamental Rights in Context*, in THE CHARTERING OF EUROPE: THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS AND ITS CONSTITUTIONAL IMPLICATIONS, 17 (Erik O. Eriksen et al. eds., 2003); LARRY SIEDENTOP, DEMOCRACY IN EUROPE (2001).

This means that the FM remains the head of CFSP, even if s/he loses his/her function as a commissioner as a result of the resignation of the entire Commission: a strong intergovernmental tendency of the new post.<sup>16</sup> This tendency is strengthened even further by the new regulations of QMV, according to which a double majority of 55% of the Member States representing at least 65% of the EU population is necessary for a decision to be passed (Article I-25 CT). Particularly the population quorum stipulates that the FM needs the support of large Member States (for example Germany, France and the UK), three of which can practically compose a blocking minority (plus one other, which for example could be the ever "supportive" Luxembourg).

The procedure reflects the ambivalence of the post, the so-called double-hatting, which on the one hand is supposed to guarantee an integration of CFSP having hitherto been sliced between different EU institutions causing incoherence and hence the inability of the EU to make common decisions in that field. On the other hand, one can argue that the double-hatting can destroy the collegial nature of the Commission, since the FM might have conflicting loyalties, and this will rather strengthen the Council. Regarding the implementation of CFSP, the activity of the FM may also involve conflict with the Political and Security Committee, which according to Article III-307 CT monitors the implementation of the agreed policies. Article III-292(3) CT envisages that the FM assists the Council and the Commission in ensuring consistency between different areas of external action, meaning that the huge burden of coordination will fall on the FM, especially when one takes into consideration potential conflicts between Member States. Provisions with regard to the structured cooperation in military matters preprogram those conflicts. The FM will have to fill the gap between those who are involved, for instance, in the so-called structured cooperation and those who are not (Article III-310(1) CT). Nevertheless, the FM will be confronted not only with the daunting task of coordinating national interests of the Member States, but also those of the respective General Directorates of the Commission that fall under an external relations label. In fulfilling his/her tasks, s/he will be mostly dependent on personal ability to convince the Council and Commission to cooperate. Hence, the success of the FM probably will be a strong personal variable, as it is in case of the Commission President, which suggests cycles of European foreign policy rather than linear stability.

Furthermore, the FM will have to play an active role in the sensitive domain of crisis management. Article III-309(2) CT specifies that the FM shall ensure

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<sup>16</sup> See Daniel Thym, *Reforming Europe's Common Foreign and Security Policy*, 10 EUROPEAN LAW JOURNAL 5 (2004).

coordination of the civilian and military aspects of such tasks under the authority of the Council. Therefore, the FM will be a position with an extremely heavy workload (being the vice-president of the Commission, conducting administrative duties with the Council and having a demanding travel schedule due to his/her representation tasks), which makes probable that a single person will be unable to do it effectively. The FM also represents the EU in the international organizations and conferences (Article III-296(2) CT), which also includes his/her presence in the UN Security Council (Article III-305(2) CT) as well as his/her being the contact person for the European Parliament for CFSP (Article III-304 CT). In addition, s/he also presides over the Foreign Affairs Council as stated explicitly by the IGC in the supplemented Article I-28 of the Constitutional Treaty.<sup>17</sup> Most likely, it will make more deputies or special representatives necessary, which may in turn create problems of coordination and control. The European External Action Service (EEAS) is to assist the FM. The Council would rule on the structure of the EEAS with the consent of the Commission.<sup>18</sup> However, it is still unclear how diplomatic service of the EEAS will be constructed and how this service will relate to staff outside of it but still working in the area of external relations.<sup>19</sup> Practical constraints make the creation of the EEAS a daunting task because it requires sensitive negotiations between the Commission and the Council on the scope and structure of the service. The creation of the EEAS implies a thorough reorganization of Commission and Council. On the one hand, the EEAS might be organized as a horizontal network of actors within existing services (the Commission's DG Relex, the Council's DGs that work on CFSP and CSDP, and perhaps even Member States' civil services). Yet in this case, it is unclear how the lines of hierarchy could be drawn and whether this would ensure a vertical implementation of policies and thus consistency of CFSP. On the other hand, a EU Ministry of External Relations could be constructed, which would reflect the structure of the national bureaucracies with clear loyalties. However, the creation of a separate external service would mean a loss of the Commission's influence on external relations and a stronger intergovernmentalization of the FM.

In addition, the European Council President will bring about a stronger intergovernmental orientation of CFSP. S/he will replace the current system of rotating presidencies and could potentially assume some of the functions currently fulfilled by the High Representative for CFSP (Article I-22 CT). This rather controversial proposal of the Convention (Article I-21 Draft Constitutional Treaty)

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<sup>17</sup> Article I-27 DCT did not contain paragraph 4.

<sup>18</sup> See Declaration 24 on Article III-296 CT concerning EEAS in the Declarations concerning provisions of the Constitution, attached to the Constitutional Treaty.

<sup>19</sup> See DUKE, SUPRA note 13, at 32.

establishes a President who is selected for a period of two and a half years and has both internal and external tasks to fulfill. The President would assume administrative functions with regard to preparing the European Council meetings and to facilitating cooperation, as well as with regard to representing the EU externally. As a result, there is no clear-cut division of labor between the European Council President and the FM. Since the tasks of the President are probably not entirely symbolic, concurrence and possibly even conflict could occur between the FM and the President. The Convention had established the post of the President as a proposal by the national governments mainly as a countermeasure to the increased power of the Commission President following his/her election by the European Parliament, thereby giving much stronger legitimacy to the Commission President than s/he has hitherto enjoyed. However, the post of the European Council President was created as a counterweight to the Commission President, which was supposed to place a stronger intergovernmental element in the institutional system of the EU.<sup>20</sup>

## *II. Voting Procedures in CFSP*

An intergovernmental orientation of CFSP also has been maintained due to the restrictions of QMV in this field. The Constitutional Treaty stipulates that a greater range of decisions shall fall under the qualified majority voting. At the same time it suggests changes to the mechanism of QMV itself (Article I-25 CT) to be introduced on 1 November 2009, in case the Constitution is ratified (Declaration on Article I-25 attached to CT). Nevertheless, the double majority formula (55% of Member States, representing 65% EU population) does not have much effect on CFSP, where the vote of unanimity will still be the norm. Even though there is a possibility of abstention from a vote, the basic decision-making rules remain unchanged (Article III-300(1) CT). In the event of abstention formally declared by any Member State, the decision is adopted, but it does not apply to the abstaining member. At the same time, the Member State accepts that the Union as such is bound by it, a regulation formulated by the Nice Treaty (Article 23(1) TEU). The respective Member State is also called upon not to take any action against the decision or to impede its application. At the same time, the Member State concerned refrains from any action likely to conflict with the Union's decision. The exemption, allowing for QMV, is envisaged in four cases (for example when adopting any European decision implementing a Union action or appointing a special representative, Article III-300(2) CT), but those are second-order decisions that presuppose a consensus at an earlier stage.

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<sup>20</sup> See Christopher Hill, *CFSP: Conventions, Constitutions and Consequentiality*, XXXII INTERNATIONAL SPECTATOR No. 4, 75 (2002).

The Member States also retain the right to invoke reasons of vital national interests (the Luxembourg compromise), which may block any decision taken by QMV. In this case, it leads to a conciliation procedure by the FM. If the FM is unsuccessful, the issue is transferred to the European Council (Article III-300(2) CT).

The only modification pointing in the direction of expanding QMV has been brought about by the Convention. It relates to a vague clause, which gives power to the European Council to decide unanimously to switch over to QMV, but it excludes this step in the field of military and defense issues (Article 300(3), Article 300(4) CT). This so-called *passerelle* clause is not likely to drastically change the decision-making process, since it relates only to decisions of secondary importance presupposing as it does unanimity on the switch to QMV. Another supplement has been added by the IGC, on the initiative of the Italian presidency; the supplemented treaty stipulates that it is possible to use QMV in the Council whenever the FM makes a proposal (Article III-300(2b) CT).<sup>21</sup> However, the change will not be dramatic, since the FM will act under the mandate of the Council in any case.

Despite the fact that the Draft Constitutional Treaty merged the EU and EC Treaties in a single text and created a single EU personality, it seems that the hitherto existent pillar structure of the EU will continue to have an influence on the functioning and further development of CFSP.

#### **D. Extra-constitutional Developments in CFSP?**

##### *I. Common Security and Defense Policy*

The CSDP, which is a subset of CFSP, also experienced changes in the Draft Constitutional Treaty (DCT). The DCT expands the definition of CSDP tasks established by the Treaty of Nice (Article 17(2) TEU) by modifying the Petersberg tasks<sup>22</sup> to include the fight against terrorism. Besides peacekeeping, conflict prevention and peacemaking, which were previously provided for by the Nice Treaty, the new definition of tasks includes joint disarmament operations, military assistance, deployment of combat forces as well as post-conflict stabilization. It moves CSDP in a military direction, since the Petersberg tasks emphasized predominantly civilian and humanitarian reactions by the EU to international crises.

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<sup>21</sup> DCT lacks this provision (Article III-201).

<sup>22</sup> Petersberg tasks include, above all, humanitarian and rescue missions. See Martin Ortega, *Petersberg Tasks, and Missions for the EU Military Forces*, WORKING PAPER (2005), INSTITUTE FOR SECURITY STUDIES, PARIS, [HTTP://WWW.ISS-EU.ORG/ESDP/04-MO.PDF](http://www.iss-eu.org/ESDP/04-MO.PDF).

Moreover, it describes more accurately the military activity of the EU at present, which means that CSDP has so far evolved outside the constitutional framework only to be caught up by the DCT in 2003. By the same token, one might argue that the DCT as well as the Constitutional Treaty do not structure the political process but rather the political process has defined the structure of the constitution. Since 2003 the EU has been engaged in a number of military operations both in and outside Europe. For instance, in March 2003 it launched a military operation (code-named Concordia) in the Former Yugoslav Republic of Macedonia (FYROM). It followed a NATO operation and continued until December 2003. Concordia included 400 combat personnel with the goal of peacemaking and peacekeeping in response to the ethnic clashes in FYROM. It allowed the implementation of the August 2001 Ohrid Framework Agreement.<sup>23</sup> In addition, in June 2003, the EU launched its first autonomous operation (code-named Artemis), since Concordia utilized NATO resources. It took place in the Democratic Republic of Congo under the leadership of France acting as the EU framework nation providing the command and control capabilities for the planning, launch and management of the operation. It continued until September 2003. One of the main goals of the operation was to disarm the militias in the Congolese town of Bunia. The Framework Nation concept was endorsed in July 2002 outside of the European treaties, which can be regarded as a precursor structure for the CT. The EU military Committee monitored the operation, while the Political and Security Committee exercised political control and strategic direction under the responsibility of the Council. Operation Artemis took place during the debate within the Convention, which was overtaken by the events.

Against this background, one might argue that neither the European treaties nor the Constitutional Treaty itself have given much impetus to the development of CSDP, since CSDP has been evolving outside of the constitutional framework.<sup>24</sup> Furthermore, the Constitutional Treaty will probably not even structure the political process in the future. This is due to the fact that the Petersberg list is open-ended, since there is no consensus on whether it might include more demanding crisis management cases similar to NATO's military intervention in the Kosovo crisis.

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<sup>23</sup> Ulf Brunnbauer, *The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments*, 1 JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE (2002).

<sup>24</sup> Udo Diedrichs and Matthias Jopp, *Flexible Modes of Governance: Making CFSP and ESDP Work*, 2 THE INTERNATIONAL SPECTATOR 15 (2003). See Kathrin Blanck, *Flexible Integration in the Common Foreign and Security Policy*, 61 EUROPAINSTITUT WORKING PAPER (2004), WIRTSCHAFTSUNIVERSITÄT WIEN, [HTTP://FGR.WU-WIEN.AC.AT/INSTITUT/EF/WP/WP61.PDF](http://fgr.wu-wien.ac.at/institut/ef/wp/wp61.pdf).

Moreover, there are other extra-constitutional developments. In order to guarantee autonomous and better coordinated development of military and defense capabilities of the EU, an armament agency is provided for by the Constitutional Treaty (European Defense Agency, Articles I-41(3) and III-311 CT). The agency has the task of identifying military capability objectives and promoting harmonization in procurement policies. This provision was quite consensual, since benefits of the agency to the Member States are obvious, making military expenditure, particularly in times of budget constraints more efficient. Nevertheless, cooperation with regard to the defense industry is nothing revolutionary. There had been relevant developments in this area before the constitution. For example, Britain, France, Germany and Italy had already set up the Organization for Joint Armaments Cooperation (OCCAR) in 1996, which was tasked with controlling, coordinating and implementing armaments programs and received legal status with the OCCAR Convention in 2001.<sup>25</sup> In addition, Britain, France, Germany, Italy, Spain and Sweden, countries with the biggest arms industries, signed in 1998 a Letter of Intent that led to the Framework Agreement in 2000. Moreover, the establishment of the European Armament Agency, not to replace OCCAR, has been debated for a longer period. Hence, one can even speak of an extra-constitutional “weapons procurement process.” Apart from this development, there has been further extra-constitutional progress towards the establishment of EU military headquarters (HQ) for ESDP. The debate on this issue came to the fore during the deep EU divisions over the Iraq war, when Belgium, France, Germany and Luxembourg held a meeting in April 2003 to discuss several initiatives to further military integration. The main controversy concerned an autonomous HQ to be located in Tervuren near Brussels, separate from NATO HQ in Mons. In the second half of 2003, an agreement was reached with the aid of Britain that led to a decision to establish an autonomous EU military planning cell (SHAPE) within NATO supreme military headquarters with the responsibility for planning Europe’s operations. There was also agreement over the necessity to prepare the rapid deployment of 1500 combat troops able to be deployed within 10 days to a distance of up to 4000 km for a period of 30 to 120 days. This agreement was later integrated into the Protocol on Permanent Structural Cooperation attached to CT.<sup>26</sup>

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<sup>25</sup> See Burkhard Schmitt, *The European Union and Armaments: Getting a Bigger Bang for the Euro*, 63 CHAILLOT PAPERS (2003), INSTITUTE FOR SECURITY STUDIES, PARIS, [HTTP://WWW.ISS-EU.ORG/CHAILLOT/CHAI63E.PDF](http://www.iss-eu.org/chailLOT/CHAI63E.PDF).

<sup>26</sup> See Protocol on Permanent Structured Cooperation Established by Article I-41(6) and Article III-312 of CT.



## *II. Solidarity Clause*

As mentioned above, solidarity mechanisms are relevant features of constitutions of multinational regimes, consociations or hybrid regimes, particularly if the constitution is supposed to be a framework of reference for collective identity. Nonetheless the idea of mutual security guarantees has been quite controversial in the Convention debates (Articles I-42 and III-231 DCT; Articles I-43 and III-329 CT). The clause relates to states that are victims of terrorist attack or natural and man-made disasters. The implication of this provision is uncertain, particularly since Article III-214 of the DCT, concerning closer cooperation on mutual defense and providing for a quite ambitious establishment of a collective defense system within the EU, has been entirely removed from the CT. In addition, Article I-40(7) of the DCT stating, "if one of the Member States ... is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power" has been deleted from the CT.<sup>27</sup> The remaining Articles on the solidarity clause are extremely vague, making uncertain whether these provisions imply a real military defense guarantee or could be fulfilled by a mere condemnation of the aggression or even solely by a symbolic declaration of aid, especially by the non-NATO countries. Since the Article applies to every member of the EU, it posed a dilemma for the neutral Member States, Austria, Finland, Ireland and Sweden, which realized during the IGC summit in December 2003 that a literal application of the solidarity clause would be inconsistent with their security policies. The Article was given a short-lived supplement in December 2003 with another vague statement saying that the solidarity clause "[...] shall not prejudice the specific character of the security and defense policy of certain Member States". However, even this diluted version has been removed from the Constitutional Treaty.<sup>28</sup> Moreover, the declaration on Articles I-43 and III-329 of CT states clearly that "[...] none of the provisions of Articles I-43 and III-329 of the Constitution is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State". Hence, an explicit defense clause is not provided by the supplemented Constitutional Treaty, which may lead to the conclusion that a constitutionalization in CSDP has only a limited range due to the lack of an obligation to solidarity.

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<sup>27</sup> See Article I-41 CT.

<sup>28</sup> Addendum to the Presidency Note, Conference of the Representatives of the Governments of the Member States, CIG 60/03 ADD 1, Brussels, 9 December 2003.

## II. Challenge of a "Hard Core"

Provisions of enhanced and structured cooperation, which could leave some EU members outside new institutional arrangements, could further burden the solidarity of CSDP.

The European Convention has proposed some changes with regard to the enhanced cooperation already provided for by the Nice Treaty. According to Article 43 of the TEU eight countries are required to initiate enhanced cooperation, with an exception provided for the second pillar, where the veto option was retained. The Draft Constitutional Treaty provided for a revised clause on enhanced cooperation in CSDP, which had previously been excluded. A condition for initiating the procedure is that enhanced cooperation can be undertaken only by at least one third of the Member States (Article I-43(2) of the DCT and Article I-44 of the Constitutional Treaty). It is hoped that enhanced cooperation would allow flexible solutions of cooperation within CSDP.<sup>29</sup> Another innovation in CSDP is a provision concerning 'structured cooperation'. It gives opportunity to some Member States to go ahead with integration of their military capabilities, without the participation of all Member States (Articles I-40(6) and III-213 DCT; Articles I-41(6) and III-312 CT). This provision is controversial, since it was envisaged to further an integration-friendly 'hard core,' similar to the Euro-zone, and to give CSDP some autonomy with regard to NATO. Article III-312 of CT implies that the deliberation and the decision-making process take place only within the group exercising 'structured cooperation', also concerning the enlargement of the group. Furthermore, the provision refers to the possession of higher military capabilities with a perspective of more demanding tasks by the states which wish to accept more binding commitments in CSDP. In the DCT, the EU Council may also ask those countries to carry out crisis management tasks (Article III-213(4) of the DCT). This provision, however, does not reappear in the CT. The IGC summit in December 2003 made the concept of the 'structured cooperation' less vague by the provisions in the Protocol on Permanent Structural Cooperation (established by Article I-41(6) and Article III-312 CT). This Protocol states that the willing Member States are to supply by 2007 combat units with transport and logistical elements capable of deployment within five to thirty days as a condition of their participation.

In sum, the Constitutional Treaty establishes new provisions, which include rules for a 'hard core' in the security and defense field (allowing for more flexibility in cooperation and strengthening large Member States). Those measures embrace the new scope of CSDP, the structured cooperation beyond the so-called Petersberg

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<sup>29</sup> DIEDRICHS AND JOPP, *supra* note 24, at 15.

tasks, ad-hoc coalitions of willing Member States as well as an armaments agency to integrate common military resources and capabilities. However, particularly the provisions of enhanced and structured cooperation could lead to a “hard core,” which, in absence of the solidarity clause, could detach the more militarily capable countries from the “inefficient” Member States. In other words, new regulations in CSDP could, on the one hand, improve the efficiency of defense policy, but, on the other hand, these might be a further challenge to the solidarity between Member States, thus showing limitations of the constitutionalization of CFSP.

## **E. Democratic accountability of CFSP?**

### *I. Limitations of Parliamentary Scrutiny of CFSP*

The Draft Constitutional Treaty has given limited powers of scrutiny over CFSP to the Member States’ parliaments and to the European Parliament (EP). Since CFSP remains mainly an intergovernmental institution, the power of scrutiny lies primarily with the Member States or national parliaments. This does not mean that CFSP is actually controlled by the parliaments. CFSP has evolved based on multilateral agreements, which means that the respective executive branches gain additional executive powers within their governments. The position of national governments, even if agreed with the parliaments before the diplomatic exchange (as it is for example in the case of Denmark), almost always changes due to the nature of the European negotiations that strive for a compromise based on side-payments and package deals.<sup>30</sup> Especially with regard to CSDP, there is a high degree of informal and formal, but extra-constitutional, meetings and agreements, frequently not including all EU Member States. Currently, there are limited mechanisms allowing for a synchronization of national parliaments in order to scrutinize CFSP, since the possibilities of influencing the decision-making in CFSP within the national framework are restricted to a given nation-state. Even in this case, many national parliaments are virtually excluded from decision-making in foreign and defense policy. For instance, most of the national parliaments do not vote on military missions in foreign countries, the mandate of those missions and the budget.<sup>31</sup>

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<sup>30</sup> See DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993).

<sup>31</sup> See Willem F. van Eekelen, *The Parliamentary Dimension of Defence Procurement*, 5 OCCASIONAL PAPER, (GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES 2005, [HTTP://WWW.DCAF.CH/PUBLICATIONS/PUBLICATIONS%20NEW/OCCASIONAL\\_PAPERS/5.PDF](http://www.dcaf.ch/publications/publications%20new/occasional_papers/5.pdf)).

Neither the European Convention nor the IGC has introduced significant changes with regard to control and scrutiny of the EP. The EP has no rights of policy initiative or significant scrutiny rights in CFSP. The role of the EP confines itself to the right to information, making recommendations and debating general guidelines for CFSP (Article III-205 of the DCT; Article III-304 CT). The EP can question the European President as well as call the FM and special representatives to appear before Parliament's Foreign and Defense Committee in order to receive information. The only area in which the EP possesses substantial rights is in its role in the 'ordinary legislative procedure' (previously known as co-decision procedure). However, this applies to CFSP only with regard to general foreign policy guidelines and with regard to the approval of CFSP expenditure, whenever it is a part of the EU budget.<sup>32</sup> But almost the entire CFSP, and in any case CSDP, is financed by the Member States. Nevertheless, there are some changes brought about by the European Convention that slightly increase EP control of CFSP, although the influence of the EP in this field remains marginal. They include the duty of the European President to report to the EP after each of its meetings in order to increase the regularity of information exchange between EP and the Presidency (Article I-22(2d) CT). In addition, special representatives may provide briefings to the EP (Article III-304(1) of the Constitutional Treaty). Furthermore, the Protocol on the Role of National Parliaments in the European Union to CT (Title II, Article 10) establishes that a conference of Parliamentary Committees for Union Affairs (COSAC) may submit any contribution for the attention of the European Parliament and organize interparliamentary conferences on specific topics, in particular to debate matters on CFSP, including CSDP. However, the contributions are not binding on national parliaments.

## *II. Alternative Democratic Control Mechanisms in CFSP?*

According to the Constitutional Treaty, the EP is also given the power to elect the President of the Commission, and the Commission as a body is responsible to the EP (Article I-20(1) and Article I-26(8) CT). Although the Commission President does not hold any voting rights in CFSP, the European Parliament has gained some political leverage with regard to the Foreign Minister. The IGC summit in December 2003 agreed that the FM should be given full voting rights in the Commission, even on decisions outside CFSP. However, in the event of a censure motion from the European Parliament on the Commission, the FM only resigns his role as a commissioner. The request of the Commission President is not sufficient to obtain the resignation of the FM as is the case with other commissioners. Article I-

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<sup>32</sup> See Daniel Thym, *Parlamentsfreier Raum? Die Rolle des Europäischen Parlaments in der Gemeinsamen Außen- und Sicherheitspolitik*, Humboldt-Universität zu Berlin, [www.whi-berlin.de/EPinderGASP.htm](http://www.whi-berlin.de/EPinderGASP.htm).

28 (1) of CT provides a solution, which stipulates that the FM shall resign on the request of the President of the Commission and in agreement with the European Council, which shows limits to the control of the Parliament over the FM.

Despite these limited changes, the European Convention also included provisions for more involvement of the national parliaments in the formulation of EU policy that have some effect on the parliamentary scrutiny of CFSP. Article 2 of the Protocol on the Role of National Parliaments in the European Union calls for the agendas and results of Council meetings to be distributed to the national parliaments at the same time as they are sent to the governments. Article 4 of the same Protocol demands that “a six-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure”. This could give more time to the national parliaments to react to the proposals and policies within CFSP, debated and decided in the EU.

An additional possibility of an increased democratic control of CFSP, at least hypothetically, includes the EU referendum provided for in Article I-47 of CT. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal. Nevertheless, due to the nature of CFSP as crisis management under time pressure and discreet diplomatic negotiations, the provision for referendum will not have any substantial value for the democratic control of CFSP.

Both the European Convention and the IGC failed to give to the parliaments (national and European) any substantial power of democratic control over CFSP. Slight modifications can undoubtedly not compensate for the accountability gap in CFSP and especially CSDP, which suffer from an informal and executive-dominated character. One possible explanation for the failure to make substantial changes in this area may be found in the inability of the Convention members to deal with the workload as well as their indolence in lobbying for changes with more significant substance. Two working groups (group on external relations and group on defense) responsible within the Convention for CFSP/CSDP have, surprisingly, not proposed any substantial modifications regarding the possible democratic scrutiny of CFSP.<sup>33</sup> A high degree of confusion among the Convention members is pointed to by another study. According to an analysis of the Vienna

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<sup>33</sup> KLEGER, *supra* note 12.

Institute of Higher Studies<sup>34</sup>, the new system of decision-making, introduced by the Convention, considerably shifted the power relations in the EU on the scale between equality and fairness from 40 points (slightly in favor of small countries) to 80 points (massively in favor of large countries). At the same, the members of the Conventions were completely unaware of the effects of the changes to the decision-making system. This could suggest that the Convention might not be the best means to bring about deep and significant reforms in complex political systems such as the EU is.<sup>35</sup> If one takes the still limited democratic accountability of CFSP into account, it is difficult to argue that a real constitutionalization of CFSP took place. CFSP was not even subject to controversy between supranational and intergovernmental actors, since the parliamentarians in the Convention did not take any steps to promote democratic scrutiny of foreign and defense policy. Nor were the national governments interested in giving up their executive powers.

## F. Conclusions

The constitutionalization of CFSP is at best limited. At worst, there is a pull of intergovernmentalism in CFSP, if one regards the constitutionalization as a matter of relation between different policy areas. In comparison to other policy fields of the EU, CFSP is more intergovernmental, since other policy fields experienced more progress towards supranationalism. Although there are new linkages established between institutions in the field of CFSP, those seem rather to diminish the role of the Commission, which is the primary locus of supranationalism. The Constitutional Treaty states clearly that the Commission ensures the external representation of the EU *with the exception of CFSP* (Article 25.1 of the DCT). In addition, voting by unanimity prevails in CFSP, whereas it has been expanded in many new policy areas. The FM who coordinates CFSP would also withdraw policy areas from the European Commission and integrate them into CFSP probably claiming the staff of the Commission as a part the EEAS. Moreover, the post of the European President implies not only a competition to the post of FM, causing problems of coordination, but it has also been deliberately conceived as an intergovernmental strengthening of the EU and a counterweight to the President of the Commission. Furthermore, the Constitutional Treaty has not given and will probably not give impetus to new developments in this field, since CSDP has

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<sup>34</sup> Bernhard Felderer et al, *Draft Constitution: The Double Majority Implies a Massive Transfer of Power to the Large Member States - Is this Intended?* INSTITUTE FOR ADVANCED STUDIES (2003), VIENNA, [HTTP://WWW.IHS.AC.AT/PUBLICATIONS/LIB/FORUM1JUNE2003.PDF](http://www.ihs.ac.at/publications/lib/forum1june2003.pdf).

<sup>35</sup> See Ireneusz Pawel Karolewski, *Convention as a New Method of Decision Making in the Enlarged European Union. How Democratic Can it Really Be?* PAPER PRESENTED AT THE SGIR CONFERENCE "CONSTRUCTING WORLD ORDERS", THE HAGUE, 9-11 SEPTEMBER 2004; Steven Everts and Daniel Keohane, *The European Convention and EU foreign Policy: Learning from Failure*, 45 SURVIVAL 3 (2003).

already been evolving outside the constitutional framework. Additionally, new provisions for enhanced and structured cooperation could prove to be a burden for solidarity between Member States, particularly in the absence of a solidarity clause. Finally, even though there have been slight modifications in favor of democratic control by national parliaments and the European Parliament these have not been dramatic and will not lead to the democratic scrutiny of CFSP.

*Comment on Ireneusz Pawel Karolewski –  
Constitutionalization of the Common Foreign and  
Security Policy of the European Union: Implications of  
the Constitutional Treaty*

By Markus Rau\*

Within the ongoing debate on the constitutionalization at the EU level,<sup>1</sup> European foreign policy has gained more and more attention. This is due to the Union's growing relevance and importance as "an actor in the international relations,"<sup>2</sup> which has also increasingly found its expression at the normative level of the founding documents of the EU. To what extent does the Constitutional Treaty (CT) bring about improvement in the legal regime governing the EU's external activities, thus strengthening the Union's capabilities to, as current Article 2(1) TEU puts it, "assert its identity on the international scene"?<sup>3</sup>

While Pawel Karolewski presented a rather skeptical view of the further constitutionalization of European foreign policy, I will try to shed a more positive light on the provisions of the CT relating to the Union's external action. In doing so, I would like to begin by taking a short glance at the current state of affairs. For I believe that the perception one has of the present situation necessarily determines what one expects from the changes to be achieved by the CT. And here my first thesis is that: *The current regime governing European foreign policy is better than its reputation.*

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<sup>1</sup> On the various contexts in which the notion of constitutionalization is currently used, see Rainer Wahl, *Konstitutionalisierung - Leitbegriff oder Allerweltsbegriff?*, in *DER WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART - Festschrift für Winfried Brohm zum 70. Geburtstag* 191 (Carl-Eugen Eberle ed., 2002).

<sup>2</sup> See Christian Tomuschat, *Die Europäische Union als ein Akteur in den internationalen Beziehungen*, in *VERHANDELN FÜR DEN FRIEDEN - LIBER AMICORUM TONO EITEL 799* (Jochen A. Frowein et al. eds., 2003).

<sup>3</sup> On the issue of European identity at the international level, see Thomas Bruha and Markus Rau, *Europäische Identitätsbildung: die internationale Dimension*, in *EUROPÄISCHE ÖFFENTLICHKEIT* 289 (Claudio Franzius and Ulrich K. Preuß eds., 2004).



It is important to remember in that respect that European foreign policy is not confined to the CFSP but also comprises the external activities of the EC. It is not necessary to go into detail here. Suffice it to mention the pertinent rules relating to the Common Commercial Policy,<sup>4</sup> environmental policy,<sup>5</sup> or development cooperation and humanitarian aid,<sup>6</sup> which are widely seen as operating more or less successfully. As regards the CFSP, we should not be blinded by the EU's political split during the war in Iraq in 2003, which, to be sure, was certainly unfortunate, to say the least.<sup>7</sup> Rather, my impression is that, leaving aside the Iraq crisis, considerable progress has been achieved over the last years. If you take, for instance, the EU's efforts within the framework of the CFSP to promote respect for democracy and human rights or acceptance of the International Criminal Court (ICC),<sup>8</sup> one has to acknowledge that the Union as an international player has come quite a long way. To make it more concrete: Just think of the *amicus curiae* brief filed by the EU in the *McCarver* case<sup>9</sup> before the U.S. Supreme Court,<sup>10</sup> concerning the execution of the death penalty against mentally retarded offenders,<sup>11</sup> or the 2001 EU Guidelines on Human Rights Dialogues.<sup>12</sup>

The provisions in the CT relating to foreign policy build upon the progress achieved so far and undertake to cautiously further develop the current system. Even though the merger of the present pillars does not entail a harmonization of

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<sup>4</sup> See Treaty Establishing the European Community, Article 133, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter TEC].

<sup>5</sup> Article 174(4) TEC.

<sup>6</sup> Articles 181 and 181a TEC.

<sup>7</sup> See Bruha and Rau, *supra* note 3, at 310-311.

<sup>8</sup> For a detailed analysis of the legal foundations and current activities of the EU in the field of international human rights policy, see Thomas Bruha and Markus Rau, *Bedeutung der Grundrechte der EU für Drittstaaten*, in *HANDBUCH DER EUROPÄISCHEN GRUNDRECHTE* (Sebastian Heselhaus and Carsten Nowak eds., forthcoming).

<sup>9</sup> *McCarver v. North Carolina*, 533 U.S. 975 (2001).

<sup>10</sup> Brief for the European Union as Amicus Curiae in *Ernest Paul McCarver v. State of North Carolina*, available at <http://www.eurunion.org/legislat/DeathPenalty/EUActionsUSCases2001.htm>.

<sup>11</sup> On this issue, especially against the background of the Supreme Court's later decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), see Lutz Eidam, *Mentally Retarded Offenders and the Death Penalty - The Latest Supreme Court Ruling and Possible European Influences*, 4 GERMAN LAW JOURNAL 491 (2003).

<sup>12</sup> Council of the European Union, *European Guidelines on Human Rights Dialogues*, 13 December 2001.

the different legal instruments and decision-making procedures,<sup>13</sup> it is to be endorsed that the relevant articles covering the different aspects of EU external policy now are grouped in a single section of the CT. Titel V of Part III consists of 37 more-or-less detailed articles; there probably is no other constitutional document in the world that deals in such depth with foreign policy. This brings me to my second thesis: *At least from a purely formal perspective, the degree of constitutionalization of foreign policy the CT brings about is without precedent in the national legal orders.*

It is interesting to see in that context that the constitutionalization of the Union's external action is not restricted to institutional and procedural aspects, but also comprises substantive issues. Article III-292(1) CT, for example, mandates that the "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." The provision mirrors Article I-3 CT. It is further concretized by Article III-292(2) CT, which builds upon current Article 11(1) TEU, the provision now having general application in all foreign policy fields. Unlike most national constitutions, the CT thus also explicitly makes normative demands on foreign policy and tries to provide for coherence between the Union's internal and external action.<sup>14</sup>

When it comes to institutions and procedures, I also believe that from the point of view of political responsibilities, the "double hat" solution foreseen for the new post of the Union Minister for Foreign Affairs may turn out to be problematic.<sup>15</sup> All in all, however, I think that the merger of the present functions of the High

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<sup>13</sup> See, e.g., Daniel Thym, *The Institutional Balance of European Foreign Policy in the Treaty establishing a Constitution for Europe*, WHI-Paper 13/04, 3, available at <http://www.rewi.huberlin.de/WHI/papers/whipapers1304/paper1304.pdf>; Daniel Thym, *Die neue institutionelle Architektur europäischer Außen und Sicherheitspolitik*, 42 ARCHIV DES VÖLKERRECHTS 44, 45-46 (2004).

<sup>14</sup> See Thomas Bruha and Markus Rau, *Verfassungsrechtliche Dimensionen europäischer Außenpolitik*, Sec. III ("Materiell-verfassungsrechtliche Bindungen europäischer Außenpolitik"), in *DIE EUROPÄISCHE UNION IM WANDEL: INNERE VERFASSTHEIT UND ÄUßERE HANDLUNGSFÄHIGKEIT* (Thomas Bruha and Carsten Nowak eds., forthcoming); Bruha and Markus Rau, *supra* note 3, at 313-317. For a discussion of the current constitutional constraints regarding European foreign policy against the background of the Iraq crisis of 2003, see Franz C. Meyer, *Angriffskrieg und europäisches Verfassungsrecht. Zu den rechtlichen Bindungen von Außenpolitik in Europa*, 41 ARCHIV DES VÖLKERRECHTS 394 (2003).

<sup>15</sup> On the Union Foreign Minister, see Thym, *The Institutional Balance*, *supra* note 13, at 14-17; Thym, *Die neue institutionelle Architektur*, *supra* note 13, at 60-64.

Representative for the CFSP, the Commissioner responsible for external relations, and the respective foreign affairs competences of the Council Presidency may help both in ensuring coherence between foreign policy decisions and enabling the Union to speak with one voice, even though I don't feel much sympathy for the *title* of a Union Foreign Minister.

By contrast, I am not sure whether I can follow the argument that both the creation of a separate external service and the European Council President would mean a loss of the Commission's influence on external relations and a stronger intergovernmentalization of European foreign policy. In particular with regard to the CFSP, this seems all the more doubtful as the Commission's role in the second pillar, as opposed to its responsibilities at the EC level, is already a rather reduced according to existing law.<sup>16</sup> One may argue though that the Commission's influence on the CFSP diminishes due to the loss of its right of initiative pursuant to Article III-299(1) CT.<sup>17</sup>

As regards the observation that the overall character of the CFSP remains intergovernmental, we probably all agree. Yet, it seems to me that the possibility for the European Council, as foreseen in Article 300(3) CT, to agree by unanimity to extend the use of the qualified majority voting in the field of the CFSP constitutes a promising step forward. Besides, as long as there is no parliamentary control of the CFSP, one might even argue that the unanimity requirement shields the democratic principle. This brings me to my third thesis, which is: *The democratic deficit in European foreign policy is less dramatic than it is often argued.*

Even though generally speaking, I am much in favor of the idea of the foreign affairs power being a combined power, shared both by the executive and the legislative branches,<sup>18</sup> I would just like to remind you that in most national constitutional systems, foreign policy is still seen as a prerogative of the government. To be sure: This is not to totally neglect the problems relating to the lack of parliamentary scrutiny of the Union's external activities. Thus, I believe that the European Parliament's limited role in the adoption of international treaties, for example, will in the long run have to be reconsidered.<sup>19</sup>

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<sup>16</sup> For further details, see Bruha and Rau, *supra* note 14, at Sec. II ("Kompetenzabgrenzung im Bereich der auswärtigen Gewalt der EU").

<sup>17</sup> See Thym, *Die neue institutionelle Architektur*, *supra* note 13, at 50.

<sup>18</sup> In respect of German constitutional law, see, e.g., Rüdiger Wolfrum, *Kontrolle der auswärtigen Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 39 (1997).

<sup>19</sup> See Meinhard Hilf and Frank Schorkopf, *Das Europäische Parlament in den Außenbeziehungen der Europäischen Union*, 7 EUROPARECHT 185, 200-201 (1999).

To come to an end, the CT is certainly not visionary in character as regards the further constitutionalization of European foreign policy. Yet, and this would be my last thesis: *European foreign policy has never really followed the concept of integration through law.*<sup>20</sup> The CT adds a limited number of new tools to be used by the European institutions to strengthen the EU's role in the international arena. It remains to be seen what the Union organs will make out of it.

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<sup>20</sup> See Hans-Joachim Cremer, *Anmerkungen zur GASP - Eine rechtspolitische Perspektive*, 31 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 587, 589-590 (2004).



## Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade

By Dorota Leczykiewicz\*

### A. Introduction

The European Union (EU) acts in the area of international trade through the community's commercial policy regulated by the European Community (EC) Treaty. The position of the Union in external trade relations is dependant on the unique legal character of this entity. By developing a legal order which is supreme to the law of its Member States, and creating a complex system of institutions and modes of decision-making, the Community has ceased to be a mere representative of the countries it comprises. The increasing transfer of competences from the Member States onto the community allowed it to aim at the realization of common objectives as opposed to merely collective ones. As a result, tensions between the EC and dissatisfied Member States occur and the delineation of competences may turn out to be crucial when interests of an individual Member State are involved. Therefore, the paper which considers the situation of the "new" European Union in the area of international trade, in light of the Treaty Establishing a Constitution for Europe (Constitutional Treaty), should necessarily investigate how the position of the EU will be strengthened *vis-à-vis* its Member States.

In the first part the paper will investigate the scope of the Common Commercial Policy (CCP) - a sphere of the Union's exclusive competence - as envisaged by the Constitutional Treaty. It will be submitted that expanding the scope of CCP has been and still is the most effective method of broadening the EU competences. Next, the focus of the paper will move to the Union's institutions involved in the realization of the commercial policy. An analysis determining to what extent individual Member States with separate interests and agendas may defend and promote their positions through those institutions follows. The role of the Commission, the Council, and the European Parliament in this field will be investigated; as well as further issues concerning the distribution of powers through adoption of a particular procedure and mode of voting within the Council.

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Finally, the question of how the CCP has been included in general mechanisms governing the functioning of the new Union will be dealt with. Consequently, the problem of uniformity of this policy will be raised as a factor, which may also contribute to the position of the Union when looked from the perspective of its trade partners.

## **B. The Scope of the Common Commercial Policy**

Commercial Policy has been identified by the European Court of Justice (ECJ) as one of the spheres in which the Community's competence is exclusive. The Opinion 1/75 in the *Low Cost Standard* case denied Member States the power to enter into international agreements or to legislate matters related to commercial policy, even if the Community has not yet acted.<sup>1</sup> Article I-13 of the Constitutional Treaty seems to codify this case law by explicitly stating that Common Commercial Policy belongs to one of the Union's exclusive competences. An exclusive competence is also defined by the Constitutional Treaty in Article I-12. Article I-12 instructs that if an area is so characterized, the Member States are able to legislate only if empowered by the Union or by implementation of Union acts.

Although it appears as a mere summary of current state of affairs, the substantive scope of the empowerment may be easily changed by incorporating a new issue within the scope of the CCP, which means that this issue is automatically covered by the Union exclusively and Member States will no longer have the possibility to act on this matter. This part of the paper will deal with the delineation of the scope of the Union's commercial policy taking into account explicit changes in the wording of provisions, as compared to those present in the EC Treaty, and existing case law on the boundaries of this policy.

The vast number of ECJ opinions on this matter are the result of procedure established in Article 300 (6) EC Treaty which enables the Court to rule on the compatibility of an envisaged agreement with the Treaty, and on matters of competence, if the institutions or the Member States feel that the case may be disputable. In practice, however, the procedure has often been used for opposite reasons, particularly by the Commission; namely, to disapprove Member States' competence asserting exclusive Community competence through broad interpretation of the CCP. The Commission was able to convince the Court that interpretation of Article 133 EC Treaty, which would restrict the common commercial policy to measures intended to have an effect on the traditional aspects

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<sup>1</sup> Case 1/75, *Low Cost Standard*, 1975 E.C.R. 1355; Case 41/76, *Suzanne Criel, nee Donckerwolcke and Henru Schou v. Procureur de la Republique*, 1976 E.C.R. 1921.

of external trade, was improper on the ground that the CCP would become nugatory over time.<sup>2</sup> The Court also classified further measures as falling within the scope of the CCP by treating them as important elements of the commercial policy as such, and referring to the unity of the common market and to the uniformity of the policy in question.<sup>3</sup> The same effect was achieved by the Court with regard to measures concerning trade in services, by identifying the similarity to cross-frontier supplies of services not involving any movement of persons to trade in goods.<sup>4</sup>

However, if we consider that all policies covered by the World Trade Organization (WTO) are trade policies, it has been made clear in the EC Treaty and in the Court's case law that the Member States retain certain powers, in particular powers regarding services and intellectual property. Those issues covered by the WTO agreement have been recognized to constitute a sphere of shared competence, where so-called mixed agreements must be concluded. Additionally, the fact that those issues were covered by other specific chapters of the Treaty suggests they did not fall within the scope of the CCP, and as a result they were not in the EC's exclusive competence.<sup>5</sup>

The Amsterdam Treaty allowed the Council, acting unanimously on a proposal from the Commission and after consulting the Parliament, to extend the application of provisions on Common Commercial Policy to services and intellectual property. Therefore, it seems that it allowed the institutions of the Community to expend its field of exclusive competence so as to cover new aspects. New paragraph 5 after the Treaty of Nice has a narrower scope than the Amsterdam paragraph as it refers to *trade* in services and to the *commercial aspects* of intellectual property rights. It operates a dichotomy between the negotiation and conclusion of international agreements and the adoption of internal Community rules and it presupposes that

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<sup>2</sup> Case 1/78, *Natural Rubber*, 1979 E.C.R. 2871. Stating that the CCP covered general economic policy measures, like the international agreement on natural rubber.

<sup>3</sup> Case 1/75, *Low Cost Standard*, 1975 E.C.R. 1355, 1362. The Court ruled that the CCP covered systems of aid for exports and credits for financing local costs linked to export operations.

<sup>4</sup> Case 1/94, *WTO*, 1994 E.C.R. I-5267.

<sup>5</sup> Case 1/94, *WTO*, 1994 E.C.R. I-5267, para. 47. Consumption abroad, commercial presence and the presence of natural persons as modes of supply of services covered by GATT Agreement were not recognized to fall under the scope of the CCP. The Court pointed out that regarding the movement of natural persons, it was clear from Article 3 EC Treaty, which distinguished between a common commercial policy and measures concerning the entry and movement of persons, that the treatment of nationals of non-member countries on crossing the external frontiers of Member States could not be regarded as falling within the common commercial policy.



there may be internal competence of the Community in those fields.<sup>6</sup> Unanimity is a prescribed mode of voting where the agreement includes provisions for which unanimity is required for the adoption of internal rules or where the agreement relates to a field in which the Community has not yet adopted internal rules. In other words, it precludes the Community from concluding an agreement on the basis of a Council qualified majority decision, which decision promulgates rules in fields in which there were no Community harmonization measures. The conclusion of such an agreement would achieve harmonization within the Community and thus would enable the institutions to escape the internal constraints in relation to procedures and voting, which normally appear in the case of harmonization.<sup>7</sup>

The changes introduced by the Constitutional Treaty relate to both form and substance. Intellectual property and trade services were moved from a separate paragraph<sup>8</sup> to the first paragraph of Article III-315 of the Constitutional Treaty, which is the equivalent of the EC Treaty Article 133. It should also be noted, that the Constitutional Treaty abolishes the possibility that the Council extend the external competence of the Union to non-commercial aspects of intellectual property rights, which are currently contained in Article 133(7) EC Treaty. If the wording of paragraph 7 in Article 133 was indeed to allow the Community's capacity with regard to changes of Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, it could be argued that the abolition of this provision in the Constitutional Treaty could mean that the EU's competence according to Article III-315 should never embrace those changes.

According to Markus Krajewski, such a reading of this provision of the Constitutional Treaty is too narrow. He refers to the intention of the Convention to broaden and simplify competences relating to external trade matters and argues that the term "commercial aspects of intellectual property rights" in Article III-315 should therefore be read as a reference to all trade-related aspects of intellectual property rights within the world trading system.<sup>9</sup>

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<sup>6</sup> According to Article I-13(2) of the Constitutional Treaty, the exclusive competence would also include the conclusion of an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." This provision is an attempt to codify the case law of the ECJ on implied external powers, in particular in the *ERTA* judgment and Cases 1/76, *Inland Waterways* and 1/94, *WTO*.

<sup>7</sup> Arts. 94, 95 and 308 of Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty].

<sup>8</sup> Art. 133(5) EC Treaty.

<sup>9</sup> Markus Krajewski, *External Trade Law and The Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMMON MARKET LAW REVIEW 91, 111 (2005).

The Constitutional Treaty also contains a provision parallel to Article 133(5) EC Treaty.<sup>10</sup> Accordingly, the Council is required to adopt measures, regarding trade in services and the commercial aspects of intellectual property, unanimously where the agreement in those fields includes provisions requiring unanimity for adopting internal rules. However, Article III-315(4) does not require unanimity where agreements include provisions relating to a field in which the Community has not yet acted. This means that trade in services and commercial aspects of intellectual property have become a genuine part of the Union's exclusive competence whether the EU will decide to exercise its internal competences in that respect or not.

Paragraph 1 of Article III-315, apart from including trade in services and the commercial aspects of intellectual property, adds a completely new field to the scope of the CCP; namely, foreign direct investment. Foreign direct investment by service providers, which is covered by the General Agreement on Tariffs and Trade (GATT) has already been within Community competence since the Treaty of Nice. The scope of the Community's competence has been extended in the Constitutional Treaty so as to include foreign direct investment by all companies, including those manufacturing goods. Such an extension of the scope of the common commercial policy was already discussed in the context of revisions of the Amsterdam and Nice treaties, but was not agreed upon. The extension of the competence to foreign direct investment would be seen in the context of the WTO and other international organizations (such as the Organization for Economic Cooperation and Development or OECD) in attempts to negotiate multilateral rules on investment.<sup>11</sup> Traditionally, however, there has been a clear distinction between international trade agreements and international investment agreements, the latter concern protection on investment in a particular country.

In practical terms, trade agreements are often regional or multilateral agreements, whereas investment agreements are often bilateral agreements.<sup>12</sup> Incorporating investment in the scope of the CCP, and thus assuming an exclusive competence for the Union, would mean that Member States would lose the competence to negotiate, conclude, and implement these agreements. Additionally, the Union would be responsible for the negotiation of new, or the re-negotiation of old, investment agreements. It seems, however, that one should interpret the term

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<sup>10</sup> Art. III-315(4) of the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) [hereinafter CT].

<sup>11</sup> Krajewski, *supra* note 9.

<sup>12</sup> MITSUO MATSUSHITA, *ET AL.*, THE WORLD TRADE ORGANIZATION - LAW, PRACTICE AND POLICY 522 (2004).

“foreign direct investment” used in Article III-315 in the light of Article III-314 of the Constitutional Treaty; Article III-314 states that the Union aims to contribute to the progressive abolition of *restrictions* on international trade and on foreign direct investment. This would suggest that foreign direct investment is only part of the common commercial policy as far as restrictions on foreign direct investment are concerned, but not where investment protection against expropriation is concerned. Investment protection against expropriation is traditionally an element of investment agreements.

What stems from the points raised above is that Article III-315 of the Constitutional Treaty clearly broadens the scope of the Union’s exclusive competence by expanding the scope of issues covered by the CCP through upfront reference in paragraph 1 of the provision. It now applies to trade in goods *and services* and *commercial aspects of intellectual property* as well as to *direct foreign investment*. As a result, comments may be heard that “[t]here can be no doubt that all current WTO matters would come within the scope of the common commercial policy if the Constitutional Treaty entered into force.”<sup>13</sup>

### C. Limitations on the Common Commercial Policy

Currently, the Community’s competence to conclude agreements is to the greatest extent limited by Article 133(6), which states that an agreement may not be concluded if it includes provisions which would go beyond the Community’s internal powers; particularly by leading to harmonization of the laws or regulations of the members states in an area for which this Treaty rules out such harmonization. This is another safeguard against circumvention of provisions regulating or restricting harmonization of the laws of the Member States. Article III-315(6), which is the equivalent of Article 133(6) (of the EC Treaty) also limits the competences of the Union in external trade policy according to the internal distribution of powers between the Union and Member States. Consequently, the “new” Union would not have the exclusive competence to negotiate, conclude, or implement an international agreement covering aspects which the Union does not have the power to legislate internally.

Apart from invoking explicit limitations prescribed by the Treaties relating to harmonization of national legal systems of the Member States, attempts were made to narrow the scope of the CCP by including aspects of external trade policy within general foreign policy, which is still the second EU “intergovernmental” pillar.

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<sup>13</sup> PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 55 (2004).

Thus, to the extent that the Member States continue to have powers in the area of Common Foreign and Security Policy (CFSP), the principle of exclusivity of the EC competence does not come into play.

The juxtaposition of commercial and foreign policy may be clearly seen when we consider that the preferred instruments of international relations, used in exercising political and economic pressure on countries and regimes, which can be decreed by the UN Security Council, are trade restrictions and embargoes. It is difficult to see them as non-trade measures, given their marked effects on trade, but there are doubts as to whether they should be really treated as such. If we regard trade restrictions used for political purposes as regular trade measures, the authority to adopt trade sanctions would then appear to come within the EC's exclusive powers. Therefore, the Member States are likely to argue that what relates to foreign and security policy should be excluded from the scope of the CCP, and that national governments are still left with substantial freedom in adopting measures in that respect.

This argument was used by the German government in defending the legality under Community law of legislation, which applied to the control of export of so-called dual-use goods.<sup>14</sup> The German legislation enabled the authorities to curtail contracts and activities in the sphere of foreign trade in order "to guarantee Germany's security, prevent a disturbance of peaceful coexistence", or "prevent the external relations of Germany from being seriously disrupted". In order to decide on the distribution of competences, as between the Community and the Member States, to adopt such measures, the Court stated that the question was whether the common commercial policy solely concerned measures which pursued commercial objectives. However, the ECJ came to the conclusion that measures, whose effect was to prevent or restrict the export of certain products, could not be treated as falling outside the scope of the common commercial policy simply because they had foreign policy and security objectives<sup>15</sup> on the grounds that Member States should not be able to restrict the scope of the CCP by freely deciding, in the light of its own foreign policy or security requirements, whether a measure was covered by

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<sup>14</sup> Case C-70/94, *Werner v. Germany*, 1995 E.C.R. I-3189; Case C-83/94, *Leifer and Others*, 1995 E.C.R. I-3231.

<sup>15</sup> *See*, Case C-62/88, *Greece v. Council*, 1990 E.C.R. I-1527 (Chernobyl I Case) and Case C-281/01, *Commission v. Council*, 2002 E.C.R. I-12049 where the Court adopted the approach that trade measures are trade measures whatever the objective pursued, when a Member State tried to limit the Community's exclusive competence by arguing that the measure fell within environmental protection rather, which is an area of shared competence (Article 174 EC Treaty and also I-14 of the Constitution). The situation is even clearer when an instrument had direct and immediate impact on trade and only possible positive environmental effect.

current Article 133. Nevertheless, the Court accepted that the German legislation conformed to EC legislation on export, which enables Member States to adopt restrictions on public security grounds.

In *Centro-Com*,<sup>16</sup> the Court accepted that the Member States had indeed retained their competence in the field of foreign and security policy, but the powers retained by the Member States had to be exercised in a manner consistent with Community law. It was within the province of the Member States to adopt measures of foreign and security policy in the exercise of their national competence. Those measures nevertheless had to respect the provisions adopted by the Community in the field of the common commercial policy provided by the current Article 133, which may result from political measures adopted within the second pillar.<sup>17</sup>

When the Constitutional Treaty is in force, Common Foreign and Security Policy will be further incorporated within what the workings of the new Union. According to Article I-16, the Union will have competence in all areas and questions relating to the Union's security and the Council will adopt European decisions which define actions and positions to be taken by the Union in order to implement the guidelines of the European Council. Tensions between the CCP and CFSP may arise not on the question of who has the competence, but also on the mode of voting. The CCP, in most cases, requires only qualified majority; while the CFSP requires unanimity.<sup>18</sup> Bringing the issue within the scope of the latter policy would insure more effective protection of individual interests of the Member States.

Moreover, also after the Constitutional Treaty is effective, Member States will be able to use derogations from measures of commercial policy taken by the Union as allowed in the German case cited above. If one treats the CCP as an external equivalent to internal provisions regulating trade between Member States, it may be argued that exceptions mentioned in Article 134 of the EC Treaty and in EC regulations reflect Article 30 EC Treaty derogations from the prohibition on restrictions on import and export within the common market.<sup>19</sup> In the area covered by the exclusive competence of the Community and in future of the Union, they will give the Member States at least some possibility to take necessary protective measures and to conduct an "individualized" trade policy.

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<sup>16</sup> Case C-124/92, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England*, 1997 E.C.R. I-81.

<sup>17</sup> Art. 301 EC Treaty.

<sup>18</sup> Art. III-300(1) CT.

<sup>19</sup> Art. 134 EC Treaty, removed from the draft Constitution, situations such as those arising in it would now be dealt with under the Import Regulation.

#### D. Institutions of the EU and the Common Commercial Policy

According to the Article III-315 of the Constitutional Treaty, three institutions will be involved in the CCP: the Commission, the Council and the European Parliament. The most significant change relates to the evolution of the involvement of the Parliament in that field. As far as internal rules are concerned, the Constitutional Treaty in paragraph 2 of Article III-315, states that measures defining the framework for implementing the CCP should take the form of European laws. Thus, Article III-315(2) refers us to the chapter of the Constitutional Treaty where legal acts of the Union are set out. European law is the equivalent of the current Regulation, which means that the Union will continue to adopt internal measures which are generally and directly applicable. Article I-34 specifies the procedure by which European law should be adopted. This will take place under ordinary legislative procedure, which is a new name for the so-called co-decision procedure. As a result, the most "communitarian" procedure thus far has been extended to the CCP and, at least where implementing measures are in question, the Council will need the Parliament's approval.

Paragraph 3 of Article III-315 deals with external action of the Union. Under Art. III, the Commission is only required to report regularly to the EP on the progress of negotiations – an obligation which has not been assigned to the Commission in the current EC Treaty. In practice, even today the Parliament is involved by being informed and consulted. Its consent may be required when the agreement is not limited to trade or because the agreement comes within one of the categories requiring Parliamentary assent (Article 300(3) EC Treaty and Article III-325(6) of the Constitution). Such a situation occurred in the conclusion of the WTO agreement, where the EP's approval was necessary because the agreement established a specific institutional framework. Nevertheless, unless such a situation occurs, Parliament will still lack "hard" instruments to influence the negotiations. It seems that the drafters of the Constitutional Treaty regarded this as sufficient to make the Commission accountable for their actions in the CCP under the general system of checks and balances in the Union's institutional framework.

The Commission retains its capacity as the institution recommending commencement of negotiations to the Council and effectively conducting those negotiations under the surveillance of a special committee appointed by the Council and within the framework of directives issued by the Council (Article 133(3) EC Treaty and Article III-315 of the Constitution). It is clear, however, that the Council and the Commission may have different interests. This is well exemplified by the *Natural Rubber* case, which involved an international agreement drafted in the framework of 1976 UNCTAD "Integrated Programme for Commodities," designed to improve conditions for trade in certain commodities

which were of particular interest for the developing countries. The Commission proposed to the Council that it be given a mandate to conduct negotiations, it considered that the draft agreement came within the scope of current Article 133 EC. The Council had rejected the view and had decided that the negotiations were to be conducted by a Community delegation and by delegations from Member States, which were to act on the basis of a common standpoint. The Commission went to the Court of Justice and requested an Opinion on the scope of the Community's competence.<sup>20</sup>

Additionally, in the *Energy Star Agreement* case,<sup>21</sup> the Commission challenged the Council's conclusion of the agreement on the basis of Article 175(1) (environmental protection), which is an area of EC shared competence, in conjunction with Article 300. Of course, the Commission was not interested in concluding a mixed agreement because it would still need to take into account the position of individual Member States and it argued that the agreement in question should have been concluded on the basis on Article 133 – exclusively by the Community. The Court agreed with the position of the Commission. It is thus clear that the Commission, in order to be able to act independently from Member States, will argue the necessity, as the case-law shows with much support from the ECJ, of founding the negotiation and conclusion of agreements entirely on the basis of provisions relating to the CCP.

#### **E. Qualified Majority or Unanimity?**

In a situation where the scope of the CCP is interpreted broadly by the ECJ, the Council may appear as the last bastion of Member States, through which they can defend their individual interests. In order to analyze to what extent this will be possible and how difficult it will be for the Commission to push decisions in the wording drafted by this institution, it is crucial to consider the systems of voting in the field of common commercial policy.<sup>22</sup>

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<sup>20</sup> Case 1/78, *Natural Rubber*, 1979 E.C.R. 2871.

<sup>21</sup> Case C-281/01, *Commission v. Council*, 2002 E.C.R. I-12049.

<sup>22</sup> The system of voting may primarily depend on the legal basis. It is obvious that the Commission will look for the legal basis allowing qualified majority as opposed to unanimity. In the case on the correct legal basis for the adoption of generalized tariff preferences (GSP) (Case 45/86, *Commission v. Council*, 1987 E.C.R. 1493) the Commission advanced an argument that Article 133 requiring qualified majority should be used and the Council was of the opinion that GSP regulations were in fact based on Article 133 EC Treaty and Article 308 EC Treaty, the latter requiring unanimity. The Court noted that the contested regulations not only had commercial-policy aims, but also major-development policy aims. In the context of the organization of the powers of the Community, the choice of legal basis for a measure could not depend simply on an institution's conviction as to the objective pursued, but had to be based on objective factors which were amenable to judicial review (paras. 10-11). Moreover, it concluded that

Similar to Article 133 of the EC Treaty, the Constitutional Treaty envisages that the Council, in exercising its powers in the CCP, will act by qualified majority.<sup>23</sup> As has been mentioned earlier, Article III-315(4) treats agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, differently. It requires unanimity where such agreements include provisions for which unanimity is required for the adoption on internal rules. This exception is comparably narrower than the derogation envisaged by paragraph 5 of Article 133 EC Treaty. Article III-315(4) of the Constitutional Treaty institutes another exception concerning trade in cultural and audiovisual services, educational services, and social and human health services. In Article 133(6) subparagraph 2 of the EC Treaty such agreements had a mixed character. The sectoral carve-out is thus retained by the requirement of unanimity of the Council's decision.

However, qualified majority remains the default option and when a Member State would like to call for a unanimous vote; it would have to show that unanimity is required for the adoption of internal rules relating to issues in the agreement in the fields of trade in services and the commercial aspects of intellectual property as well foreign direct investment. A Member State may specifically invoke either subparagraph 3(a) or 3(b) of Article III- 315(4) and must explain why and how the agreement in question would pose a risk to the Union's cultural and linguistic diversity or to the provision of health, social, education services. This means that if this is not shown or if the other Council members do not share this view, the decision will be taken by qualified majority voting and only a judgment by the ECJ would provide ultimate clarity.

#### **F. Homogeneity and Uniformity of the Common Commercial Policy**

The constitutional uniformity of the "new" Union depends on whether all policies will be governed by the same mechanism of functioning. The incorporation of the CCP into the general system of the EU, at the highest level, will be determined by setting uniform objectives to be pursued by the Union's institutions. Article III-315(1) states that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action, which broadly include the principles which have inspired the creation of the Union, its development and enlargement, and other universal values. This means that, at least

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Article 133 EC Treaty is the proper legal basis and, therefore, there is no need to justify the Community's competence on the basis of Article 308 EC Treaty if it is only used where no other Treaty provision conferred the competence (paras. 14-21).

<sup>23</sup> Art. III-315(4) CT.



in theory, it should not only cover trade liberalization and development of economic activities. We will be able to observe whether and how the nature of the CCP will be changed by the fact that the Union's action in this field will need to include such values as democracy, human rights, equality and solidarity. One may assume that Commercial Policy and Development should approximate even further.

Maximum uniformity would also be achieved if all policies were governed by the ordinary legislative procedure. This clearly occurred with regard to internal measures adopted within CCP. As far as the conclusion of international agreements is concerned, the decision of the Council must indeed to be made by qualified majority voting like in the case of ordinary legislative procedure, but the role of the Parliament is rather secondary. The conclusion of international agreement in the area of the CCP could be unified further if the European Parliament participated on the basis of a similar mechanism to the one envisaged for the ordinary legislative procedure.

Consequently, we could ask whether the procedure of taking action to conclude international agreements in commercial policy is at least homogenized with constitutional provisions relating to conclusion of international agreements by the Union in other areas. According to Article III-325(6), the Parliament in such cases is to be consulted unless its approval is required by subparagraph 2(a). It is, however, necessary to remember that the exceptions which require the EP's approval to conclude an international agreement would apply also within the scope of the CCP. Thus, the Constitutional Treaty adopts an intermediate method for the commercial policy, as in the sphere of foreign and security policy, which also belongs to the Union's external action, the involvement of the Parliament is almost entirely excluded.

Homogeneity of the Union's commercial policy as such may be also achieved by various means. The primary method would involve further transfer of competences to the EU. As a result, there will be more uniform internal rules regulating trade between Member States and third states, and the Union will be the sole actor as far as negotiating and concluding agreements are concerned. It has been discussed that the Constitutional Treaty has advanced in this direction. By expanding the scope of the CCP, the Union will probably be able to negotiate and conclude agreements across the entire sphere covered by the WTO agreement. There will be no longer the need for the Member States' participation. Similarly, the trade in cultural and audiovisual services and in social, education and health services will become a field of exclusive competence of the Union. The sectoral carve-out for intellectual property, trade in services, foreign direct investment, as well as for cultural, educational and health services, has nevertheless been preserved by the

requirement of unanimity in the Council. In that respect, homogeneity of measures adopted in order to conclude an international agreement may be endangered by the necessity to balance competing interests of the Member States and to achieve difficult compromises.

### **G. Conclusion**

This paper has considered a number of factors influencing the role of the European Union in the field of international trade. It was first argued that the position of the new Union *vis-à-vis* its Member States will become stronger as a result of expanding the material scope of the Common Commercial Policy – the area in which the Community had, and the Union will have, the exclusive competence. Interrelations between the CCP and other policies were also shown in the context of limiting and delineating the sphere covered by the principle of the exclusivity of the Union's competences. The paper also discussed the enhanced role of the European Parliament in the CCP and how it can contribute or obstruct the coherency of the EU external trade policy. It was also noted that the Council retains the greatest powers in concluding international agreements, which should adequately protect the position of the Member States. The balance between the decisions approved by unanimity and those approved by qualified majority has also been investigated in order to identify the capacity of an individual Member State to effectively protect its interests and to influence the commercial policy of the Union. In the context of homogeneity and uniformity of the Union's commercial policy, transformation of the shared competence to conclude agreements relating to trade in cultural, educational and health services into the exclusive competence has been discussed. Consequently, the paper argued that the position of the European Union in the Constitutional Treaty has been strengthened by a broader definition of the Union's commercial policy, an extension of application of the qualified majority voting procedure in the Council, involvement of the European Parliament, and by transforming some of the fields of shared competences into those within the Union's exclusive competences, though requiring the Council's unanimous vote. What may stem from these observations is that Article III-315 of the Constitutional Treaty is capable of influencing the balance between the Union and its Member States by shifting "the burden of proof" to justify the Union's competences to take certain actions by qualified majority from the EU and the Commission onto the Member States and the Council to give evidence that the matter falls outside the scope of the EU exclusiveness or that unanimity in a given case is required. From the perspective of the EU, the Constitutional Treaty certainly smoothes out some of the irregularities of the CCP. However, in a situation where subtle changes may affect a balance achieved with difficulty, uniformity of commercial policy and simplification of its rules and mechanisms should not themselves be the aim.



## ***Comment on Dorota Leczykiewicz - Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade***

*By Karen Kaiser \**

### **A. Introduction**

I would like to elaborate on some of the elements of unity and differentiation with regard to the Union's common commercial policy under the Constitutional Treaty. I do not want to touch upon the elements of differentiation that are already part of the common commercial policy under the EC Treaty (EC) and would remain so under the Constitutional Treaty, such as the special so-called 133-committee<sup>1</sup> and the principle of unanimous voting in cases where agreements include provisions for which unanimity is required for the adoption of internal rules.<sup>2</sup> However, I try to find out whether the Constitutional Treaty introduces new elements of differentiation.

### **B. Elements of Unity**

I would like to distinguish between elements of internal and external unity. As understood here, internal unity reflects the unity of the Union as a political community *vis-à-vis* its Member States, illustrated most prominently by the "Community method,"<sup>3</sup> while external unity reflects the unity of the Union *vis-à-vis* third countries.

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<sup>1</sup> Compare, Treaty Establishing the European Community, art. 133 (3) (2), Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC] and Treaty Establishing a Constitution for Europe, art. III-315 (3) (3), Dec. 16, 2004, 2004 O.J. (C310) [hereinafter Constitutional Treaty].

<sup>2</sup> Compare, EC, art. 133 (5) (2), and (3) and Constitutional Treaty, art. III-315 (4) and (2).

<sup>3</sup> See Bast, in this volume.

*I. Internal Unity: Parliamentary Consent to International Agreements*

Dorota Leczykiewicz has pointed out one element of internal unity: the regular involvement of the European Parliament within the context of the common commercial policy, foreseen for the first time under the Constitutional Treaty. Hereunder, the common commercial policy would be implemented by means of European laws, which are adopted according to the ordinary legislative, i.e. co-decision, procedure.

However, unlike to Dorota Leczykiewicz, I think that the common commercial policy has not arrived at the "Community method" in only this respect. Parliamentary consent would not only be required where European laws are adopted, but also where international agreements are concluded. According to Art. III-325 (6) (a) of the Constitutional Treaty, "agreements covering fields to which [...] the ordinary legislative procedure applies" would require parliamentary consent. As has been shown, the common commercial policy is a field to which the ordinary legislative procedure applies. An exception applicable to agreements under Art. III-315 (3) of the Constitutional Treaty has not been provided for.<sup>4</sup>

This would not only strengthen democratic control within the Union, but also within the World Trade Organization (WTO). Two different suggestions for strengthening democratic control within the WTO have been discussed so far: establishing a standing Parliamentary Assembly with consultative power and, alternatively, convening regular inter-parliamentary meetings through existing structures such as the International Parliamentary Union. However, it is doubtful that even the second, less improbable suggestion can be realized in the near future.

Members of the US Congress have only reluctantly taken part in past inter-parliamentary meetings and, in view of the authority of the US Congress over US trade policy,<sup>5</sup> it is unlikely that their participation will ever increase. The reason is that the members of the US Congress do not need inter-parliamentary meetings to exercise democratic control. Inter-parliamentary meetings could even diminish US power, whereas the meetings would enhance the power of the members of national parliaments who have no say regarding the trade policy of their countries.<sup>6</sup> It can be argued that, just like the US Congress, the European Parliament would no longer

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<sup>4</sup> Compare, EC, art. 300 (3).

<sup>5</sup> U.S. Const. art. I, § 8.

<sup>6</sup> Gregory Shaffer, *Parliamentary Oversight of WTO Rulemaking*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 629, 630 (2004).

need inter-parliamentary meetings to exercise democratic control should the Constitutional Treaty enter into force and put the European Parliament within the Union on a similar powerful footing as the US Congress within the US.

*II. External Unity: Exclusivity of the Extended Common Commercial Policy*

Dorota Leczykiewicz has also alluded to an element of external unity: the exclusivity of the common commercial policy that would be extended to trade in services and the commercial aspects of intellectual property as well as to foreign direct investment. Current Art. 133 (5) 4 EC is interpreted as giving the Community only a concurrent competence in the fields of trade in services and the commercial aspects of intellectual property.<sup>7</sup>

Although exclusivity is not the standard type of competence of the "Community method," and therefore rather an element of differentiation, the exclusivity of the extended common commercial policy can be seen as an element of external unity in so far as the number of mixed agreements – at least in the field of international economic law – would decrease. Mixed agreements are an inevitable corollary of the limited and normally non-exclusive scope of the Community's competence. When the content of a particular agreement goes beyond the Community's competence, the Community's action will have to be complemented by that of the member states.

Although persistent criticism has been voiced against the practice of concluding mixed agreements "as a way of whittling down systematically the personality and capacity of the Community as a representative of the collective interest,"<sup>8</sup> the European Court of Justice (ECJ) has come to recognize the position of mixed agreements on several occasions, most prominently with regard to the General Agreement on Trade in Services (GATS)<sup>9</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>10</sup> both of 15 April 1994.

GATS and TRIPS, however, would no longer be considered to be mixed agreements, should the Constitutional Treaty enter into force. Both agreements

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<sup>7</sup> PIET EECKHOUT, *EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS* 51 (2004); Christoph Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 *COMMON MARKET LAW REVIEW* 7, 19 (2002).

<sup>8</sup> Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 *COMMON MARKET LAW REVIEW* 387, 388 (1999).

<sup>9</sup> 1994 O.J. (L 336) 190.

<sup>10</sup> 1994 O.J. (L 336) 213.

would no longer fall partly within the competence of the European Community or within the competence of the Member States, but fully within the competence of the Union for the extended common commercial policy. This would put an end to discussion of the delimitation of competences in the abstract, undermining external unity, and would assure the unitary representation of interests within the WTO for the first time.

Admittedly, according to the ECJ's case law, Community institutions and Member States have the duty to cooperate within the context of mixed agreements at present.<sup>11</sup> The duty of cooperation is said to flow from the requirement of unity in the international representation of the Community and applies to the processes of negotiation, conclusion and fulfillment of the commitments entered into in mixed agreements. The duty of cooperation is both a mutual concept because the European Community and the Member States must co-operate with each other, and a flexible concept because the European Community and the Member States are allowed to reach a practical solution tailored to the facts of the particular case. So far, so good.

In cases of emergency, however, the duty of cooperation does not assure the unitary representation of interests. Having its legal basis in Article 10 EC, the duty is only an obligation of conduct, i.e. an obligation to endeavor to or to strive to reach a certain result, but not an obligation of result, i.e. an obligation to attain a precise result.<sup>12</sup> In other words, Community institutions and Member States must cooperate, but this cooperation does not necessarily have to lead to the unitary representation of interests.

### **C. Element of Differentiation: Inconsistency between Internal and External Competences?**

I will now reach a possible new element of differentiation with regard to the common commercial policy, the inconsistency between internal and external competences. Dorota Leczykiewicz has also mentioned that, under the Constitutional Treaty, the Union would have a set of unitary principles, values, and objectives guiding its external policy-making. Art. III-292 (3) of the Constitutional Treaty introduces the principle of consistency: consistency between the different areas of external action on the one hand and, more importantly, consistency between the Union's external and internal action on the other hand.

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<sup>11</sup> See, e.g., Case 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (re WTO), 1994 E.C.R. I-5267, para. 108.

<sup>12</sup> KAREN KAISER, GEISTIGES EIGENTUM UND GEMEINSCHAFTSRECHT 168 (2004).

A possible element of differentiation relating to this principle could be seen in Art. III-315 (6) of the Constitutional Treaty, which would limit the exercise of the competences of the common commercial policy. It reads:

The exercise of the competences conferred by this Article in the field of common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonization.

Dorota Leczykiewicz has interpreted this ambiguous paragraph in line with the principle of consistency between the Union's external and internal action. According to her interpretation, the Union would not have the competence to conclude international agreements in the field of the common commercial policy which cover aspects on which the Union does not have the power to legislate internally. However, Art. III-315 (6) could also be interpreted differently; namely, in such a way that it would only limit the Union's competence to implement international agreements in the field of common commercial policy, but not its competence to conclude them.<sup>13</sup> Otherwise, one could argue, the exclusivity of the extended common commercial policy would not become effective. Since the external competence would extend beyond the scope of the internal competence, this interpretation would, however, deviate from the principle of consistency between the Union's external and internal action.

Until now, one of the major arguments put forth against extending external competences beyond the scope of internal competences is the effect such extensions would have on the division of powers between the Community and the Member States. The legislative discretion left to the Member States, when implementing Union agreements, would be considerably small. One has to ask oneself whether the aim of allowing the Union to act effectively is to be given precedence over the conflicting aim of preserving Member States' powers.

The Union has been compared with federal systems where the inconsistency between external and internal powers is nothing unusual.<sup>14</sup> However, the national

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<sup>13</sup> See, e.g., Jacques H. J. Bourgeois, *Mixed Agreements: A New Approach?*, in LA COMMUNAUTE EUROPEENNE ET LES ACCORDS MIXTES 83, 89 (Jacques H. J. Bourgeois, et al. eds., 1997) and, more recently, Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy*, 42 COMMON MARKET LAW REVIEW 91, 116 (2005).

<sup>14</sup> Bourgeois, *supra* note 13, at 91 (Belgium). Krajewski, *supra* note 13, at 117 (Germany and Switzerland).



legal orders of the Member States are not as homogeneous as the legal orders of the sub-entities of federal systems. In the field of intellectual property law for example, Ireland and the United Kingdom follow an economically-oriented copyright approach, while the continental Member States follow an approach based on the author's human rights. If the external competence of the Union would extend beyond the scope of the internal competence, who would take care that the Union agreements can actually be implemented into the national legal orders of the Member States?

Eventually, the interpretation that is in line with the principle of consistency between the Union's external and internal action would not render the exclusivity of the extended common commercial policy as ineffective as it seems at first glance. The exclusivity of the extended common commercial policy would no longer depend on the nature of the Union's internal competences. Most of the Union's internal competences, in particular the competence for the internal market, are concurrent. Exclusivity, as such, would be an improvement.

## *Comment on Atina Krajewska - Plural Concepts of Human Dignity and the Constitutional Treaty*

By Felix Arndt\*

### A. Biotechnology as a Challenge to the Cohesion of European Constitutionalism

The interest in biotechnology is a global phenomenon. Consequently, its underlying issues transcend national borders and ultimately call for regulation in an international framework.<sup>1</sup> The ethical and legal questions of biomedicine touch upon fundamental issues of human life and our self-conception. The risks as well as the possibilities depicted in the debate are far-reaching. Moreover, the field is dynamic and new scientific developments can have significant implications for the political and legal situation.

In light of these circumstances, it is hardly surprising that little consensus has evolved on the limits of biomedical research, neither in the United Nations nor in the European Union (EU). And even in many Member States of the EU the discussion remains lively.<sup>2</sup>

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<sup>1</sup> Spiros Simitis, *A Convention on Cloning – Annotations to an almost Unsolvable Dilemma*, in HUMAN DIGNITY AND HUMAN CLONING 167, 169 (Vöneky & Wolfrum eds., 2004).

<sup>2</sup> For comparative studies see Deryck Beyleveld *et al.*, *The Regulation of Embryo Research in Europe*, in HUMAN EMBRYO RESEARCH IN PLURALISTIC EUROPE 111-155 (Solter *et al.* eds., 2003); Kristiane Weber-Hassemer, *Die ethisch-rechtliche Diskussion. Ein internationaler Vergleich*, in KLONEN IN BIOMEDIZINISCHER FORSCHUNG UND REPRODUKTION 361-366 (Honnefelder *et al.* eds., 2003); Hans-Georg Koch, *Embryonenschutz ohne Grenzen?*, in FESTSCHRIFT ESER 1091, 1106 (2004). For the German debate see National Ethics Council, *Opinions on the Import of Human Embryonic Stem Cells* (2001), on *Genetic Diagnosis before and during Pregnancy* (2003), and on *Cloning* (2004), available at <http://www.nationalerethikrat.de>. See also Christian Starck, Jörn Ipsen, Horst Dreier, and Wolfgang Graf Vitzthum, in HUMAN DIGNITY AND HUMAN CLONING, *supra* note 1, at 63, 69, 77 and 87. For a monographic discussion see JENS KERSTEN, *DAS KLONEN VON MENSCHEN* (2004). In Switzerland, a law permitting a limited creation of embryonic stem cells was adopted in a referendum on 28 November 2004.

In such a situation, comparative law can serve the important function to clarify existing national positions and discussions and to foster common solutions. Two aspects are particularly important for comparing developments in a meaningful way. First, a comparative analysis of the legal framework for biomedicine in Europe should not be restricted to the level of ordinary legislation or the question whether a certain technology is legal or not but needs to include the constitutional framework and the cultural setting.<sup>3</sup> Only then it is possible to get a profound impression of an ongoing debate and not only a snapshot of a rather contingent situation at a certain moment. Secondly, it has to be underlined that – despite overarching issues – biomedicine encompasses various techniques and applications. Different forms of cloning, the creation of embryonic stem cells, the subsequent research, as well as preimplantation genetic diagnosis touch on these fundamental issues in a specific way and thus raise distinct questions.<sup>4</sup>

Tackling such a task would exceed the limits of a comment. Rather than analysing the fragmented situation from a comparative perspective, I will thus focus on the question how the European Union and its Constitutional Treaty deal with the divergent approaches its Member States have towards biotechnology. It has been argued that the incorporation of the Charter of Fundamental Rights entails a centralising tendency.<sup>5</sup> Prominent examples of the centralising effects of human rights include the US-American<sup>6</sup> and the German<sup>7</sup> experience. There are notable differences, however, between those examples and the situation in the European Union. In particular, the Constitutional Treaty does not contain a gateway for extending the scope of its fundamental rights that is comparable to the 14<sup>th</sup> Amendment of the US-Constitution. Quite on the contrary, Articles II-111 and II-112 CT hardly provide an argument for directly expanding the scope of European

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<sup>3</sup> Erhard Denninger, *Embryo und Grundgesetz*, 86 KRITISCHE VIERTELJAHRESSCHRIFT 191, 191 (2003); Rainer Wahl, *Verfassungsvergleichung als Kulturvergleichung*, in VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 96-118 (*idem* ed., 2003). On the function of comparative analysis in European Constitutional Law, see Philipp Dann, *Thoughts on a Methodology of European Constitutional Law*, in this volume.

<sup>4</sup> It is, for example, controversial, if the entities produced with cell-transfer cloning should be governed by the same rules as those produced by embryo-splitting. See Koch, *supra* note 2, at 1114; Jens Reich, *Empirische Totipotenz und metaphysische Gattungszugehörigkeit bei der Beurteilung des vorgeburtlichen menschlichen Lebens*, 50 ZEITSCHRIFT FÜR MEDIZINISCHE ETHIK 115, 129 (2004).

<sup>5</sup> Atina Krajewska, *Fundamental Rights Concerning Biomedicine in the Constitutional Treaty and Their Effect on the Diverse Legal Systems of Member States*, in this volume.

<sup>6</sup> Francis G. Jabobs & Kenneth L. Karst, *The "Federal" Legal Order: The USA and Europe Compared*, 1 INTEGRATION THROUGH LAW 169, 205 (Cappelletti, Seccombe & Weiler eds., 1986).

<sup>7</sup> KONRAD HESSE, *Der unitarische Bundesstaat*, in AUSGEWÄHLTE SCHRIFTEN 116, 130 (1984).

fundamental rights.<sup>8</sup> Indirect or decentralized mechanisms of harmonisation<sup>9</sup>, however, remain possible.

Different concepts of human dignity are not only a challenge to finding unity in diversity, but also bring about the question whether the Constitutional Treaty itself is able to employ a unitary concept of human dignity or has to embrace differentiated concepts in different settings.<sup>10</sup> Arguably, at least with respect to human rights, different standards ought to be applied depending on the context.<sup>11</sup> On the other hand, differentiations between different standards of human dignity may conflict with its universal aspiration and its normative inviolability.

To shed some light on this question, this comment analyses three constellations in which the concept of human dignity is of significance in the context of European constitutional law. The first is the admissibility of domestic laws being obstacles to free movement in the name of safeguarding human dignity, the second concerns the suspension procedure according to Article 59 CT and the third constellation is the review of European legislation in light of Article 61 CT.

## **B. Human Dignity and Biotechnology – Three Constellations**

### *I. Protection of Human Dignity as a Justification for Restrictions on Free Movement*

Domestic laws regulating biotechnology will frequently result in obstacles to the free movement of goods or services in the European Union. Examples include the German import ban on embryonic stem cells lines obtained after 1 January 2002<sup>12</sup> or

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<sup>8</sup> Jürgen Kühling, *Grundrechte*, in *EUROPÄISCHES VERFASSUNGSRECHT* 581, 610 (von Bogdandy ed., 2003), (an English version in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (v. Bogdandy & Bast eds., forthcoming)).

<sup>9</sup> See e.g., the introduction of the freedom of information with reference to the Charter of Fundamental Rights by the Tribunal Constitucional, 30 November 2000 (No. STC-292, para. II-8), for an English translation see *THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES VOLUME 2* (Oppenheimer ed., 2003).

<sup>10</sup> On these two dimensions of unity, see Jürgen Bast, *The Constitutional Treaty as a Reflexive Constitution*, in this volume.

<sup>11</sup> Armin von Bogdandy, *The European Union as a Human Rights Organization? – Human Rights and the Core of the European Union*, 37 *COMMON MARKET LAW REVIEW* 1307, 1318 (2000).

<sup>12</sup> Stammzellgesetz, 28 June 2002, *Bundesgesetzblatt I* 2277 (for a translation see the annex V 19 of *HUMAN DIGNITY AND HUMAN CLONING*, *supra* note 1).

the conceivable penalisation of parents or their doctors seeking preimplantation diagnosis in a more liberal Member State<sup>13</sup>.

Such restrictions can arguably be justified by invoking the respect for human dignity as part of the *ordre public* justification. In the context of an exemption, the appropriate level of protection is generally determined by the individual Member State. In a recent judgment the European Court of Justice (ECJ) has clarified that the fact that a certain activity is permissible in some Member States does not preclude a Member State from relying on the respect for human dignity as a justification for a domestic ban of this activity.<sup>14</sup> The European legal order thus accepts plural concepts of human dignity. Notably, the ECJ does not have to decide itself on the scope of the respect for human dignity as a matter of European constitutional law in this context but only if the national interpretation is plausible and can thus justify an obstacle to the common market.<sup>15</sup>

## *II. Respect for Human Dignity as an Overarching Principle of the Union and its Member States*

The European standard for the protection of human dignity is relevant for the interpretation of Article I-59 CT. It provides a procedure to enforce the fundamental values of Article I-2 CT, which include the respect for human dignity. Significantly, Article I-2 CT clarifies Article 6 EU which only referred to the respect of human rights and not specifically to human dignity. In case of a “serious and persistent breach” (Art. I-59(2) CT) of these fundamental values by a Member State, its voting rights may ultimately be suspended. This mechanism serves the mutual stabilisation and the structural compatibility of the Member States and the European Union, but not a sweeping enforcement of fundamental rights by the European Union.<sup>16</sup>

In contrast to other human rights issues, however, the two requirements limiting the application of Article I-59 CT will hardly provide a way to avoid a decision on

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<sup>13</sup> On the penalisation of accessories see ALBIN ESER & HANS-GEORG KOCH, FORSCHUNG MIT EMBRYONALEN STAMMZELLEN IM IN- UND AUSLAND 87 (2003).

<sup>14</sup> Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609, paras. 37-38.

<sup>15</sup> For a different view see Jürgen Bröhmer, *Case note on Case C-36/02*, 15 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 755, 757 (2004). Bröhmer misinterprets the reach of the ECJ's finding that “measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community”, Case C-112/00, *Schmidberger v. Republik Österreich*, 2003 E.C.R. I-5659, para. 73.

<sup>16</sup> ARMIN VON BOGDANDY, SUPRANATIONALER FÖDERALISMUS 15 (1999).

whether the respect for human dignity mandates certain limits on biotechnology in all Member States. Violations of human dignity would regularly amount to a *serious* breach, as a justification for any infringement is excluded<sup>17</sup> and consequently distinctions between different degrees of violations could hardly be reconciled with the inviolability of human dignity. And in case of an ongoing research policy, a *persistent* breach could also hardly be denied.

The meaning of respect for human dignity in the context of Article I-59 CT is closely linked to the procedure that governs its decision-making process. Such a realist perspective<sup>18</sup> is especially appropriate if a political decision-making process<sup>19</sup> is concerned rather than an independent judicial process. Consequently, one cannot ignore that the determination of the existence of a serious and persistent breach requires unanimity in the Council and the consent the European Parliament which has to act by a super-majority. As a result, Article I-59 CT refers only to a minimum standard of the fundamental principles.

Unless all Member States except one believe that a certain biotechnological procedure violates human dignity, such a determination will not be made. It is highly unlikely that such a broad agreement on biotechnological issues will emerge in the future. It has to be underlined that not only those Member States which actively support research cloning will prevent such a determination. Some Member States abstaining from this technology still do not grant the protection of human dignity to any totipotent cell outside the womb. As a result, Member States will not be compelled by Article 59 CT to harmonise their divergent understandings of the consequences of human dignity for biotechnology.

### III. Human Dignity as a Limit to European Legislation

Article II-61 CT becomes relevant if European legislation touches upon issues of human dignity and biotechnology. In particular, two scenarios can be imagined.

First, some authors discuss the consequences of a hypothetical European law regulating the admissibility of research cloning in all Member States and warn of an

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<sup>17</sup>Martin Borowski, *Art. 1 CGREU, KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION* (Meyer ed. 2003), para. 40. For the German case see Horst Dreier, *Article 1(1) GG, 1 GRUNDGESETZ-KOMMENTAR*, (*idem* ed., 2<sup>nd</sup> ed. 2004), paras. 132-134.

<sup>18</sup> Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>19</sup> The ECJ can review the legality of acts under Article I-59 CT solely in respect of the procedural stipulations, *cf.* Article III-371 CT.

irreconcilable conflict.<sup>20</sup> The Constitutional Treaty does provide mechanisms, however, for avoiding a conflict on the scope of human dignity in that context.

With respect to research cloning in general, the European Union does not have the competence to regulate its admissibility. The appropriate legal basis for laws in the field of research in general would be Articles III-251/252 CT. These, however, do not provide for the harmonisation of legislation, but solely for the adoption and implementation of framework programmes. Article III-172 CT is only applicable insofar as a law or framework law serves the functioning of the internal market (*e.g.* the liberalisation of provisions banning the import of embryonic stem cells or the restricting free movement of researchers) not for a general policy on cloning.<sup>21</sup> Thus the potential conflict is already limited by the distribution of competences. Even if a limited measure was to be adopted, Article III-172(4) CT would allow the Member States to maintain their restrictive policies on cloning, as these are justified by major needs as shown above. This possibility thus can serve as an instrument to protect the national identity of a Member State. Likewise, the ECJ could take recourse to Article I-5 CT and protect differentiated concepts of human dignity instead of deciding itself which understanding is preferable.

The second constellation concerns the financing of research projects which some Member States consider to conflict with the respect for human dignity under the European framework programmes, *e.g.* projects involving the derivation of embryonic stem cells from embryos created for that purpose or projects involving research cloning. In principle, the state is only allowed to finance projects which are legal and do not conflict with its obligation to protect human dignity.<sup>22</sup> As the EU undoubtedly has a competence to finance research, it would be more difficult for the ECJ to evade the question of human dignity.

Respect for human dignity belongs to the general principles of Community law.<sup>23</sup> The classic sources of inspiration for the existence of a general principle, which will equally guide the interpretation of the Charter, appear to support a finding that respect for human dignity in Article II-61 CT does not exclude most

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<sup>20</sup> Yvonne Dorf, *Zur Interpretation der Grundrechtecharta*, 60 JURISTENZEITUNG 126, 132 (2005).

<sup>21</sup> Arguably, Articles III-251/252 are even *lex specialis* to Article III-172, see Martin Nettesheim, *Kompetenzen*, EUROPÄISCHES VERFASSUNGSRECHT 415, 474 (v. Bogdandy ed. 2003), an English version in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (v. Bogdandy & Bast eds., forthcoming).

<sup>22</sup> BVerfGE 88, 203 (315) (F.R.G.) on the financing of abortion.

<sup>23</sup> Case C-377/98, *Kingdom of the Netherlands v. European Parliament and Council*, 2001 E.C.R. I-7079, paras. 70-77; Markus Rau & Frank Schorkopf, *Der EuGH und die Menschenwürde*, 55 NEUE JURISTISCHE WOCHENSCHRIFT 2448-2449 (2002).

biotechnological research. For one, it is the lack of a common legal tradition between the Member States which causes the conflict. Likewise, the prohibition only of “reproductive” (more precisely: birth) cloning in Article II-63 CT implies that a consensus on the prohibition of other forms of cloning did not exist and the decision was left to the legislatures.<sup>24</sup> Furthermore, the common international obligations of the Member States point in that direction. The majority of the ECtHR has recently refrained from finding that the unborn is encompassed by the right to life.<sup>25</sup>

Additionally, a significant tension between Article II-61 CT and Article I-2 CT seems to be the result if the ECJ wanted to employ more than a minimum standard for reviewing Union action. As shown above, a differentiation between the standards of Article I-2 CT in connection with Article I-59 CT and Article II-61 CT is highly problematic. Taken seriously, a ban on the financing of cloning research on the basis of Article II-61 CT would thus exert considerable pressure to invoke proceedings of suspension against the United Kingdom and other Member States. Depending on the perspective, either the authority of the ECJ or the legitimacy of the Union would be damaged, if the political process did not follow the ECJ’s lead.

With an alternative line of reasoning, however, the ECJ would be able to avoid conflict while still ensuring a level of respect for human dignity above the minimum consensus. Depending on their share in the European budget, Member States that consider all forms of cloning to be contrary to human dignity indirectly have to finance such research. Arguably, the financing of such research by a European programme would thus raise a conflict between their fundamental constitutional value and membership in the EU and consequently touch upon their national identity.

### C. Conclusion

The Constitutional Treaty provides ample mechanisms to cope with divergent concepts of human dignity in the European Union. The key element is Article I-5 CT, which calls for the respect for national identities. Accordingly, the Constitutional Treaty accepts plural concepts of human dignity and does not prescribe its Member States a fully homogeneous understanding, as we have seen with respect to the justifications of obstacles to free movement. It shares this characteristic with a liberal understanding of human dignity in a pluralistic

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<sup>24</sup> Denninger, *supra* note 3, at 201; Kersten, *supra* note 2, at 115.

<sup>25</sup> *Vo v. France*, App. No. 53924/00 at para. 85 (Eur. Ct. H.R. 8 July 2004).



society.<sup>26</sup> If plural concepts of human dignity are thus understood as contributions to a discursive process rather than as irrevocable claims of truth, a Member State that refers to a restrictive understanding of human dignity in biotechnological issues does not at the same time deny the validity of the principle in a more liberal country.<sup>27</sup>

Moreover, the principle of respect of national identities relieves the Constitutional Treaty of a decision between different understandings of human dignity. As a result, the possible dilemma between constitutional conflict and incoherent meanings of human dignity within the Constitutional Treaty can be avoided.

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<sup>26</sup> Denninger, *supra* note 3, at 196.

<sup>27</sup> But see Helmuth Schulze-Fielitz, *Verfassungsvergleichung als Einbahnstraße?*, VERFASSUNG IM DISKURS DER WELT 355-379, 372 (Blankenagel *et al.* eds., 2004); Dreier, *supra* note 17, at note 285, who use comparative law as an argument for a more liberal position.

## Remarks on Art. I-52 of the Constitutional Treaty: New Aspects of the European Ecclesiastical Law?

By Michał Rynkowski\*

### A. Introductory Remarks

The question of churches and religious communities in the EU/EC law arose for the first time in 1997, when Declaration No. 11 on the status of churches and non-confessional organisations was attached to the Amsterdam Treaty. According to this Declaration, “The European Union will respect and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union will equally respect the status of philosophical and non-confessional organisations.” The content of this Declaration was commented on many times by distinguished experts of the European ecclesiastical law.<sup>1</sup> Art. I-52 of the Treaty establishing a Constitution for Europe (Constitutional Treaty/CT) repeats in paragraph one and two Declaration No. 11, and introduces in paragraph three a provision on dialogue between the EU and religious bodies: “Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.” Instead of repeating opinions and statements referring to the above mentioned Declaration, which would be relevant for Art. I-52(1) and (2) CT, it should focus on two aspects:

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<sup>1</sup> Sophie C. van Bijsterveld, *Die Kirchenerklärung von Amsterdam – Genese und Bedeutung, mit spezieller Beachtung der Rolle der COMECE*, in: 1 ÖSTERREICHISCHES ARCHIV FÜR RECHT UND RELIGION, 46 (1999); Gerhard Robbers, *W sprawie ‘artykułu kościelnego’ w Traktacie Amsterdamskim*, in: EUROPA. FUNDAMENTY JEDNOŚCI, 158 (ANIELA DYLUS ED. 1999).

1) How far do the ten new Member States give a new meaning to Art. 52(1) and (2) CT – are their church-state systems very different from those of the old Member States?

2) Currently, how is the dialogue mentioned in Art. I-52(3) CT carried out?

## **B. Differentiated Church – State Relations in New Member States**

The plurality and differentiation of the church-state systems existing in the Member States of the EU is astonishing for anybody who starts dealing with this subject. Contemporarily, there are a few models of church-state relations, ranging from states with a State Church to states with a strict separation between church and state. For example, in the United Kingdom legal acts of the Church of England (called measures) are signed by the Queen and have the same legal force and effect like parliamentary statutes.<sup>2</sup> In Denmark, there is a Minister of Ecclesiastical Affairs who is a member of the Danish government and at the same time she/he is the highest administrative body<sup>3</sup> that may repeal bishops' decisions. In Greece, the President of Republic has to swear on the Holy Trinity, which means that only a person of Christian belief may take this office.<sup>4</sup> On the contrary, the French system does not recognise any church, so almost all of them are registered as "associations culturelles" (except for the Catholic Church, however this exception is not generally known).<sup>5</sup> For many years there has been a general opinion that systems in other European Member States can be described as being somewhere between two poles: (Danish or English) State Church and (French) *laïcité*. But is this statement true with regard to the new Member States? How far do they differ from the systems of the old Member States? Finding an answer to this question is not that easy.

Thanks to the European Consortium for Church-State Research, there are a number of valuable publications referring to different legal questions of the church-state relations in the fifteen Member States of the EU.<sup>6</sup> However, there are only a few

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<sup>2</sup> NORMAN DOE, *THE LEGAL FRAMEWORK OF THE CHURCH OF ENGLAND* 61 (1996).

<sup>3</sup> Valuable information *available at*: <http://www.km.dk>.

<sup>4</sup> Charalambos Papastathis, *State and Church in Greece*, in *STATE AND CHURCH IN THE EU* 115, 124 (Gerhard Robbers ed., 2005).

<sup>5</sup> Brigitte Basdevant-Gaudemet, *State and Church in France*, in *STATE AND CHURCH IN THE EU* 157, 163 (Gerhard Robbers ed., 2005).

<sup>6</sup> A few titles of volumes could be quoted: European Consortium for Church-State Research No. 8 *MARRIAGE AND RELIGION IN EUROPE* (1993); No. 9: *CHURCHES AND LABOUR LAW IN THE EC COUNTRIES*

publications that give an overview of the situation in the new Member States.<sup>7</sup> Some contributions, edited as an annual chronicle, were published in the European Journal for Church-State Research.<sup>8</sup> Another fact is that after some decades of (mostly Soviet) occupation, the ecclesiastical law in new Member States cannot be honestly regarded as a leading area of academic research. Moreover, since basically only their citizens know the language of a respective Member State, the access to the legal texts is very limited. Until a collection of the ecclesiastical norms by Salvatore Berlingò<sup>9</sup> includes vol. IV on the new Member States, one of a few reliable translations in English is the edition of Hungarian church-state laws, edited by Balázs Schanda.<sup>10</sup> Additionally, there are some separate articles describing the contemporary problems of the ecclesiastical law in eastern and central European states.<sup>11</sup> The first comprehensive handbook about all Member States, both old and new ones, is the 2<sup>nd</sup> edition of the book by Gerhard Robbers "Church and State in the European Union."

How is it possible to compare the legal position of churches and religious communities in different Member States?

First of all, there is no legal definition of a church, neither in the EC-legislation nor in the jurisprudence of the European Court of Justice. The European Court of Justice worked out its own "communitarian" definition of different terms, like it was with the term "worker."<sup>12</sup> However, to determine what is a church or religious community in a Member State is a decision of the legislation or jurisprudence of a given Member State. Generally, there are a few models:

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(1993); No. 10: THE LEGAL STATUS OF THE RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EU (1994); No. 11: LE STATUT CONSTITUTIONNEL DES CULTES DANS LE PAYS DE L'UNION EUROPÉENNE (1995); No. 13, RELIGIONS IN EUROPEAN UNION LAW (1998).

<sup>7</sup> Vol. 17 of the European Consortium: THE STATUS OF RELIGIOUS CONFESSIONS OF THE STATES APPLYING FOR MEMBERSHIP TO THE EUROPEAN UNION (2002); in this volume contributions relating to: Hungary, Poland, Estonia, Czech Republic, Slovenia, Cyprus, Bulgaria and Turkey - others were missing.

<sup>8</sup> Rik Torfs, *Preface*, 1-9 EUROPEAN JOURNAL FOR CHURCH AND STATE RESEARCH (1994-2002).

<sup>9</sup> CODE EUROPEEN DROIT ET RELIGIONS, (Salvatore Berlingò ed., vol I 2001). It was planned as consisting of 3 volumes for 15 Member States, but maybe will include new Member States in its next volumes.

<sup>10</sup> BALÁZS SCHANDA, LEGISLATION ON CHURCH-STATE RELATIONS IN HUNGARY (2002).

<sup>11</sup> DAS STAAT-KIRCHE-VERHÄLTNIS IN DEN ADALBERT-LÄNDERN: ERFahrungen und Perspektiven (Hans Hermann Henrix ed., 2002); PETER ERDŐ, *Typen des Verhältnisses zwischen Kirche und Staat in den Beitrittsländern*, in ÖSTERREICHISCHES ARCHIV FÜR RECHT UND RELIGION 2 (2003).

<sup>12</sup> Case 53/81, Levin v. Staatssecretaris van Justitie, 1984 E.C.R. 1035.

- Churches and religious communities as legal entities of public law (Austria, Germany, Italy)<sup>13</sup>
- Churches and religious communities of private law (Estonia, France, in England all denominations except for Church of England)
- Churches as legal entities *sui generis* (Netherlands, Hungary)
- Such entities acquire their legal personality according to canon law (Austria, Hungary, Poland).

Some countries are mentioned in more than one category, which is not contradictory (e.g. Hungary: church entities acquire legal personality by the virtue of canon law and they are considered by the State as legal entities *sui generis*).

Concerning the position of religion in a state, it should be noticed that only in Malta there is a constitutionally prevailing religion (Art. 2 of the Maltese Constitution), although there is no formula such as "State Church." In some other states, the percentage of adherents of a given denomination is very high – Catholics in Poland and Orthodox in Cyprus, just like Catholics in Luxembourg and in Ireland – but none of these religions are *de iure* a predominant one. On the contrary, the constitutional provisions of those countries underline the equality of all denominations. However, another comparison is possible – the real social position of the Catholic Church in Poland and in Hungary differs significantly from the position of other churches, just like it is in the case of the Catholic Church in Italy. In Hungary, even the Constitutional Court referred to this issue in its judgement<sup>14</sup> stating: "Treating the Churches equally does not exclude taking the actual social roles of the individual Churches into account."<sup>15</sup>

Concerning church finances, there is quite a variety of options: in Belgium the clergy is entirely paid from the state budget (Art. 181 of the constitution)<sup>16</sup> and if a local administration of ecclesiastical temporal goods causes deficits, the local

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<sup>13</sup> "Catholic church which has public law legal capacity, even if it is in no way comparable to the bodies which form part of the State organisation," Silvio Ferrari, *State and Church in Italy*, in STATE AND CHURCH IN THE EU 209, 216 (Gerhard Robbers ed., 2005).

<sup>14</sup> Hungarian Constitutional Court, decision 4/1993 (II.12.) AB.

<sup>15</sup> Translation by Balázs Schanda, *State and Church in Hungary*, in STATE AND CHURCH IN THE EU 323, 331 (Gerhard Robbers ed., 2005).

<sup>16</sup> Rik Torfs, *Il finanziamento delle chiese in Belgio* in QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 1998/1, 219.

municipality is obliged to cover it.<sup>17</sup> The opposite situation is present in Portugal, where the State does not finance the religious communities, but the Catholic Church does not pay a single euro to the State – it is not obliged to pay CIT, real-estate tax or other taxes, except for PIT. The provision relating to VAT, resulting from concordates 1940 and 2004, required a special provision due to the communitarian obligations of Portugal.<sup>18</sup> In this respect, it legitimated the assumption that the situation in the new Member States must range somewhere between the Belgium and the Portuguese system. Indeed, churches are generally exempted from many taxes, especially real-estates tax, but on the other hand, in some countries they are not allowed to mortgage them.<sup>19</sup> Since tax year 1997, the Hungarian law has provided an option that 1% of personal income tax may be donated to a church or religious community, chosen by the taxpayer. Very much like the Spanish or Italian model, if a taxpayer does not decide, this 1% automatically goes to the State budget. In 2004, (tax declarations and return of the year 2003) the same model was launched in Poland. In Estonia churches may be included on the list of non-taxable non-profit-making organisations. Interestingly, in Malta – the only country with a constitutionally prevailing religion – neither the Catholic Church nor any other enjoys any kind of tax exemption.<sup>20</sup>

A majority of new Member States concluded treaties with the Holy See, called concordat (Poland), Basic Agreement (Slovakia), Agreement (Latvia, Estonia) or having no particular name, being a bundle of agreements devoted to separate questions (Hungary, Lithuania – system similar to the Spanish one). One of the consequences of such an agreement is the civil recognition of confessional marriages, like it is in Latvia, Lithuania, Malta, Poland, Slovakia, Czech Republic (although in the Czech Republic by virtue of a state law, and not concordat). This provision, in Poland was primarily meant for the Catholic Church, but was extended and currently applies to eleven of the major/oldest churches and religious communities. In Hungary, the state does not recognize confessional marriages and entering into one has no effect in civil law,<sup>21</sup> nor does it in the

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<sup>17</sup> Rik Torfs, *State and Church in Belgium* in STATE AND CHURCH IN THE EU 9, 14 (Gerhard Robbers ed., 2005).

<sup>18</sup> Vitalino Canas, *State and Church in Portugal*, in STATE AND CHURCH IN THE EU 439, 459 (Gerhard Robbers ed., 2005).

<sup>19</sup> Ringolds Balodis, *State and Church in Latvia*, in STATE AND CHURCH IN THE EU 253, 272 (Gerhard Robbers ed., 2005).

<sup>20</sup> Ugo Mifsud Bonnici, *State and Church in Malta*, in STATE AND CHURCH IN THE EU 347, 359 (Gerhard Robbers ed., 2005).

<sup>21</sup> Schanda, *supra* note 15, at 337.

Netherlands. However, in Belgium a priest who celebrates a religious marriage of a couple not married under state law, may be punished.<sup>22</sup> The Estonian system is similar to the British one: in Estonia it is a priest and not a church or religious community which is authorised by a state; in the United Kingdom a building is important, and not a priest or denomination. On the contrary, until 1989 Orthodox Cypriots could conclude only a religious marriage.<sup>23</sup>

As shown above, the models of church-state relations in new Member States are differentiated, but they do not exceed the existing framework of the fifteen (old) Member States. The first part of this paper may be concluded with a quotation from the Bible – which seems to be appropriate if questions relating to churches and religion are discussed: “Is there anything whereof it may be said, See, this is new? It hath been already of old time, which was before us.”<sup>24</sup>

### C. Dialogue between the EU and Churches and Non-Confessional Organisations

#### I. Who is Conducting the Dialogue?

There are a number of open questions concerning the dialogue of the EU with churches and religious communities.<sup>25</sup> Generally, it is clear who is in charge of this dialogue on both sides. In the European Commission there is a team called Bureau of European Policy Advisors (BEPA),<sup>26</sup> previously called Forward Studies Unit (FSU, 1992-2000) and Group of Policy Advisors (GOPA, 2000-2004). One of those advisers, Dr. Michael Weninger, is responsible for a field described as “Dialogue with Religions, Churches and Humanisms; Relationships with Non-Applicant Neighbouring States in Eastern Europe; South-East Europe, including Turkey.” Under the Prodi Commission his tasks were described in a narrower way as dialogue with religions, churches and humanism.<sup>27</sup> The website does not provide too many clues about activities of BEPA, stating merely: “In the political area the main items covered are, amongst others, external relations, EU institutional issues, trends in public opinion, trends in EU political forces, emerging actors in the world,

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<sup>22</sup> Art. 267 of the Belgium Code of Penal Law.

<sup>23</sup> A. Emilianides, *State and Church in Cyprus*, in *STATE AND CHURCH IN THE EU* 231, 245 (Gerhard Robbers ed., 2005).

<sup>24</sup> *Ecclesiastes* 1:10.

<sup>25</sup> MARCO VENTURA, *LA LAICITÀ DELL'UNIONE EUROPEA* 195 (2001).

<sup>26</sup> [http://www.europa.eu.int/comm/dgs/policy\\_advisers/team/index\\_en.htm](http://www.europa.eu.int/comm/dgs/policy_advisers/team/index_en.htm).

<sup>27</sup> More available at [http://www.europa.eu.int/comm/dgs/policy\\_advisers/index\\_en.htm](http://www.europa.eu.int/comm/dgs/policy_advisers/index_en.htm).

dialogue with communities of faith and conviction.” Hopefully, this page is under construction but there is no sign indicating it is. The still accessible website of GOPA lists meetings of Dr. Weninger with churches and religions. However, the most recent meeting was supposed to be held in March 2004. For over eighteen months there has been no update of this site.

Churches and religious communities established diversified umbrella-organisations and special offices in order to have a representation towards the EU institutions. Two of the most important players are COMECE (Commission of Bishops’ Conference of the EC) and CEC-KEK (Conference of European Churches). The first one represents the Catholic Church, the second one represents over 120 non-Catholic churches in Europe, which means that it unites different Protestant and Orthodox churches. There are other organisations (offices, entities), inter alia the Muslim Council for Cooperation in Europe and the Conference of European Rabbis.<sup>28</sup> Some other entities like Caritas Europa, Eurodiaconia, and Evangelische Kirche in Deutschland created their own offices.<sup>29</sup> Before their dialogue with the Commission will be discussed, as an example some basic data about structures and scopes of COMECE and CEC-KEK should be provided.

COMECE was founded in 1980 following a wish of Holy Father John Paul II. Every bishops’ conference in the EU-Member State delegates its one member to COMECE. Currently, it consists of twenty-one members. The number twenty-one and not the expected twenty-five can be explained due to the fact, that the structure of the Catholic Church does not necessarily mirror the state borders. There is only one bishops’ conference for Denmark, Finland and Sweden, but there is a common conference of England and Wales and separately of Scotland. Another question is Cyprus, with its bishop residing in Jerusalem. This is an interesting case because it is the first Member State of the EU with a bishop residing outside the borders of the EU. CEC-KEK – Conference of European Churches consists of 126 non-Catholic churches from almost all states in Europe. To be exact, even some catholic churches which do not recognise the Pope as its head – as it is in case of Polish Catholic Church<sup>30</sup> – are members of CEC-KEK. In order to improve the co-operation and contacts with the EC-institutions, the six major organisations established an advisory body of the initiative “Soul for Europe,” consisting of twelve representatives – two representatives of each: COMECE, CEC-KEK, Orthodox

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<sup>28</sup> More available at <http://www.cer-online.org>.

<sup>29</sup> MICHAŁ RYNKOWSKI, STATUS PRAWNY KOŚCIOŁÓW I ZWIĄZKÓW WYZNANIOWYCH W UNII EUROPEJSKIEJ 149 (2004).

<sup>30</sup> Church founded by Polish emigrants in the USA in the 19<sup>th</sup> century, does not recognise the Pope as Head of the Church.



Liaison Office, Muslim Council for Cooperation in Europe, Conference of European Rabbis, European Humanist Federation.<sup>31</sup> Interestingly, works of this initiative have been led for nine years by Humanist, Mr Claude Wachtelaer.<sup>32</sup> "Soul for Europe" was advising how to distribute money for different religious and ecumenic projects, which were covered from the budget heading 15 06 01 03 (the full and official name of this headline is: Grants to help cover the permanent work programme of a body which pursues an aim of general European interest in the field of active European citizenship or an objective forming part of the European Union's activities in this area).

COMECE, CEC-KEK and other religious institutions observe the work of European institutions and prepare different documents and statements. It would take too much space to mention all of them, so just to name the priorities of their work: human rights, migration, bio-ethic, civic society, education, legal affairs. They issue different publications: "*La construction européenne et les institutions religieuses*", "*L'euro et l'Europe*", "*Responsabilité de l'Europe pour le développement mondial: marchés et institutions après Seattle*" (all by COMECE), and some interesting analysis, e.g. "The European Convention," edited by COMECE, CEC-KEK, EKD. Almost all organisations issued statements referring to EU-enlargement or elections to the EP in 2004; COMECE regularly updates its homepage, providing news and comments on current events.<sup>33</sup>

## II. A Dialogue –What Should be the Content?

Representatives of all churches and religious communities contact BEPA and Dr. Weninger on more or less a regular basis. However, since the EU respects all denominations equally, the organisation of humanists and very small religious groups are received by Dr. Weninger in the same manner. Moreover, since there is no definition of 'sect'<sup>34</sup> some "new religious movements" are present during meetings, even those concerning combating illegal activities of sects. There is no legal reason for not inviting them, but their presence seems to be inappropriate. The European Commission is a hostage of the "political correctness" just like the European Parliament was a few years ago, when it issued on 29 February 1996 a

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<sup>31</sup> <http://www.humanism.be/new/english/1-1-ehf.htm>.

<sup>32</sup> A SOUL FOR EUROPE, FINAL ANNUAL REPORT: ETHICS AND SPIRITUALITY 2 (2004).

<sup>33</sup> Available at <http://www.comece.org>.

<sup>34</sup> Michał Rynkowski, *Freedom of Religion in the European Union, in THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 71, 82 (Adam Bodnar et al. eds., 2003).

resolution on sects.<sup>35</sup> The EP refrained from naming this sect, even when reminded of the “recent events in France,” during which sixteen persons, among them three children, were killed on 23 December 1995.

The meetings with Dr. Weninger are of purely consultative character, no decisions are being taken. Should this change one day, a special procedure – kind of qualified majority – should be launched for the representatives of COMECE and CEC-KEK. According to the newest statistics, among European citizens, 55% declare their affiliation to the Catholic Church, 13.4% are Protestants, 6.7% Anglicans, 3.1% Orthodox, 2.9% Muslims.<sup>36</sup> Taking into account, that CEC-KEK unites Protestants, Anglicans and Orthodox, it represents some 23% of Europeans. COMECE and CEC-KEK have the strongest positions, but if they had – hypothetically – only two votes, that would be a clear disadvantage in comparison with numerous split-up free churches and new religious movements.

Another important question is what can or should be a content of co-operation and dialogue between the EU and churches. The collection of the EU/EC legal acts referring to churches and religious communities<sup>37</sup> show that there are a variety of fields, being of interest both for churches and the EU, including free movement of persons, trade mark law, banking, slaughterery, custom law, etc. In this context another question may rise: is there any chance or any need for the concordat between the EU and the Holy See?

### III. *Is a Concordat Possible? Is it Needed?*

The lacking legal personality of the EU was finally granted in the constitutional treaty, but even without the constitutional treaty, it could be the EC concluding an international treaty. No doubts that the Holy See is a subject of international law, so there are legal preconditions for such an agreement. The fact that many Member States have already concluded concordats (not necessarily under this specific name) with the Holy See, show an additional agreement on the EU-level would not be a problem. The German Länder concluded treaties with the Holy See despite Reichskonkordat of 1933 on the federal level. An important remark is that the content of an EU-concordat should differ from those with the Member States, in

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<sup>35</sup> 18.3.1996 O.J. (C 78) 31.

<sup>36</sup> 0.3 % are Jews, 18.25 % other denomination and persons not belonging to a denomination, see Gerhard Robbers, *State and Church in the EU*, in *STATE AND CHURCH IN THE EU* 577, 578 (Gerhard Robbers ed., 2005).

<sup>37</sup> GERHARD ROBBERS, *RELIGION-RELATED NORMS IN EUROPEAN UNION LAW* (August 2, 2005), available at <http://www.uni-trier.de/~ievr/EUreligionlaw/>.

order not to repeat or not to overlap. Therefore, another follow-up question arises: what should/could be a content of a concordat, in order not to repeat the “national” concordats?

M. Kalbusch listed in his dissertation<sup>38</sup> some areas which would be of interest for both sides. However, his proposals were not really appealing: environmental issues, trade with less developed countries, protection of rights of employees. In my personal opinion, it seems that only two questions would be legitimated in the concordat: religious education in so-called “European schools” and religious service in the European militaries unit – once they will be functioning. Apparently, question of a concordat will not turn out in legislative works in the foreseeable future. In connection with those issues, there is a perpetual question of equality: if the EU/EC concludes an international treaty with the Holy See (being international representation of the Catholic Church), what would be the legal basis for agreements with other denominations? Gerhard Robbers suggested that Art. 282 or 308 TEC could be used as a basis. However, the ECJ underlined in its opinion 2/94 that Art. 308 should not be used for the widening of the EC-powers.

#### D. Conclusions and Outlook

Despite the new constitutional provision on an open, transparent and regular dialogue with churches, the situation is actually not that optimistic. Representatives of religious bodies admit that only J. Delors was really interested in the co-operation with them. His successors continued his work but did not add any new impulse. The financial support got more and more limited (recently reduced to 40 000 euro per year), and new administrative requirements had to be fulfilled. The advisory body of the initiative “Soul for Europe” had to become an association according to Belgium law in 2004.<sup>39</sup> The Commission signed a financial programme for 2004 on 14 October 2004, but the first portion of a grant arrived on 29 November.<sup>40</sup> During the official conference of the “Soul for Europe” that is traditionally held once a year in November, due to the change of Commission, there were neither rooms nor interpreters available, which made this international session very difficult. As a response to those actions of the Commission, the General Assembly decided to dissolve the associations. The co-ordinator of

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<sup>38</sup> MARCO KALBUSCH, RECHTLICHE BEZIEHUNGEN ZWISCHEN DER KATHOLISCHEN KIRCHE UND DER EUROPÄISCHEN UNION (Dissertation zur Erlangung des Lizentiats im kanonischen Recht, vorgelegt von Marco Kalbusch, Promotor: Prof. Dr. Rik Torfs, Faculteit Kerkelijk Recht, Katholieke Universiteit Leuven, 1999).

<sup>39</sup> A SOUL FOR EUROPE, FINAL ANNUAL REPORT: ETHICS AND SPIRITUALITY (2004) *supra* note 32, at 4.

<sup>40</sup> *Id.*

initiative, Ms. Win Burton, concluded in her final annual report (2004) that “the relations have been practically only administrative, even with the GOPA (...) there has been no dialogue as such.”

Hopefully an introduction of a provision on dialogue with churches will not coincide with the end of the dialogue that has been so far more or less successfully maintained.



## “United in Diversity” – The Integration of Enhanced Cooperation into the European Constitutional Order

By Daniel Thym\*

### A. Introduction

The “unity dogma” has long characterized the European law discourse. In many of its landmark decisions the European Court of Justice had recourse to the “unity argument,” such as in *Costa vs. E.N.E.L.*, where it rightly states that “the executive force of Community law cannot vary from one state to another ... without jeopardizing the attainment of the objectives of the Treaty.”<sup>1</sup> Other expressions of the “unity dogma” include the legal principle of non-discrimination enshrined in the fundamental freedoms, which lie at the heart of the single market, or the political concept of *acquis communautaire* obliging new Member States to subscribe to all existing Community laws. Indeed, the establishment of a supranational legal order requires a continued focus on its uniform application in the Member States without which the effectiveness of European law is at stake. My intention is not to call into question the underlying rationale of this quest for unity. The aim of this contribution is rather to show that the asymmetric non-participation of individual Member States in selected areas of Union activity can be embedded into the existing European legal order and does not contradict its constitutional aspirations, thereby giving substance to the Union’s motto “United in Diversity.”<sup>2</sup>

Various forms of differentiation have characterized the European legal order since its beginning and persist under the Treaty establishing a Constitution for Europe (CT). They range from specific safeguard clauses in the original 1957 Treaty

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<sup>1</sup> Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1251.

<sup>2</sup> Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) 53 [hereinafter CT].

establishing the European Economic Community (EEC Treaty)<sup>3</sup> and the numerous protocols attached to the Treaties<sup>4</sup> to the differentiated treatment of Member States and their regions in the manifold exceptions and privileges in secondary legislation.<sup>5</sup> They add up to a complex picture in which even the single market, which is often regarded as the sacrosanct “core” of European integration, is subject to various degrees of flexibility and differentiation.<sup>6</sup> Moreover, the European constitutional order is fragmented horizontally with specific Treaty regimes governing, *inter alia*, the Common Foreign and Security Policy (CFSP) and Economic and Monetary Union.<sup>7</sup> All these specificities do, however, have one thing in common: they do not generally limit the scope of European law by exempting one or several Member States from its geographic field of application. Rather, the law applies to all with only its legal effects being suspended or modified with regard to one or several Member States. This common ground extends to transitional periods which have been a regulatory tool of successive enlargements. They also suspend the application of European law in the new Member States for the time period specified in the accession treaty; but once this period has elapsed, European law automatically applies.<sup>8</sup>

In 1992, the heads of state or government agreed on a new formula: the asymmetric non-participation of Member States in a specific policy field in whose legislative implementation only the “ins” would participate, while the voting rights of the “outs” would be suspended. By granting the United Kingdom and Denmark a political opt-out from the third phase of monetary union, independent of the convergence criteria applicable to all Member States, they recognized that the

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<sup>3</sup> E.g. Treaty on European Union, 1992 O.J. (C191) 1 [hereinafter TEU], art. 95(4)-(10), CT art. III-172(4)-(10), and CT art. 176, Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty], art. III-234(6).

<sup>4</sup> One “minor” example: the Protocol on the Acquisition of Property in Denmark of 1992 which continues to be attached to the Constitution.

<sup>5</sup> For various forms of “actual and potential”, “inter-state and intra-state”, “temporary and non-temporary”, “general and specific” as well as “positive and negative discrimination” in primary and secondary European law see the extensive analysis by FILIP TUYTSCHAEVER, *DIFFERENTIATION IN EUROPEAN UNION LAW* (1999) and DOMINIK HANF, *DIFFERENTIATION IN THE LAW OF EUROPEAN INTEGRATION* (2002).

<sup>6</sup> Gráinne de Búrca, *Differentiation within the ‘Core’?*, in *CONSTITUTIONAL CHANGE IN THE EU* 133, 133 (Gráinne de Búrca & Joanne Scott eds., 2000).

<sup>7</sup> On sector-specific forms of horizontal differentiation, see Bast in this volume.

<sup>8</sup> See, for example, Treaty of Accession art. 24, Sep. 23, 2003, 2003 O.J. (C 227) E. on the possible suspension of the free movement of workers for a period of up to seven years after the 2004 enlargement Art. 24 of the Act of Accession in combination with the respective Annexes.

Union would proceed non-simultaneously. There is no guarantee that the two “outs” will ever catch up with the *avant-garde* and the asymmetry of integration may, in fact, continue indefinitely.<sup>9</sup> This legal construction was taken up a few years later in the Treaty of Amsterdam, which combined the integration of the Schengen law into the European legal order and the partial communitarization of justice and home affairs law in Title IV EC with an asymmetric status for the UK and Denmark.<sup>10</sup> On its basis, one of the most important growth areas of European integration has been realized without the participation of all Member States in recent years. Thus, the asymmetric non-participation of some Member States has become a daily practice – and might be further extended in the years to come, if the general mechanism for enhanced cooperation is put into practice, which was first agreed upon in Amsterdam, reformed substantially in Nice and has now been codified in Articles I-44, III-416-423 CT.<sup>11</sup>

In the following sections, the integration of the general mechanism for enhanced cooperation into the constitutional order of the European Union will be illustrated in the light of the practical experience with the existing forms of asymmetry. Section B will pay particular attention to the potential of asymmetry in accommodating diversity at a time when European integration transcended the functional logic of the single market towards political union. Section C takes a closer look at the substantive constraints of, and procedural requirements for enhanced cooperation demonstrating that they do not contradict the general principles of European law as characteristic features of its supranational legal order. Against this background, Section D illustrates that the general mechanism for enhanced cooperation and the other forms of asymmetry are integrated into the single legal and institutional framework of the European Union, thereby preserving its constitutional unity. Section E, the outlook, eventually reveals that a hardly noticed change in the regime governing enhanced cooperation may play an important part in preserving the dynamics of European integration in the era of the Constitutional Treaty. Lack of space unfortunately precludes a detailed analysis of asymmetry in the field of CFSP, including defense. The specificity of its legal regime for enhanced cooperation and extensive new forms of asymmetry in the

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<sup>9</sup> CT Protocol No. 13, art. 9: “The UK may notify the Council at any time of its intention to adopt the euro.” Similarly for Denmark Protocol No. 14.

<sup>10</sup> See DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT 79-130 (2004); available at <http://www.thym.de/daniel/ungleichzeitigkeit>. The special status of the UK and Denmark is continued with slight modifications in Protocols Nos 17, 19 and 20 attached to the CT.

<sup>11</sup> This article follows the spelling of the Treaty of Nice and the constitutional Treaty which speaks of “cooperation” and does not use the British-English “co-operation”.



Constitutional Treaty require a degree of attention which must be preserved for other publications.<sup>12</sup>

### B. Accommodating Diversity

The introduction of the general mechanism for enhanced cooperation has been called a “Copernican revolution”<sup>13</sup> by some commentators and hailed as the way out of the alleged dilemma between enlargement and deepening integration “to strengthen the Union from within.”<sup>14</sup> Others have warned of “constitutional chaos”,<sup>15</sup> that is, a “blatant assault on,”<sup>16</sup> and “natural contradiction with”<sup>17</sup> the uniform application of Community law. Just like in law and in life, the correct answer lies somewhere between the antipodes of enhanced cooperation as the magic potion for the future success of European integration and a deadly poison leading to a constitutional heart attack. Instead, it appears as a pragmatic new institute which allows for limited asymmetrical progress in specific situations when the Member States cannot agree on the appropriateness of European action. Enhanced cooperation and the other forms of flexibility allow the accommodation of political diversity regarding the adequacy of specific integration projects within the existing institutional and legal framework of the European Union.

The initial introduction of asymmetry by the Maastricht Treaty illustrates this pragmatic character. It neither stemmed from the desire to establish a “hard federalist core” with its own institutional and legal structure besides the existing Treaty framework, nor followed the *à la carte*-logic of a principled freedom where Member States to pick and choose the policy areas in which they want to

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<sup>12</sup> The general mechanism for enhanced cooperation comprises specific rules for CFSP in Art. III-419(2) and 420(2) CT and is complimented by various forms of “asymmetric” defense cooperation in CT art. I-41, art III-310-312. A preliminary assessment is given by Matthias Jopp & Elfried Regelsberger, *GASP und ESVP im Verfassungsvertrag*, 26 INTEGRATIOQN 550, 552 (2003); Christian Deubner, *Verstärkte Zusammenarbeit in der verfassten Europäischen Union*, 27 INTEGRATION 274, 282 (2004) and THYM, *supra* note 10, at 162, 173.

<sup>13</sup> Vlad Constantinesco, *Les clauses de coopération renforcée*, 33 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 751, 752 (1997) (quoting Renaud Dehousse).

<sup>14</sup> Guy Verhofstadt, Belgian prime minister, Speech to the European Policy Centre: A Vision for Europe (Sep. 21, 2000) (A few weeks before the Nice IGC), *available at*: <http://www.europa.eu.int/futurum>.

<sup>15</sup> Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET LAW REVIEW 17, 67 (1993), albeit not with regard to enhanced cooperation.

<sup>16</sup> Stephen Weatherhill, *'If I'd Wanted You to Understand I Would Have Explained It Better'*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 21, 22 (David O'Keeffe & Patrick Twomey eds., 1999).

<sup>17</sup> Constantinesco, *supra* note 13, at 758.

participate. Granting a political opt-out to two Member States and obliging the others to participate in monetary union on the basis of the convergence criteria, was simply the only compromise on which the United Kingdom, which opposed monetary union in principle, and its continental partners, which argued for the equal participation of all, could agree. When the Schengen law and justice and home affairs were communitarized in Amsterdam, the Intergovernmental Conference (IGC) took up the model of individual opt-outs. At a first look, enhanced cooperation transcends this logic because it is not confined to specific Member States or subject matters, but rather characterized by a geographic and thematic openness. They neither give privilege nor exclude specific Member States and are *a priori* not limited to certain policy fields. However, a closer look at the procedural and substantive constraints illustrates a similar integrationist pragmatism, since they provide an abstract solution of political conflicts about the suitability of Union action. This may or may not occur at some point in the future during the legislative process.

First, the establishment of enhanced cooperation is always a last resort, if the Union as a whole cannot agree on a specific measure because one or more Member States oppose an action and block its adoption, (classic example: unanimous tax harmonization on the basis of Article 93, 94 EC; Article III-171, 173 CT<sup>18</sup>). It is explicitly required that the Council shall only embark on enhanced cooperation “as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.”<sup>19</sup> Second, enhanced cooperation is, in principle, a one-way street leading towards closer integration. It should “aim to further the objectives of the Union”<sup>20</sup> with the existing *acquis communautaire* being taboo for retrogression.<sup>21</sup> European laws adopted in its framework are regular European law and enjoy the same legal effects as any other Union law, except that they are limited in geographic scope.<sup>22</sup> Eventually, the decision to participate in enhanced cooperation may not be revoked, since the later withdrawal of the participating Member States was deliberately not foreseen – in obvious contrast to the extensive procedural rules on the authorization of enhanced cooperation and the later participation of the initial outs.

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<sup>18</sup> Indeed, former internal market Commissioner Frits Bolkestein supported the idea of harmonizing corporate taxation asymmetrically; see *Leader: Strange Bedfellows*, FINANCIAL TIMES, July 20, 2004.

<sup>19</sup> CT art. I-44(2); TEU art. 44a.

<sup>20</sup> CT art. I-44(1); TEU art. 43(a).

<sup>21</sup> CT art. III-416, “Any enhanced cooperation shall comply with the Constitution and the law of the Union”; more explicitly TEU art. 43(c): “respect the *acquis communautaire*.”

<sup>22</sup> CT art. I-44(4); TEU art. 44(2).

Enhanced cooperation, therefore, does not reverse the integrationist status quo achieved in the past decades and continues the tradition of “ever closer union.” The only break in the integration logic of the Union’s founding years is the harmonious alignment of integrationist dynamics in some Member States with national political decisions to stay out of new projects. The latter may result from political disagreement over the orientation of the proposed action or the conviction that the issue under debate would better be dealt with at the national level. In any case, this acceptance of diversity heralds a new approach to European integration beyond the functionalism of economic integration. In the single market field, a similar reference to national interests, that is, the acceptance of difference appears *a priori* as illegitimate, since the single market is all about the removal of barriers to, or discriminations in trade between the Member States. Any call for permanent national opt-outs and privileges does therefore immediately provoke criticism of social dumping or protectionism.<sup>23</sup> Existing forms of differentiation in the single market sphere, therefore, regularly require an objective justification and are often subject to specific political or legal supervision through the Commission and/or the Court of Justice.<sup>24</sup>

The various forms of asymmetry transcend this de-politicized integration logic of the internal market and illustrate the Union’s gradual transition from the functional integration logic of the internal market to political union. Instead of viewing European integration as a quasi-natural phenomenon with spill-overs to ever new policy areas, the democratically formulated policy preferences of individual Member States are preserved and explicitly recognized as legitimate. Correspondingly, the asymmetry of the European legal order focuses on new policy fields such as security and defense, justice and home affairs or, potentially, social affairs and tax harmonization. These policy fields are closely associated with the concept and the *finalité* of political union, while the core of the single market *acquis* and the fundamental freedoms are preserved as pan-European principles.<sup>25</sup> Asymmetry thus holds a remarkable “democratic potential.” It allows respect for national democratic majorities, without this majority, as a European minority preventing the realization of the European majority preference.<sup>26</sup> It underlines the

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<sup>23</sup> Such as the British opt-out from Maastricht’s Agreement on Social Policy criticized for “social dumping” among others by Gisbert Brinkmann, *Lawmaking under the Social Chapter of Maastricht*, in *LAWMAKING IN THE EUROPEAN UNION* 239, 261 (Paul Craig & Carol Harlow eds., 1998).

<sup>24</sup> See, *supra* notes 3-8 (and accompanying text within this piece).

<sup>25</sup> On the latter aspect, *infra* section C.II.

<sup>26</sup> Armin von Bogdandy, *Europäische Prinzipienlehre*, in *EUROPÄISCHES VERFASSUNGSRECHT* 149, 180 (Armin von Bogdandy ed., 2003). For further explanations of asymmetry as an expression of the gradual transition of European integration from the functionalist integration logic of the single market to political union see THYM, *supra* note 10, at 342-8.

political maturity of European integration, when asymmetry allows division without fundamental rupture. Diversity of opinion over the future pace of the Union is explicitly recognized and accommodated in the overall framework of common rules and institutions.

### C. "Flexibility" in Chains?

So far, enhanced cooperation has not contributed widely to the facilitation of European integration. Instead, the Constitutional Treaty undertakes the third reform of its legal regime without a single case of application besides the pre-existing Schengen Protocol, which is legally construed as a specialized form of enhanced cooperation.<sup>27</sup> The only occasion when recourse to the procedure was seriously discussed was after Silvio Berlusconi's initial refusal to agree to the framework decision on the European Arrest Warrant in December 2001. The alternative of enhanced cooperation as a "veto-buster" contributed to the softening of the Italian opposition.<sup>28</sup> The limited practical impact of enhanced cooperation should however not be misinterpreted as the absence of any potential. The last section argued that its introduction did not stem from an underlying drive for a general "asymmetrization" of the European legal order. Rather, it offers a pragmatic compromise out of specific situations in which Member States disagree on the suitability of Union action. Arguably, such a situation has not arisen so far, since most projects could be realized among all. Nonetheless, many commentators hold the Treaty regime for enhanced cooperation responsible for its practical irrelevance.<sup>29</sup> This contribution, in contrast, intends to show that its substantive constraints (subsection I.) and procedural requirements (subsection II.) are not an excessive limitation.

#### I. Substantive Constraints

A closer analysis reveals that most substantive requirements laid down in Articles I-44 and III-416-423 CT are declaratory confirmations of general principles of

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<sup>27</sup> See art. 1 Schengen Protocol (= Protocol No. 17 attached to the CT).

<sup>28</sup> See Chairman of the EP-Committee on Justice and Home Affairs Graham Watson, *Go Ahead on Arrest Warrant Without Italy*, FINANCIAL TIMES, Dec. 8, 2001. The debate on the asymmetric introduction of carbon dioxide taxes never got off the ground; *Europas Umweltschützer fordern 'Öko-Schengen'*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 15, 2000. On corporate tax harmonization see *Leader: Strange Bedfellows*, *supra* note 18.

<sup>29</sup> See Giorgio Gaja, *How Flexible is Flexibility under the Amsterdam Treaty*, 35 COMMON MARKET LAW REVIEW 855, 870 (1998) (a criticism of the Amsterdam and Nice regimes); Wolfgang Wessels, *Die Vertragsreform von Nizza*, 24 INTEGRATION 8, 15 (2001) and Jo Shaw, *The Treaty of Nice: Legal and Constitutional Implications*, 7 EUROPEAN PUBLIC LAW 195, 202 (2001).

Community law. Among the hitherto “ten commandments” enshrined in EU Article 43(a)-(j), which are continued in different articles of Constitutional Treaty, the minimum threshold for Member State participation of one third is probably the most prominent and effective substantive constraint (excluding for example an enhanced cooperation of the “mythical” six founding members, which are often cited as the core of integration).<sup>30</sup> The numerous declaratory confirmations of general principles of Community law include the obligation to further the objectives of the Union and protect its interests.<sup>31</sup> Likewise, the obligation to comply with the Constitution and the existing *acquis* adopted with the participation of all Member States,<sup>32</sup> the necessary respect for the latter’s competencies, rights and obligations<sup>33</sup> and the condition to remain within the limits of the powers of the Union in line with the principle of conferral, are self-evident features of secondary European law. However, this excludes the exclusive competencies.<sup>34</sup>

Any asymmetric realization of Union policies in the economic or social field will, however, be measured by the standard of Article III-416 CT that it “shall not undermine the internal market or economic, social and territorial cohesion.” The legal interpretation of this clause defies easy definition and is further complicated by textual changes in the Constitutional Treaty which improve the literary quality of the text but blur its legal meaning. The Treaty of Nice is much clearer when it obliges enhanced cooperation not to undermine the internal market “as defined in Article 14(2) EC” and economic and social cohesion “in accordance with Title XVII EC”. Read in combination with the said references, the Treaty of Nice commands compliance with the fundamental freedoms explicitly referred to in Article 14(2)

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<sup>30</sup> The Amsterdam Treaty had originally required the participation of the *majority* of Member States, while the Treaty of Nice lowered the criterion to *eight* Member States in TEU art. 43(g), (8 are the majority of 15, but about one third of 25). The Constitution now returns to a relative threshold of one third in CT art. I-44(2).

<sup>31</sup> CT art. I-44(1); TEU art. 43(a). The additional requirement of protecting the Union’s interests and reinforcing the integration process does not constitute independent legal hurdles, since respect for them is arguably inherent in the Union’s objectives and assessed during the complicated authorization procedure discussed below.

<sup>32</sup> CT art. III-416(1); TEU art. 43(b) and (c).

<sup>33</sup> CT art. III-417 and TEU art. 43(h); the rather unclear Amsterdam obligation to respect the “interests” of the non-participating Member States had already been deleted by the Treaty of Nice. The remaining obligation stems logically from the limited geographic scope of asymmetric Union law.

<sup>34</sup> Explicitly TEU art. 43(d) and, without explicit reference to the principle of conferral, CT art. I-44(1). The deletion of the explicit reference to the principle of attributed powers does of course not entail that they are not bound by the principle of conferral under CT art. I-11(1), (EC Treaty art. 5(2)) as suggested by Janis A. Emmanouilidis & Claus Giering, *In Vielfalt geeint - Elemente der Differenzierung in Verfassungsentwurf*, 26 INTEGRATION 454, 457 (2003).

EC. Measures of “positive integration” such as the harmonization of national legislation in the environmental, social, tax or consumer protection field are therefore permitted as long as they respect the fundamental freedoms.<sup>35</sup> In this respect, asymmetry is again not treated any better or worse than regular Community law, which has to respect the fundamental freedoms as general principles of Community law alike.<sup>36</sup> In the same vein, the reference to economic and social cohesion read in combination with Title XVII EC guarantees the uniform continuation and financing of structural funds adopted on its basis.<sup>37</sup> The drafting history of the Constitutional Treaty suggests that the deletion of these references was motivated by stylistic considerations and did not intend a change of legal substance.<sup>38</sup>

The additional prohibition in Article III-416 CT to “constitute a barrier to or discrimination in trade between Member States” leads us even deeper into the eccentricities of European Treaty change and the challenge of multilingualism. Lack of space precludes a comprehensive presentation, but in short the following history supports my argument that the rule contains an additional obligation to respect fundamental freedoms and is therefore not as prohibitive as some commentators suggest.<sup>39</sup> The linguistic version of the Treaty of Amsterdam, *inter alia* in English and German, took up the wording of Article 30 EC and the Court’s *Dassonville* jurisprudence and obliged enhanced cooperation (then known as *closer* cooperation) not to constitute a “discrimination or restriction of trade between the Member States.”<sup>40</sup> Only the French version of the Amsterdam Treaty contained a different linguistic version and was, nonetheless, interpreted as a reference to the free movement of goods.<sup>41</sup> Comprehensibly, the French presidency based its reform

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<sup>35</sup> Elsewhere, I have given a more thorough analysis of this argument, including references to and discussion of possible alternative views. See THYM, *supra* note 10, at 68-9, 250-4.

<sup>36</sup> See, for instance, Case 240/83, *Procureur de la République v. ADBHU*, 1985 E.C.R. 539, para. 9.

<sup>37</sup> The transfer of structural funds such as the European Regional Development Fund (ERDF) into enhanced cooperation would have implied asymmetric financing in accordance with CT art. III-423, TEU art. 44a and would be in obvious conflict with the underlying principle of solidarity.

<sup>38</sup> The comment on the original proposal of a new art. J in *The European Convention*, CONV 723/03, (May 14, 2003), at 20 simply states that the wording was taken from the Treaty of Nice.

<sup>39</sup> E.g. Armin Hatje, *Art. 11 EGV*, in *EU-KOMMENTAR 11* (Jürgen Schwarze ed., 2000) (“entscheidend einschränkt”).

<sup>40</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 art. 11(1)(e) and, similarly, Case 8/74, *Procureur du Roi v. Benoît*, 1974 E.C.R. 837, para. 7.

<sup>41</sup> Three commentators work in different languages. See Helmut Kortenber (pseudonym), *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MARKET LAW REVIEW 833, 849 (1998); Rainer

proposals for the new Article 43(f) EU (now Article III-416 CT) on the French text of the Amsterdam Treaty during the IGC drafting the Treaty of Nice. The French presidency aligned the other linguistic versions to it, thereby eliminating the textual reference to Articles 28, 30 EC (Articles III-153-154 CT). Still, the drafting history and the absence of another convincing interpretation suggest that Article III-416 CT obliges enhanced cooperation to respect the free movement of goods.<sup>42</sup> Thus, the harmonization of national legislation on the environment, consumer protection, taxes and social standards is not generally excluded from the scope of enhanced cooperation, while the fundamental freedoms, as the “core” of the internal market, preserve a level-playing field of equality of Union citizens and economic actors.

## II. Procedural Requirements

If the substantive constraints for enhanced cooperation are largely declaratory confirmations of general principles of Community law, then it cannot be implied that any enhanced cooperation supported by at least one third of the Member States will eventually be put into practice. Instead, the Treaties foresee a sophisticated authorization procedure which, like any decision-making procedure, is meant to feed different political opinions into a formalized outcome. With respect to the procedural requirements, the institutions will first assess compliance with the substantive constraints discussed above, whose adjudication is eventually left to the Court of Justice in cases of conflict.<sup>43</sup> But compliance with the largely declaratory legal constraints will probably not dominate the debate (although many academic observers tend to overstretch the implications of the substantive constraints and underestimate the role of political considerations). The main purpose of the authorization and participation procedures is the exchange of political pros and cons of asymmetric progress. Various procedural safeguards guarantee that the decision is not hasted but thoroughly debated, thereby facilitating that the Union as a whole agrees with the asymmetric project, including the non-participating

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Hofmann, *Wie viel Flexibilität für welches Europa*, 34 *EUROPARECHT* 713, 724 (1999); and Constantinesco, *supra* note 13, at 761.

<sup>42</sup> I have developed this argument in more detail in Thym, *supra* note 10, at 69-72. There, I also show that the additional prohibition of distortions of competition in CT art. III-416, TEU art. 43(f) should be interpreted in line with EC competition law, *i.e.* the Commission is obliged to assess and explain possible distortions in its decision (not) to propose the authorization of enhanced cooperation under CT art. III-419(1), (EC Treaty art. 11(1)), while judicial review of these complex economic evaluations is largely confined to an examination of the underlying facts and the legal consequences the Commission deduces therefrom.

<sup>43</sup> Any Member State or institution may challenge the authorization to establish an enhanced cooperation (or the refusal of the Commission to present a proposal) in accordance with the general rules on access to the Court.

Member States. More specifically, the authorization and participation procedures are modeled on the "Community method," albeit with some modifications.

First, the Commission's role as gatekeeper of Union action is extended to the authorization of enhanced cooperation, even if it may only table a proposal after a request from the Member States who want to cooperate.<sup>44</sup> This divergence from Community orthodoxy was explicitly sought for by the Commission, since it lays the potentially politically divisive initiative for the launch of the procedure on national capitals and allows the Commission to focus on its role as neutral guardian of the Community interest without bias towards the "ins" or the "outs." The Constitutional Treaty reinforces the supranational element in the authorization procedure by giving Parliament a similar right to block any enhanced cooperation it deems harmful to the integration process.<sup>45</sup> Even now, Parliament needs to consent to the authorization of asymmetric cooperation in areas where the adoption of individual laws does not foresee co-decision, such as tax issues and social policy. Parliament may possibly even use the consent requirement as leverage to introduce co-decision within the future enhanced cooperation in line with Article 422(2) CT. However, the Council's eventual authorized decision must be adopted by a qualified majority in accordance with Articles I-23(3), 44(2), III-419(1) CT. Thus, an individual Member State may not block the go-ahead for asymmetric action, contrary to the Parliament and the Commission.<sup>46</sup>

It should be emphasized again that during the authorization procedure the institutions do not only assess compliance with the substantive constraints, but also exercise original political discretion on the suitability of asymmetric action. This political leeway contrasts with the facilitation of the later participation of an initial out, which is crucial to prevent asymmetric division from resulting in political rupture. Therefore, the European Treaties have always guaranteed the "essential principle of openness."<sup>47</sup> For example, any closer cooperation shall initially "be open to all Member States" (Article III-418(1) CT; Article 43(f), 43b EU) and the

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<sup>44</sup> CT art. III-419(1); EC Treaty art. 11(1); the specific procedure for criminal matters in Art. 40a EU is given up in the Constitution, but specificities continue in CFSP.

<sup>45</sup> Art. III-419(1) CT goes beyond TEU art. 45 and the Nice version of EC Treaty art. 11(2).

<sup>46</sup> The vote by qualified majority corresponds to EC Treaty art. 11(2) EC, while the Treaty of Nice's additional *renvoi* to the European Council without veto option has been abolished (under the Treaty of Amsterdam any Member State could veto the decision at this level). Only for CFSP unanimity is required under CT art. I-23(3), III-419(2). On the harmonization of criminal law see the specific rules *in* CT art. III-270(3), (4) and CT art. III-271(3), (4).

<sup>47</sup> Claus Dieter Ehlermann, *Differentiation, Flexibility, Closer Co-operation*, 4 EUROPEAN LAW JOURNAL 246, 254 (1998).



Commission shall, upon request and without the participation of any other institution, “confirm the participation of the Member State concerned” (Article III-420(1) CT). The Constitutional Treaty therefore seems to exclude any political discretion on the side of the Commission, let alone a veto of the “ins”. The non-fulfillment of “conditions of participation laid down in the European authorization decision” is the only ground on which the desire to participate may be rejected.<sup>48</sup> The concept of participation criteria is modeled on the convergence criteria of monetary union and the Schengen evaluation procedure. However, this ignores the political character of asymmetry, which says that participation shall *not* be obligatory, if the criteria are met like in monetary union or under the Schengen system.<sup>49</sup> One may therefore question the rationale behind the new participation conditions, since questions of political preference will eventually continue to characterize the composition of asymmetric integration groups, with the initial outs having no right to participate.

#### D. Asymmetric Constitutionalism

The European Union is, much more than the nation state, a creation of the law whose abstract equality and normative neutrality have always been crucial tools used to overcome the national differences between European states and integrate them into a supranational legal order. In other words, “a Community based on the rule of law,”<sup>50</sup> or as Hallstein observed thirty years ago: “equality results in unity – this is the rationale behind the Treaty of Rome.”<sup>51</sup> It has been mentioned at the outset that there is an undeniable tension between the different forms of asymmetry and the concept of legal and political unity which has characterized the discourse on European integration for many years. This focus on the unifying, centripetal elements was crucial to overcome the divisions of the past and “forge a common destiny.”<sup>52</sup> But given the advance of European integration towards political union, the time had eventually become ripe for the integration of the existing diverse and potentially centrifugal forces into the European constitution by

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<sup>48</sup> See Treaty Establishing a Constitution for Europe art. III-418(1) and art. III-420(1).

<sup>49</sup> Comment on European Convention, *supra* note 38, at 10, 22 explicitly refer to monetary union and the Schengen evaluation procedure under Art. 3(2) of the 2003 Act of Accession (which is no example of asymmetry, since the new Member States are – contrary to the UK and Ireland – members of the Schengen group, with the duration of the transition period depending on technical adaptations; see Thym, *supra* note 10, at 114-8).

<sup>50</sup> Opinion Case C-1/91, *European Economic Area*, 1991 E.C.R. I-6079, para 21.

<sup>51</sup> WALTER HALLSTEIN, *DER UNVOLLLENDETE BUNDESSTAAT* 33 (1969) (author’s translation).

<sup>52</sup> CT, Preamble Recital 3.

diffusing latent tensions and uniting Europe in diversity.<sup>53</sup> The achievement of the specific Treaty regime of enhanced cooperation discussed above, and indeed of asymmetry in general, is their harmonious integration into the existing institutional and legal order of the European Union, thereby allowing it the pursuit of its constitutional aspirations.

First, asymmetry continues the European logic of integration through law. Its constitutional norms have been introduced into its legal order through successive Treaty amendments, which were ratified by national Parliaments and are, therefore, an integral part of European primary law. They share its hierarchical primacy over secondary European law. Scope, substantive constraints of and procedural requirements for enhanced cooperation and other forms of asymmetry are explicitly laid down in detailed Treaty provisions. One may criticize them for their lack of readability, but they are of no greater or lesser legal value than any other rule of the Constitutional Treaty. These characteristics, which did not characterize the legally dubious 1992 Edinburgh compromise on Denmark following its initial rejection of the Maastricht Treaty, and the opaque legal construction of the Agreement on Social Policy, which were both heavily criticized by Curtin in her comment on a Europe of “bits and pieces” (with both of these legal problem areas being “resolved” by the Treaty of Amsterdam). Interestingly, the most explicit constitutional rule on asymmetry of the time, the British opt-out from monetary union, was not prominently featured among Curtin’s points of criticism.<sup>54</sup>

Long before the present debate on European asymmetry, Hans Kelsen had recognized the possible need for substantive differentiation within a single legal order held together by its constitution:

When individual rules of one legal order do have a divergent geographic scope of application, different normative regimes apply to different parts of that order. The formal unity of a legal unity does not necessarily entail substantive uniformity... Among the various reasons calling for differentiated geographic

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<sup>53</sup> See von Bogdandy, *supra* note 26, 184-202, and Armin Hatje, *Grenzen der Flexibilität einer erweiterten Europäischen Union*, 40 *EUROPARECHT* 148 (2005) (on the asymmetric accommodation of diversity and section B above and on the sequence of the principles of unity and diversity among Europe’s “constitutional principles”).

<sup>54</sup> Curtin, *supra* note 15, at 51-2 only debates whether the present EC Treaty Art. 10 may be invoked to oblige the UK to rejoin the advance group at some point at the future. Unfortunately, ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* 449 (2001) extends this criticism to later forms of asymmetry such as enhanced cooperation without analyzing their difference in form and substance.

treatment ... greater geographic reach and heterogeneity of living conditions usually entail more specificity.<sup>55</sup>

Indeed, the European Union is not the only federal entity with asymmetric arrangements: At the height of the nation state, historic forms of asymmetry, such as the Austrian-Hungarian Empire, were usually associated with secession and eventual break-up. This led Georg Jellinek to conclude that they were “elements of an incomplete or disorganized state.”<sup>56</sup> But modern experiences with asymmetric federalism are much more positive. Various degrees of asymmetric federalism and quasi-federalist regionalization in the United Kingdom, Canada, Spain, Belgium and Finland have arguably contributed to the stabilization of divisive conflicts and the accommodation of diversity in obvious resemblance to asymmetry in the European Treaties.<sup>57</sup>

The legal unity of European law as a single legal order united by the Constitutional Treaty and encompassing asymmetric and symmetric law alike is primarily of dogmatic interest. In practice, the preservation of the distinctive features of European law is pivotal for the maintenance of its supranational character. It is therefore central to the integration of asymmetry into the European constitutional order that it preserves its principles, such as the primacy of European law, its direct effect and uniform interpretation in cases of limited geographic scope, the commands for respect of the fundamental freedoms and the principle of non-discrimination, and the call for mutual respect and loyalty of the Union and the Member States, even if some of the latter are not bound by its rules, but maintain the implied external powers of the Union.<sup>58</sup> If enhanced cooperation and the other forms of asymmetry had transcended these characteristics, European law may well continue to constitute a single constitutional order, but its distinguishing supranational features on which its success is arguably based would have been lost. The procedural and legal limits flowing from the preservation of Europe’s constitutional principles may in many cases prevent immediate groupings of some Member States. This would tempt them to cooperate outside the legal and

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<sup>55</sup> HANS KELSEN, *ALLGEMEINE STAATSLEHRE* 165 (1925) (author’s translation).

<sup>56</sup> GEORG JELLINEK, *STAATSLEHRE* 642 (2<sup>nd</sup> ed. 1905) (author’s translation).

<sup>57</sup> See the overview FLEXIBILITY IN CONSTITUTIONS, (Annette Schrauwen ed., 2<sup>nd</sup> ed. 2002).

<sup>58</sup> The maintenance of these characteristic principles of EU law stems from the deliberations above and is dealt with in THYM, *supra* note 10, at 233-268.

institutional framework of the Union on the basis of classic international law, but preserve the identity of the European Union and its constitutional order.<sup>59</sup>

A second important and arguably indispensable component of European constitutionalism is the single institutional framework and the respective roles of the institutions under the Community method and its deviations. Indeed, questions of institutional design and procedural arrangements have always been a means of organizational unity building, channeling the different political positions towards agreement. This applies to inter-institutional procedural rules in the same way it does to intra-institutional debates in the Parliament, the Commission and the Council. It is therefore essential that the authorization and participation procedures for asymmetric arrangements continue the path of procedural equation, reflecting the positive experiences with the Community method (*supra*, section C.II). Moreover, the regular institutional rules do of course apply inside enhanced cooperation when individual measures are debated and eventually adopted. Thus, an agreement for a framework of laws on tax harmonization or consumer protection binding 22 Member States does, for example, require compliance with the regular decision-making procedures.<sup>60</sup> This is because the adoption of asymmetric laws must, as any other European law, comply with the Constitutional Treaty and its procedural requirements.<sup>61</sup> Existing specific institutional regimes in asymmetric policy areas, such as monetary union or justice and home affairs are not conceptually related to their asymmetry and would not change if the United Kingdom and the other outs would joined the avant-garde and adopt a single currency. Contrary to international law-style cooperation outside the institutional and legal framework of the Union asymmetry is not a backdoor that allows a deviation from the regular decision-making procedures and the Community method.<sup>62</sup>

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<sup>59</sup> See Bruno de Witte, "Old Flexibility", in CONSTITUTIONAL CHANGE IN THE EU, *supra* note 6, at 31-58; THYM, *supra* note 10, at 181-202, 297-320, (on the cooperation of some Member States the important contribution).

<sup>60</sup> Which *in casu* are the ordinary legislative procedure (hitherto known as co-decision) for consumer protection (Treaty Establishing a Constitution for Europe art. I-34(1), III-235) a unanimous Council decision after consultation of the Parliament for tax harmonization (Treaty Establishing a Constitution for Europe art. III-171).

<sup>61</sup> Treaty Establishing a Constitution for Europe art. III-416; the specific (and declaratory) obligation to respect "the relevant institutional provisions" of the Treaties in TEU art. 44(1) was not integrated in the constitutional Treaty.

<sup>62</sup> As remarked incorrectly by Werner Schröder, *Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften*, in von Bogdandy, *supra* note 26, at 413-4. Unfortunately, the wording of Treaty Establishing a Constitution for Europe Art. I-44(1), TEU art. 43 may be misunderstood in this respect when it refers to enhanced cooperation allowing some Member States to "make use" of the Union's institutions and procedures.

Eventually, it should also be highlighted that the intra-institutional rules on composition, deliberation and voting are only marginally adapted in cases of asymmetry. The unchanged institutional set-up of the supranational institutions Commission, Parliament and Court of Justice is of particular importance, because it symbolizes and enhances the integration of asymmetry into the Union's single constitutional order. While the unaffected composition of the Court and the Commission is conceptually not surprising in light of the formal independence of its members, the continued voting rights of all MEPs may be contested in the same way as in other asymmetric federal settings.<sup>63</sup> It may seem undemocratic not to suspend the voting rights of MEPs elected by citizens to whom a law under debate will not apply may seem undemocratic. However, it serves as a unitary element guaranteeing that the potential objections of the outs are taken seriously. In the same sense, the equal participation of all Member States in the deliberations of the Council and its working groups (with the exception of the Euro Group outside the Treaty framework<sup>64</sup>) guarantees a continued dialogue. In contrast, the suspension of a national right to vote on individual measures in the Council is the natural consequence of the legitimate national decision not to participate.<sup>65</sup> The otherwise unchanged intra-institutional set-up guarantees that the legal differentiation of asymmetry does not lead to political rupture.

#### **E. Outlook: New Dynamics?**

The integration of enhanced cooperation and other forms of flexibility in the European constitutional order allows Europe to accommodate diversity and adopt laws with limited geographic scope without political exclusion and rupture. Besides the existing forms of asymmetry the general mechanism for enhanced cooperation remains an offer which the Union may have recourse to when the regular legislative process leads to a dead end. In this respect, the Constitutional Treaty does not entail fundamental changes, because the substantive constraints and procedural requirements of enhanced cooperation remain largely unchanged. But in one respect, the Constitutional Treaty will considerably enhance the attractiveness of asymmetric arrangements. At the very last moment, the European Convention introduced a clause on the asymmetric introduction of qualified

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<sup>63</sup> Such as the classic British debate on the "West Lothian Question" concerning the voting rights of Scottish MPs in matters devolved to the Scottish Parliament (but decided in Westminster for England).

<sup>64</sup> CT Protocol No. 12 does not change its legal nature as an informal "talking shop" with decisions being taken in the regular Ecofin Council; THYM, *supra* note 10, at 143-9.

<sup>65</sup> CT art. I-44(3); TEU art. 44(1).

majority voting within asymmetric arrangements.<sup>66</sup> Thus, some Member States may for example embark on the harmonization of tax law, including qualified majority voting the Council without non-participating Member States being able to unilaterally veto this move. Again, it remains to be seen whether developments in the years ahead will activate this potentially wide-ranging clause. It underlines the continued importance of enhanced cooperation as a means of maintaining the dynamics of the European Union in the age of the Constitutional Treaty. If the latter fails in the ratification process, the Treaties' existing mechanism for enhanced cooperation also provides a means for preserving the limited integration dynamics inside the present institutional and legal framework of the Union.

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<sup>66</sup> CT art. III-422(2) was first proposed in the text submitted to the Convention for its *last* working session – one day before the text was solemnly adopted by consensus; The European Convention, CONV 847/03, (July 9, 2003). Its reference to Treaty Establishing a Constitution for Europe art. I-44(3) clearly indicates that the *outs* may not block the move towards qualified majority voting.



## *Comment on Daniel Thym - United in Diversity or Diversified in the Union?*

*By Michał Kowalski\**

### **A. Introduction**

In his text, Daniel Thym presents in a persuasive manner, a comprehensive look at the institution of enhanced cooperation in the context of the European Union (EU) constitutional order.<sup>1</sup> It is especially important that the institution of enhanced cooperation be presented in a broader context of differentiated integration and related mechanisms - labelled as asymmetric - when introduced into the European legal order. This comment, within its framework, is only intended to refer to three specific issues. First, how the enhanced cooperation is perceived in Poland; second, to its alleged democratic potential; and third, to its character in the process of constitutionalization.

### **B. Asymmetry and Poland**

Since the enhanced cooperation, known at that time as the closer cooperation, was introduced into the European law, it has been generally perceived as a threat to Poland, as well as, to other acceding countries. Such an approach has been especially true for political discourse; however, it has also been reflected in legal discourse.<sup>2</sup> Generally, enhanced cooperation was often perceived, both in political, as well as in legal discourse, as a threat in the sense that it might result in the emergence of category B membership status of states not being able for objective reasons, *e.g.* of economic character, to participate in the enhanced forms of

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<sup>1</sup> See Thym, in this volume.

<sup>2</sup> Yet, it should be noted that the issue has not been in the centre of the EU legal discourse in Poland and the first comprehensive monograph in Polish on enhanced cooperation and other asymmetric mechanisms was published only in 2005. See MONIKA SZWARC, ZRÓZNICOWANA INTEGRACJA I WZMOCNIONA WSPÓLPRACA W PRAWIE UNII EUROPEJSKIEJ [DIFFERENTIATED INTEGRATION AND ENHANCED COOPERATION IN THE EUROPEAN UNION LAW] (2005).



integration. Also, despite its last resort character, it was perceived as a possible means of putting irresistible pressure on a particular (weaker) Member State, instead of seeking an acceptable compromise for all. As such, the institution of enhanced cooperation was, to some extent, perceived as a potential danger to the principles of unity, solidarity and equity of the Member States.<sup>3</sup> Some commentators, however, noted the positive outcomes of asymmetric mechanisms previously applied.<sup>4</sup> Nevertheless, in the official statement by the Polish Government on the Treaty of Nice presented in 2001 by the then Minister of Foreign Affairs, Władysław Bartoszewski, the mechanism of enhanced cooperation was characterized as the effective instrument for flexible integration on the one hand and the instrument for open formula guaranteeing participation to all Member States on the other hand.<sup>5</sup>

The public debate on the Constitutional Treaty in Poland with regards to becoming a Member State, in the meantime, has made almost no reference to the institution of enhanced cooperation. However, it must be noted that it has been generally limited to only two main issues, the preamble in context of the missing direct reference to Christian values, and the voting system within the Council. Also, the issue of enhanced cooperation has not been the center of interest within the Polish legal discourse, in which the general position equal to that of Władysław Bartoszewski and quoted above, seems to be accepted.

Especially following the recent outcomes of referenda in France and the Netherlands, enhanced cooperation has returned as one of the possible options, which might be applied, if the ratification process of the Constitutional Treaty fails. Prior to the French and Dutch 'no,' the Prime Minister, Marek Belka, expressed in an interview for the *Rzeczpospolita* daily, his serious concerns that a failure of the Constitutional Treaty ratification process may lead to a multi-speed Europe.<sup>6</sup> A negative attitude, in this respect, was also presented by the Minister of Foreign Affairs, Adam Rotfeld; already after the mentioned referenda.<sup>7</sup> Indeed, the failure

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<sup>3</sup> Sławomir Dudzik, "Enhanced Cooperation" *Between EU Member States – An Opportunity or a Threat to Poland*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 239 (Adam Bodnar et al. eds., 2003); see, e.g., Brygida Kuźniak, *Komentarz do TUE art. 43-45 [Commentary to TEU art. 43-45]*, in *TRAKTAT O UNII EUROPEJSKIEJ. KOMENTARZ [TREATY ON THE EUROPEAN UNION. COMMENTARY]*, 461, 464 (Kazimierz Lankosz Ed., 2003).

<sup>4</sup> Władysław Czapliński, *Koncepcja ściślejszej współpracy w prawie Unii Europejskiej [The Concept of Closer Cooperation in the European Union Law]*, 3-4 *STUDIA PRAWNICZE* 75, 89 (2001).

<sup>5</sup> *TRAKTAT Z NICEI - POLSKI PUNKT WIDZENIA [The Treaty of Nice - the Polish Standpoint]* (2001).

<sup>6</sup> *RZECZPOSPOLITA* of 4 May 2005, A5.

<sup>7</sup> *RZECZPOSPOLITA* of 16 June 2005, A10.

of the Constitutional Treaty may result in diversification of the further integration process and in consequence of the legal status of Member States. Putting the mechanism of enhanced cooperation into practice, under the present regime, seems to be one of the possible scenarios aimed at introducing at least some institutions of the Constitutional Treaty only among some Member States. However, the substantive constraints and procedural requirements of enhanced cooperation under the present regime create excessive limitations in this respect, e.g. for introducing institutional changes.<sup>8</sup>

### C. Asymmetry and Democratization

Daniel Thym supports the opinion that asymmetry, including the enhanced cooperation mechanism, holds a remarkable "democratic potential" as it manifests itself 'by allowing respect for national democratic majorities. Without this majority, which otherwise, might be cast in the role of a European minority. This would prevent the realization of majority rule in Europe.'<sup>9</sup> This statement is disputable.

Democratic standards within Member States, which obviously remain out of the question, do not seem to be either positively or negatively affected by asymmetric mechanisms. The democratic legitimacy of the EU does not seem to be affected, either. Even if we assume otherwise, it may be argued that the application of the enhanced cooperation rather tends to weaken the democratic legitimacy of the EU. Art. I-1 CT states that the EU is established due to 'the will of the citizens and States of Europe to build a common future.' It shows that the democratic legitimacy of the EU is of dual character, that is, directly given by the citizens, as well as, given by the Member States.<sup>10</sup> In this context, it should be taken into account that asymmetric mechanisms applied so far have been determined in specific norms of primary law and, as such, must have been accepted by all Member States through adequate ratification procedures. Thus, the legitimacy of introduced asymmetric mechanisms was ensured. What is more, in consequence non-participating Member States, although not bound by the new mechanisms, must have also approved their

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<sup>8</sup> See Stanisław Biernat, *Możliwe następstwa odmowy ratyfikacji traktatu konstytucyjnego przez jedno lub kilka państw członkowskich* [Possible Consequences of Constitutional Treaty Ratification Refusal in One or More Member States], in KONSTYTUCJA DLA EUROPY: PRZYSZŁY FUNDAMENT UNII EUROPEJSKIEJ [CONSTITUTION FOR EUROPE: FUTURE FUNDAMENT OF THE EUROPEAN UNION] 453, 469 (Sławomir Dudzik ed., 2005).

<sup>9</sup> Thym, *supra* note 1, at para. 9 (referring to Armin von Bogdandy, *Europäische Prinzipienlehre*, in EUROPÄISCHES VERFASSUNGSRECHT 149, 180 (von Bogdandy ed., 2003)).

<sup>10</sup> Cezary Mik, *Legitymacja demokratyczna Unii Europejskiej w świetle Traktatu Konstytucyjnego* [Democratic Legitimacy of the EU in the Light of Constitutional Treaty], in DEMOKRATYZACJA I WZMOCNIENIE LEGITYMACJI UNII EUROPEJSKIEJ [DEMOCRATIZATION AND LEGITIMACY STRENGTHENING OF THE EUROPEAN UNION] 18, 22 (Jan Barcz ed., 2005).

introduction to the European legal order.<sup>11</sup> In contrast, the possible future application of enhanced cooperation is dependent only on the provided general authorization procedure, with the Commission as the gatekeeper enjoying significant political discretion.<sup>12</sup> In this case, the democratic potential of enhanced cooperation remains rather questionable.

However, with at least one point, asymmetry, to a limited extent, seems to hold democratic potential, namely concerning transparency. Obviously it is not meant to suggest that asymmetric mechanisms, including enhanced cooperation, lead to the improvement of transparency within the EU. On the contrary, if enhanced cooperation were extensively applied, which would result in many co-existing legal regimes in particular policy areas, the transparency within the EU would only suffer. Nevertheless, asymmetric measures taken within the EU are generally more transparent than analogous measures taken by the Member States outside of the EU legal framework. The example of Schengen is significant in this respect. Indeed, the integration of the Schengen law into the European legal order greatly improved the transparency of the measures taken. Therefore, as enhanced cooperation forms an offer which should stop some Member States from seeking a legal framework for mutual cooperation outside the EU, it prevents the emergence of non-transparent legal regimes.

#### D. Asymmetry and Constitutionalization

I share the opinion that the asymmetric mechanisms in the European legal order seem to be a reliable and utilitarian offer, ensuring the further dynamics of the integration process. With regards to enhanced cooperation, however, much will depend on the scale used to put the mechanism into practice and the assessment of its actual operation. Nevertheless, the supposition that *'the asymmetric non-participation of individual Member States in selected areas of Union activity [...] does not contradict its constitutional aspirations, thereby giving substance to the Union's new motto "United in Diversity"'*<sup>13</sup> seems highly questionable. The EU constitutional aspirations manifest themselves in the constitutionalization of the European legal order. This may be understood as a transformation of the legal order from a public international legal character to a constitutional legal character, and its progressing

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<sup>11</sup> See Sławomir Dudzik, *Mechanizm wzmocnionej współpracy na tle konstytucyjnych zasad porządku prawnego Unii Europejskiej* [Enhanced Cooperation Mechanism in the Perspective of Constitutional Principles of the EU Legal Order], 1 KWARTALNIK PRAWA PUBLICZNEGO 7, 22 (2003).

<sup>12</sup> Thym, *supra* note 1, at para. 15.

<sup>13</sup> Thym, *supra* note 1, at para. 1.

consolidation.<sup>14</sup> Yet, asymmetric mechanisms lead to the diversification of the European legal order and the legal status of the EU Member States. Consequently, and more importantly, it leads to the diversification of the legal status of the EU citizens, and as such, may hardly contribute to the process. Rather, asymmetry seems to be an obstacle in the process of constitutionalization of the European legal order as it originates from different ideas within Member States on the scale of the European integration. The level of diversification of the European legal order seems to be decisive in this respect. Still, the motto, 'United in Diversity,' refers to the respect for various European identities, cultures, traditions that should not be destroyed or hindered by European integration, and not to the diversification of legal statuses on the EU level.

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<sup>14</sup> Frank Schorkopf, *Constitutionalization or a Constitution for the European Union*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION*, *supra* note 3, at 1, 11-12.



## Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?

By Jochen Herbst\*

### A. Introductory Notes: The Withdrawal Debate *De Lege Lata*

Discussing the withdrawal provision pursuant to Article I-60 of the Constitutional Treaty (CT), also referred to as the sunset clause, in the morning light of the establishment of a European Constitution is pretty much like talking about divorce on your wedding day. Before I try to start analyzing the text of this new provision, I will briefly outline the status of the legal debate on the right of withdrawal from the current EU/EC Treaty. In this context, I would like to highlight three aspects by making one political and two legal observations.

Firstly, to mention only one aspect of the political reality, withdrawal from an international organization, in particular a withdrawal from the EU, is a drastic step. It indicates that a member state has been unable to express its needs adequately in the organization. In this situation, withdrawal serves as a last resort of the respective member state.

Secondly, whatever legal position one may take, either based on a European autonomist view or on a rather traditional public international law-inspired perspective: there can be no serious doubt that, currently, there exists no unlimited right of an EU Member State to withdraw from the Union, *i.e.* without any further prerequisites and simply at the free discretion of the respective Member State, within the confines of its internal (constitutional) law provisions. Instead, the Vienna Convention on the Law of Treaties does not provide for such a virtually unlimited withdrawal right, but rather sets forth strict limitations for the exercise of a withdrawal right.

Thirdly, when applying a modern European law approach, taking into account the well-established jurisprudence of the ECJ, the Member States of the EU may no

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longer dispose of the key elements of the current European legal order. The respective reasoning of the Court is primarily still based on the conclusion that “the Community constitutes a new legal order of international law [...] the subjects of which comprise not only Member States but also their nationals.” And the ECJ continues that “[i]ndependently of the legislation of Member States, community law [...] therefore not only imposes obligations on individuals but also intended to confer upon them rights which become part of their legal heritage.”<sup>1</sup>

### **B. Some Thoughts and Open Issues Regarding the New Right to Withdraw from The Union**

Article I-60(1) CT, in my opinion, provides for a right of the individual Member State to withdraw from the Union at its free discretion simply by applying its internal, constitutional law provisions. This view is supported by the drafting history of the sunset clause.<sup>2</sup> In contrast to, *e.g.*, a Cologne doctoral thesis on the Union’s solidarity principle,<sup>3</sup> I thus particularly hesitate to limit the express right to withdraw as such by referring to more general principles both under the Community Treaties and the Constitutional Treaty, such as solidarity or loyalty of the Member States.

How will such right to withdraw be implemented according to Article I-60 CT? First of all, the Member State wishing to withdraw from the EU notifies the European Council of such intention (para. 1). As such, this notification does not have any direct terminating legal effect. Instead, a minimum period of two years, which may be best described as a notice period, for negotiating the terms and

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<sup>1</sup> See ECJ, Case C-26/62, *van Gend & Loos*, 1963 E.C.R. 1. Similarly, in its first opinion on the EEA Treaty, the ECJ held that, in contrast to the European Economic Area, which was established on the basis of an international treaty merely creating rights and obligations between the Contracting Parties and not providing for a transfer of sovereign rights to the respective inter-governmental institutions, the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. According to the ECJ, the Community Treaties established a new legal order for the benefit of which the states have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals; the essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions. See Case C-1/91, 1991 E.C.R. I-6079, 6102.

<sup>2</sup> To date, all proposals and suggestions for a respective amendment of the sunset clause have been rejected. The documentation of the drafting process and the proposed amendments of Article I-60 Constitutional Treaty are available at <http://european-convention.eu.int/amendments.asp?content=46&lang=EN>.

<sup>3</sup> See PETER GUSSONE, *DAS SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION UND SEINE GRENZEN* (forthcoming 2006).

conditions of a withdrawal and its implementation in the form of a withdrawal implementation agreement, is triggered by the Member State's notification to the European Council.<sup>4</sup>

Pursuant to Article I-60(2), sentence 1 CT, the withdrawal implementation agreement needs to take account of the framework for the "future relationship" between the withdrawing Member State and the EU. As it appears, the drafters of the Constitutional Treaty thus assume that some kind of (legal) relationship will still remain between the Union and the withdrawing Member State even after the withdrawal has come into effect. Furthermore, the withdrawal implementation agreement will need to determine the effective date as well as all terms and conditions of the withdrawal because Article I-60 CT does not directly deal with these issues. Most importantly, though not expressly mentioned in the provision, any legal consequences of the withdrawal regarding the rights and obligations for any natural persons and legal entities affected by the withdrawal need to be dealt with. In the absence of a well-drafted withdrawal implementation agreement, the specific legal consequences will remain open to doubt. What, for instance, should happen to the employees of the Union who are nationals of the withdrawing Member State? What will be the fate of the Union's offices on the territory of the withdrawing Member State? And can nationals of the withdrawing Member State still be eligible for scholarships sponsored by the EU? Is the withdrawing Member State obligated to pay its outstanding contributions?<sup>5</sup> What happens, *e.g.*, to damage claims by individuals based on European law against the withdrawing Member State which were already brought before the ECJ during the two-year notice period but which have neither been satisfied nor even adjudicated by the effective date of the withdrawal? The latter question *e.g.* involves aspects of both substantive and procedural law. On the other hand, regarding the legal consequences arising from withdrawal, para.3 of the withdrawal provision stipulates that the Constitutional Treaty shall "cease to apply" to the withdrawing Member State as of the effective date of the withdrawal. If this questionable provision were to be construed as prohibiting interim and grandfathering provisions in a withdrawal implementation agreement, the drafters of such an agreement would have a hard time finding practicable solutions regarding ongoing legal relationships such as cases pending before the ECJ, etc. Bearing the complexity of these issues in mind, I am convinced that the two-year notice period,

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<sup>4</sup> In this context, I suspect that the two-year notice period for withdrawal is related to the Union's experience in the Greenland case. In this case, the withdrawal implementation took approximately 2.5 years to take effect.

<sup>5</sup> Regarding further issues, *see* KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 126 (2004).



as a general rule, is far too short for negotiating and concluding a withdrawal implementation agreement in an “average” Member State withdrawal case.

Although the latter issues are crucial elements of any withdrawal, the conclusion of a withdrawal implementation agreement is, again, not a precondition for the withdrawal by a Member State taking effect. Having said that, both the Union and the withdrawing Member State will have a vital interest in concluding a withdrawal implementation agreement. It needs to be noted in this context, however, that an express legal obligation to negotiate and conclude such agreement is only imposed on the Council, not on the withdrawing Member State (see Article I-60(1) CT). And how do the withdrawing Member State’s “own constitutional requirements” referred to in Article I-60(1) of the Constitutional Treaty fit into the timetable of the negotiation process regarding the withdrawal implementation agreement? In Germany, for instance, such constitutional requirements for a withdrawal of the Federal Republic of Germany would include an amendment of the German Basic Law (*Grundgesetz*), to be resolved in accordance with Article 79(2) of the German Basic Law by two-third majorities in both the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). Such constitutional amendment procedure would certainly need to be launched prior to the conclusion of the withdrawal implementation agreement, or even before the decision to withdraw at the European level was taken. And what if, during the negotiation process, the Member State revokes its withdrawal decision?

Despite the fact that the withdrawal implementation is no “reverse agreement” in relation to the admission agreement previously concluded between the Member States and the candidate state (Article 49(2) EU Treaty; Article I-58(2) CT), it is noteworthy that the withdrawal implementation agreement is negotiated and concluded between the withdrawing Member State on the one hand and the Council, but not the Member States, on the other hand.

Finally, I would like to turn to the most fundamental issue arising under the Article I-60 of the Constitutional Treaty. As already stated above, I understand that Article I-60 CT provides for a virtually unlimited right of withdrawal from the Union by a Member State. Bearing in mind my two introductory legal observations, and based on the legal view expressed by the ECJ as broadly interpreted by certain authors,<sup>6</sup> the legality of the introduction of the new withdrawal right into the Community legal order could well be challenged if one assumes that European integration is irreversible, and that the Member States have waived their right to dissolve the Union, even by unanimous agreement, and that a point of no return in

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<sup>6</sup> For a brief summary of this legal debate, *see id.*, at 28-9.

the European integration process has been reached. According to such a line of reasoning, the Member States are no longer the “masters of the treaties” because they have irreversibly vested third parties, namely the nationals of the Member States, with a legal heritage of rights. How can these Member States now claim the power, by acting collectively, to infringe such a legal heritage of third-party rights by creating the Constitutional Treaty and introducing a withdrawal provision, which ultimately, though theoretically, allows for a dissolution of the EU by way of multiple withdrawal notifications launched by all but one Member State? Bearing in mind the principle of sovereign equality of Member States, Article I-60 CT cannot be interpreted or construed in such a way that it allows only a certain number of Member States to withdraw from the Union on a “first come – first served” basis.

At the same time, however, the Council is vested with the power and responsibility to negotiate and conclude the withdrawal implementation agreement. By exercising this power and responsibility, the Council, as opposed to the Member States, thus also acts as a treasurer and custodian of the “legal heritage of rights” of the individuals emphasized by the ECJ in its well-established jurisprudence. The latter is, in my opinion, the key to understanding the withdrawal provision, which is an attempt to harmonize traditional, state-centered sovereignty and the more modern type of sovereignty or autonomy of supranational organizations. By highlighting the concept of the Council being the treasurer of the EU individuals’ legal heritage of rights in the context of a withdrawal by Member States (to be implemented by way of a withdrawal implementation agreement), Article I-60 CT provides for a model to harmonize the latter two types of sovereignty. At the same time, the involvement of the Council in the withdrawal process, therefore, adequately deals with and removes any concerns regarding (i) individuals’ rights and (ii) the legality of Article I-60 of the Constitutional Treaty itself.

### **C. Conclusion**

In a 1946 essay, George Orwell perfectly captured the fundamental tension between international organizations and their member states, namely that organizations are, at one and the same time, independent of their member states, and fundamentally dependent on them.<sup>7</sup> Nowhere in the Constitutional Treaty is this tension as clearly expressed as in Article I-60(1). On the other hand, the recent case before the Spanish Constitutional Court<sup>8</sup> clearly indicates that the right to withdraw will have a promoting effect on the European integration process rather than being a

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<sup>7</sup> See GEORGE ORWELL, *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL*. VOLUME 4: *IN FRONT OF YOUR NOSE*, 1945-1950, 152, 153 (1968). See also KLABBERS, *supra* note 5, at 39-40.

<sup>8</sup> For details on this case, see Bast, in this volume.

contradictory and explosive element. Joseph Weiler has convincingly demonstrated that insisting on the impossibility of withdrawal might be counterproductive, especially in an organization like the EU.<sup>9</sup> A decision by one Member State of the Union to withdraw would be greeted, be it with regret or relief – but it would ultimately be accepted. If a Member State of the Union cannot accept its obligations in the EU, it will be the lesser evil to allow that state to withdraw, even unilaterally. Adhering to political realities, Article I-60(1) CT allows for unilateral withdrawal at the Member State's own discretion.

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<sup>9</sup> See Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISRAEL LAW REVIEW 282, 287 (1985).

## Fundamental Rights Concerning Biomedicine in the Constitutional Treaty and their Effect on the Diverse Legal Systems of Member States

By *Atina Krajewska\**

### A. Introduction

The Constitutional Treaty<sup>1</sup> was thought to address the new challenges occurring in front of the enlarged Europe in relation to the rapidly changing international political, economic, social and cultural circumstances. In this respect, the problem of the new quality of the European Union is being repeatedly disputed. If the EU is to be something more than an arrangement for inter-state cooperation, the Union has to be able to act rationally on a collective basis, in a way that different interests or preferences will give priority to seeking agreement over self-interest maximization. The question of whether the EU envisaged in the Constitutional Treaty represents a deeper form of integration can be answered by examining its ability to achieve consensus on conflicting issues and to form a common will about how to solve common problems.<sup>2</sup> The field in which the most controversies arise nowadays is that of biotechnology and biomedicine.

Through the decoding of the human genome and development of biotechnologies we gain control over processes, which until now seemed to be uncontrollable and unforeseeable. The “line between the chance and the choice, forming the basis of our value system is shifting”<sup>3</sup>. This change is marked by great ambivalence. On the one hand, the advance of biological sciences carries a promise of benefit to humans,

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<sup>1</sup> Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 53 (hereinafter CT).

<sup>2</sup> E.O.Eriksen, *The question of Deliberative Supranationalism in the EU*, 43 (Arena, Working Paper No. 99,1999), available at [www.arena.uio.no/publications/wp99\\_4.htm](http://www.arena.uio.no/publications/wp99_4.htm).

<sup>3</sup> JUERGEN HABERMAS, *THE FUTURE OF THE HUMAN NATURE* 25 (2003).

since combined efforts of reproduction medicine and genetic engineering open up the prospect of gene-modifying interventions for therapeutic goals. On the other hand, modern genetics enables the cloning of human beings and gene manipulations, which may lead us to eugenic practices – entirely discredited in the course of the 20<sup>th</sup> century. This prospect casts a peculiar light on a condition of our normative self-understanding. Concerns focus on radical changes to the terms of human existence, to the currency of human relationship, to the boundaries of inclusion and exclusion, and to our cultural understanding of birth, life and death.<sup>4</sup>

Consequently a whole range of values, such as human dignity, personal autonomy, relief of human suffering, welfare of the child and society's well being, come into conflict. Within a state they are being transposed into the sphere of law and emerge as conflicts of fundamental rights, such as between the right to life and bodily integrity or the freedom of research and the duty of governments to best serve the health needs and other fundamental rights of their citizens. "The problem, [facing the government] (...) is precisely how conflicting claims are to be settled in the interest of the widest possible contribution to the interest of all, or at least of the great majority."<sup>5</sup>

This paper aims to address the problem of whether the constitutional provisions constitute a coherent European approach towards the controversial issues concerning biomedicine. Consequently, the answer to the question whether we can already speak of New European Bioethics and whether an approximation of the diverse European regulations is to be expected in the future has to be sought. Therefore, first of all, the normative differences between Member States and the underlying philosophical traditions need to be shortly presented. In the second part of the paper, the analysis of the EU competences as regards the area of public health and biomedical research will proceed. This will be followed by the interpretation of the legal limitations such as human dignity, which have been imposed on the latter in the course of the development of European law. As a conclusion an attempt to outline the prospective development of the European bio-law will be provided. The analysis will concentrate on the vertical effect that the constitutional provisions have upon the Member States.

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<sup>4</sup> DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 6 (2004).

<sup>5</sup> BETH SINGER, PRAGMATISM, RIGHTS AND DEMOCRACY 127 (1999) (quoting JOHN DEWEY, LIBERALISM AND SOCIAL ACTION (1935)).

## B. European Diversity

The development of a European framework is perceived as a great challenge, for the Member States of the European Union are divided as to the legitimacy of the research and the approach to take to regulate it. Tensions within and between countries occur, as they try to balance these competing requirements, as for example in the field of stem cell research or pre-implantation genetic diagnosis (PGD). There are differences between regulatory and legislative positions, or lack of regulation, in the countries involved. This lack of consensus is largely grounded in conflicting views of the moral status of the embryo, but may also reflect a demarcation of what are understood to be legitimate areas for statutory intervention. Hence, in Denmark, Belgium, Finland, France, Greece, the Netherlands, Spain, Sweden and the UK embryo research (as well as PGD) is permitted, whereas Austria, Germany, Ireland and Italy have a ban. Luxemburg, Poland and Portugal have no specific rules on any of these problems.

The legislative and regulatory frameworks, where they exist, have their origins in, and are subject to, historical, political and cultural particularities. For instance, the common law system is much more empiric, pragmatic and more susceptible to improvisation, attributable to specific historic developments, in the course of which judges and lawyers of the Crown played a crucial role.<sup>6</sup> British law is also rightly associated with Mill's ideology of robust individualism coupled with Benthamite utilitarianism, as well as political and economic liberalism.<sup>7</sup> The price of liberty is that the mere preference of the majority (or of the "community") must give way to the preferences of the contracting parties. Consequently, human dignity is seen primarily as a source of individual autonomy which should be respected. It will rarely be interpreted in a way that could possibly lead to a limitation of personal autonomy and the freedom of contracts that is crucial to the common law system. It is, thus, said to be conceptualized as empowerment rather than constraint.<sup>8</sup> Apart from what has been stated above, what affects policy-making processes is the long parliamentary tradition which resulted in the constitutional principle of the supremacy of the Parliament.

On the other side of the European normative scene one can find Germany with its abstract and theoretical restrictive approach. Like the rest of the continent it is deeply rooted in the Kantian moral philosophy, which orders treatment of the

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<sup>6</sup> KONRAD ZWIEGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 68 (1998).

<sup>7</sup> BEYLEVELD & BROWNSWARD, *supra* note 4, at 1-47.

<sup>8</sup> *Id.* at 1.

moral agent as an end and never merely as a means. Still, to a much larger extent the German legislation has been determined by the historic experience of the Nazi regime, which tried to implement their discriminatory social theory through national programs of eugenic practices. In Austria and Italy the law has been deeply affected by the philosophy of ontological personalism, stemming from the Christian tradition, in which the absolute right to life is ascribed to a human being from conception onwards. This subjective right is thus inferred from the mere potentiality of an entity to develop into a person in the future. This broad apparent interpretation is strictly connected with the concept of human dignity. It has been argued that in continental Europe human dignity is predominantly being interpreted as a constraint.<sup>9</sup> Thus, the *continental understanding* of human dignity implies not only a duty to respect the dignity of others, but also not to compromise one's own dignity, even if such a compromise would be intended by the person at stake. It also requires acting in a way that is compatible with the vision of human dignity that exists in a particular community. Consequently, if hypothetical conflict between dignity and autonomy occurs, the idea of the former predominant in the society will precede and limit the latter.

In Poland and Portugal the lack of specific regulations seems to be the consequence of both the influence of the Catholic Church and the great economic, social and cultural changes that have been taking place for the last 15-20 years. Conservative morality coupled with the victorious march of economic liberalism seems to create rather unfavorable conditions for a bioethical debate. Interestingly enough it seems to be the medical environment, which, being predominantly conservative, prevents the changes. This great dissonance between the legal and philosophical traditions of the EU Member States constitutes a substantial impediment to the unification of bio-law.

### **C. The Constitutional Treaty**

#### *I. Charter of Fundamental Rights of the EU*

##### *1. General Remarks*

Principles of liberty, equality, solidarity and respect for human rights constitute among others the founding values of the EU. The Charter of Fundamental Rights of the EU, incorporated into the Constitutional Treaty (CT) as Part II, contains a whole range of social rights, including, quite surprisingly for a document of this sort, both categories of human rights, namely those of the so-called first and second

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<sup>9</sup> *Id.* at 34.

generations. For the first time at the supranational level a due regard is given to the area of biomedicine in a legal act, intended to obtain a legally binding force.<sup>10</sup>

First of all, drawing inspiration from the 1948 Universal Declaration of Human Rights, it proclaims the inviolability of human dignity, which must be respected and protected and confirms everyone's right to life.<sup>11</sup> Secondly, it introduces the right to the physical and mental integrity of a person, stemming from Art. 3 of the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the application of biology and medicine (European Biomedicine Convention). The Charter's right encompasses the free and informed consent of the patient as well as the ban on eugenic practices, commoditization of human body parts and the human reproductive cloning.<sup>12</sup> Thirdly, broadening the scope of the well-established non-discrimination principle, it prohibits discrimination on grounds of genetic features. Finally, it declares the freedom of scientific research and the right to preventive health care. All these rights and freedoms constitute a quite admirable catalogue. However, as we all know, due to a whole range of different provisions their scope of application has been drastically constrained. Consequently, the normative dimension of the Charter appears to be extremely complex and ambiguous.

## 2. *Limitations*

First of all, Art. II-111 CT restricts the applicability of the Charter's rights primarily to the institutions, bodies of the Union, and Member States in compliance with the principle of subsidiarity. This is usually understood to have waived the horizontal effect of the Charter, namely the one between citizens. Moreover, the requirement to respect the Charter's rights is binding on the Member States only when they act in the scope of Union law. This limitation aims to prevent any reliance on the norms of the Charter in relation to mere domestic law of the Member States in areas which are still not determined by EU law. On the other hand, some argue that it will be extremely difficult to explain this distinction between national and EU law to the citizens.<sup>13</sup> Also, in view of the fact that EU law is increasingly invading

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<sup>10</sup> The symbolic role and standard-setting function of the Convention on Human Rights and Biomedicine cannot be denied. Still, the fact that it has been ratified only by an extremely small number of states substantially limits its actual legal impact.

<sup>11</sup> The European Convention, *Updated Explanations relating to the text of the Charter of Fundamental Rights*, 828 CONV 1 (July 18, 2003).

<sup>12</sup> *Id.* at 6.

<sup>13</sup> EUROPEAN UNION COMMITTEE, 14th REPORT: THE FUTURE OF EUROPE: "SOCIAL EUROPE," 2003-14, HL Paper 79 (2003) at ¶ 13, available at <http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-02906.pdf>.



domestic law, it may be presumed that this distinction will not have a long life, like in the USA as regards federal and state law.<sup>14</sup> As regards the horizontal effect, it is believed that the ECJ could well solve the problem of Art. II-111 CT (similarly to that of the horizontal effect of EU-Directives). It could, thus, declare under certain circumstances the liability of Member States to an individual for losses caused by the lack of implementation of the Charter provisions (hence conferring the Francovich doctrine).<sup>15</sup>

Further restrictions are foreseen by paragraph 2 and the second sentence of the paragraph 1 of Art. II-111 CT.<sup>16</sup> They confirm that the Charter may not have the effect of extending or modifying the competences conferred on the Union. Consequently, the obligation for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers. The foregoing provisions create a solid constraint in areas, where the ambitions of the Charter exceed the catalogue of competences of the Union. However, one should remember that the extension of competences is not tantamount to an extension of EU law as such, in a frame of a regulatory development of community law within the existing competences. The discussed article does not seem to prohibit the latter. Thus, the EU institutions are perfectly allowed to extend current EU law for instance in the field of health protection or research, for in doing so they are not extending the field of application of EU law beyond the powers defined in the Constitution.<sup>17</sup> Of course, at the same time they have to pay attention to Art. II-112 (2) CT, which imposes the obligation to exercise fundamental rights under the conditions and within the limits defined in other parts of the Constitution.<sup>18</sup>

All these reservations result in a quite blurred picture of the protection of fundamental rights and make their normative effect rather vague. The fact that the rights of the individual have possibly been curtailed by the horizontal clauses is rightly viewed as unsatisfactory, since it does not really meet the objectives layed down by the Constitutional Convention. Thus, such an approach scarcely serves the interests of transparency or makes those rights visible to the citizen.<sup>19</sup> On the other

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<sup>14</sup> A.T.J.M. JACOBS, THE FENCES SURROUNDING THE CHARTER OF FUNDAMENTAL RIGHTS IN THE NEW EUROPEAN CONSTITUTION 8 (2004), available at [www.tilburguniversity.nl/faculties/frw/research/schoordijk/ctld](http://www.tilburguniversity.nl/faculties/frw/research/schoordijk/ctld). (P.J.G. Kapteyn)

<sup>15</sup> *Id.* at 4.

<sup>16</sup> Art. II-111 CT.

<sup>17</sup> JACOBS, *supra* note 14, at 5.

<sup>18</sup> Art. II-112 (2) CT.

<sup>19</sup> HL Paper, *supra* note 13, at para. 84.

hand, the limits of the enforceability of the Charter rights allowed the UK, the most radical opponent, to agree to the incorporation of the Charter in the Constitutional Treaty, and thus to ascribe it, even if limited, a legally binding force. This widely discussed ambivalence is particularly visible in relation to the specific fundamental rights concerning biomedicine.

## II. Biomedical Research in the Constitutional Treaty

### 1. Freedom of Research

“From the perspective of the liberal state, the freedom of science and research is entitled to legal guarantees, for any enhancement of the scope of technological control over nature is bound up with the economic promise of gains in prosperity and with the political prospect of enlarging the scope of individual choice.”<sup>20</sup> The European Union seems to share this view. Thus, by means of Art. I-3 of the CT the promotion of the scientific and technological advance constitutes one of the Union’s objectives.<sup>21</sup> To achieve this goal Member States confirmed as a fundamental right the freedom of research and have equipped the EU with a range of shared competences. The former has been ensured by means of Art. II-73 of the CT, the freedom of scientific research and the respect for academic freedom<sup>22</sup>; the latter by provisions to be found in Part III of the CT.

Thus, the freedom of scientific research and the respect for academic freedom can be deduced from the freedom of thoughts and expression stated in Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It includes the right “to receive and impart information and ideas without interference by public authority and regardless of frontiers”, which constitutes the basic conditions for each individual’s self-fulfillment<sup>23</sup>. Despite the fact that no explicit reference has been made, the Charter’s freedom could be also related to the Art. 15 of the European Biomedicine Convention.<sup>24</sup> It justifies the freedom of scientific research in the field of biology and medicine not only by humanity’s right

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<sup>20</sup> HABERMAS *supra* note 3, at 25.

<sup>21</sup> Art. I-3 CT.

<sup>22</sup> Art. II-73 CT.

<sup>23</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(1), 5 E.T.S. 13.

<sup>24</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), Apr. 4, 1997, art. 15, 164 E.T.S. 5.

to knowledge, but also by the considerable progress its results may bring in terms of the health and well-being of patients.<sup>25</sup> Such an extensive interpretation, if approved by courts, could appear to liberalize the area of research in the EU. This quite remote link could be drawn through the provision of para. 5 of the Charter's Preamble according to which the Charter reaffirms the rights as they result, among other sources, from the case-law of the European Court of Human Rights.

However, following the international standards, the freedom of research contained in the CT is not absolute. The horizontal clause of Art. II-112(1) CT provides possibility for constraints, as long as they respect the essence of the freedom. Additionally, by means of Art. II-112(3) CT academic freedom can be subject to the limitations under conditions enumerated in Art. 10(2) of the ECHR. In the same vein, the Charter does not prevent Member States from applying accordingly Art. 15 of the latter document, which under special circumstances allows the derogation of Convention's rights. On the other hand, the effect of the freedom of research needs to be analyzed from a much broader perspective.

In order to prevent Art. I-3 and Art. II-73 CT from becoming a *dead letter*, the EU is entitled by means of Art. I-14 CT "to carry out activities, in particular to define and implement programs"<sup>26</sup> in the areas of research and technological development. Para. 3 of the quoted provision ends by stating that "the exercise of that competence shall not result in Member States being prevented from exercising theirs". It gives each country the ability to raise the competitiveness of its products through research, avoiding at the same time the confrontation over this in such controversial matters as embryonic stem cells.

## 2. EU Competences

Further provisions may be found in Art. III-248 to III-251 of the CT; however, they do not constitute a substantial modification, in comparison to the existing provisions of Art. 163-173 TEC. Art. III-248 CT establishes a European Research Area in which researchers, scientific knowledge and technology circulate freely, and encourages it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Constitution. This is a more ambitious rendering of Art. 163 TEC, which

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<sup>25</sup> EXPLANATORY REPORT TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND DIGNITY OF THE HUMAN BEING WITH REGARD TO THE APPLICATION OF BIOLOGY AND MEDICINE: CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE, Dec. 17, 1996, art.15, 164 E.T.S. 17, available at [www.conventions.coe.int/Treaty/en/Reports/Html/164.htm](http://www.conventions.coe.int/Treaty/en/Reports/Html/164.htm).

<sup>26</sup> Art I-14 CT.

simply provides that the EU shall “have the objective of strengthening the scientific and technological bases of Community industry”.<sup>27</sup> Art. III-250(2) CT specifies that the Commission’s initiatives in this area would aim to establish “guidelines and indicators, the organization of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.”<sup>28</sup> It also provides that the EP should be kept “fully informed.”

In my view, it is the foregoing provisions coupled with the freedom of research guarantee that have the biggest influence on the development of biomedicine and bioethics in the EU. Due to this EU competence it eventually became possible to finance stem cell research projects through the recent Sixth Framework Program (2002-2006). Despite such progress, problems still emerge. Researchers feel insecure and exposed to risk, since in some countries certain kinds of embryo research and gene patenting are penalized.<sup>29</sup> Nevertheless, the powers and duties conferred upon the Union, strengthened in the Constitutional Treaty, seem to be flexible enough to encourage the exchange of knowledge. Thus, the bigger the demand of the market and the need expressed by the researchers, the deeper the harmonization of standards that can be expected. This is actually already happening. The researchers of the Eurostem project have recommended that the funding policy of the EU should be aligned and made consistent with the principles identified in the framework program and should not disadvantage researchers in any Member States.<sup>30</sup> Moreover, the reinforced non-discrimination principle coupled with the free movement of persons, goods and services will inevitably encourage the approximation of bio-law at the supranational level. First signs of harmonization are already present in the European Constitution, which sets minimal standards of biomedical practice. Furthermore, what is even more important, it treats human dignity as the source of all human rights and as a border line for any interference with personal autonomy. Is the European bioethics promoted by the EU permissive or restrictive? What impact do these *delimiting* principles have on the creation of common philosophical and most of all legal standards?

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<sup>27</sup> The Treaty establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 163 [hereinafter EC Treaty], available at [www.europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html).

<sup>28</sup> Art III-250(2) CT.

<sup>29</sup> Louise Irving, *Creating an Ethical Framework for Stem Cell Research in Europe*, 305 BIONEWS 1 2 (2005), available at [www.BioNews.org.uk/commentaries.lasso](http://www.BioNews.org.uk/commentaries.lasso) (quoting John Harris).

<sup>30</sup> *Id.* at 3.

*III. The Limits of Biomedical Research and Practice*<sup>31</sup>*1. Human Dignity and the Notion of Personhood*

The Charter of Fundamental Rights of the EU takes into consideration the circumstances that procreation and birth are losing the element of natural uncontrollability that so far was essential for our normative self-understanding. The first article of the Charter (Art. II-61 CT) proclaims the inviolability of human dignity that should be respected and protected.<sup>32</sup> In accordance with the explanatory report, human dignity of the *person* is not only a fundamental right in itself, but also constitutes the real basis of fundamental rights. This definition is vague and ambiguous. "If the interpretation of morally saturated legal terms like 'human right' and 'human dignity' tend to be counter intuitively construed in too broad a sense, they will not only lose their power to provide clear conceptual distinctions, but also their critical potential."<sup>33</sup>

In order to identify the distinctive elements, it may be reasonable to analyze the right to life, guaranteed by Art. II-62 CT, which is ascribed to "everyone". The term "everyone" (as reaffirmed in the Explanatory Report to the Charter) is copied from the language of the ECHR. In neither document is this term defined. However, in the case *Paton v. Great Britain*, the European Commission of Human Rights<sup>34</sup> stated that the term "everyone" does not include in its scope the nasciturus. The limitations foreseen in Art. 2 of the ECHR apply only to persons already born and can be applied neither to a fetus, nor to an embryo. "Everyone" seems to refer to the potentially contested concept of a bearer of human rights. This is to be contrasted with the notion of "human being", apparently signaling "a generally accepted principle that human dignity and the identity of the human being [must] be respected as soon as life begins."<sup>35</sup> Nevertheless, in the recent case of *Vo v. France*, The European Court of Human Rights has reminded that the convention institutions have not "ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. (...) It is also clear from an examination of these cases that the issue has always been determined by weighing up various and sometimes conflicting, rights or freedoms...".<sup>36</sup> How can we then

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<sup>31</sup> The analysis is mostly based on BEYEVELD & BROWNSWORD *supra*, note 4.

<sup>32</sup> Art II-61 CT.

<sup>33</sup> Eriksen, *supra* note 2, at 36.

<sup>34</sup> *Paton v. Great Britain*, App No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, para. 24 (1980).

<sup>35</sup> See, *supra*, note 24 at 5.

<sup>36</sup> *Vo v. France*, 2004-VIII Eur. Ct. H.R. para. 80.

define the bearer of human rights, if it is understood differently in each of the Member States?

If we start with the view that the possession of human rights extends only to developed humans, who have their faculties, then “everyone” will not include “every living person”. In this view, the paradigmatic bearer of human rights will be the person who is able to exercise his or her rights. If we take a less restrictive view, we might hold that “everyone” covers all independent human life, that is, all humans from the cradle to the grave. Even in this less restrictive view, though, there are non-qualifying members of the human species, such as embryos, fetuses, and the like. This is not to say that potential qualifying human beings merit no protection but simply that, in the absence of a functioning capacity for practical reasoning or independent existence, the case for protection of such life forms cannot be made out as if they were bearers of human rights. We might, however, also hold that “everyone” includes “every instance of human life, biologically defined”. In this relaxed view, the possession and protection of human rights applies from conception onwards. In this respect, the European Court of Human Rights has held that “it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.”<sup>37</sup>

The Constitutional Treaty appears to follow the above mentioned reasoning. Therefore, it seems to foster a compromise, already applied in the Biomedicine Convention. While those, who cannot agree that the conceptus is a bearer of human rights, are to be allowed to persist with this belief, all Member States are required to accept that, in the name of human dignity, the conceptus is a protected entity. This, however, is not without any implications for the centrality of autonomy; it is not as though dignity simply functions to protect life where autonomy runs out. Rather, if embryonic and fetal life “is protected under the cover of respect for human dignity, then the autonomous choices of researchers [e.g. to create, test, manipulate, and store embryos] and of women must be measured for the legitimacy against, not only the general regime of human rights, but also against the special dignity-based regime protecting such early human life”<sup>38</sup>. By reference to respect for human dignity, embryonic and potential human life forms have a protected moral status. The acceptance of human dignity as providing direct protection for early human life represents, at the very least, a significant change to the terms of debate. It almost certainly signals a much more restrictive approach to early-stage biomedical interventions.

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<sup>37</sup> *Id.* at para. 85.

<sup>38</sup> HABERMAS, *supra* note 3, at 33.

## 2. *Discrimination on the Ground of Genetic Features*

Even greater ambivalence is related to the non-discrimination principle, stated in Art. II-81 CT, by means of which the prohibition of discrimination on the grounds of genetic features was introduced.<sup>39</sup> It goes in line with the limitations stemming from the value of human dignity. However, the practical effect of this may cause great concerns. This provision, which draws on Art. 11 of the Biomedicine Convention, does not create any power to enact anti-discrimination laws. It only addresses discriminations by the institutions and bodies of the Union themselves, when exercising the power conferred on them by Member States, and by Member States when they are implementing Union law. Surprisingly enough Art. III-124 CT, which confers power on the Union to adopt legislation and encourage harmonization, does not mention genetic feature as a discriminatory ground.<sup>40</sup> This state of law, which stems probably from the highly differentiated labor and insurance legal systems, should be viewed as unsatisfactory, for it will prolong the harmonization of such an important aspect. It is a well known fact that insurers and employers constitute extremely important pressure groups, which attempt to circumvent any final solutions as regard genetic tests. The conflict of interests appears so great that regulation meets horrendous obstacles even at the national level.

### *IV. Biomedical Practices*

The attempt to create a modern act, which would address the most important problems resulting from the rapid biotechnological developments, is reflected in the drafting of Art. II-63 CT. It guarantees the right to bodily and mental integrity, which has been recognized by the ECJ in 2001.<sup>41</sup> Apart from confirming the well established principle of free and informed consent, it contains “the prohibition of eugenic practices, in particular those that have as their goal the selection of persons”, as well as “the prohibition of the reproductive cloning of human beings”.<sup>42</sup> All these provisions are based on the Biomedicine Convention; thus, due regard must be given to it in the course of their interpretation. Stemming from the concept of human dignity they also constitute further limitations to the freedom of medical and academic research.

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<sup>39</sup> Art II-81 CT.

<sup>40</sup> Art III-118 CT.

<sup>41</sup> Case C-377/98, *Netherlands v. EP and the Council*, 2001 E.C.R. I-7079, paras. 199-215.

<sup>42</sup> Art II-63(2) CT.

The first paragraph, that acknowledges the conception of personal autonomy, seems to be rooted in both the Kantian moral philosophy and Mill's liberal individualism. This seemingly clear article may cause problems in situations, where the *person* is not capable of judging his/her own action, as in the case of pre-personal life. It is commonly accepted that in the course of the medical procedure (e.g. *in vitro* fertilization) the burden of decision is conferred upon the gamete provider (donor). What happens, however, if the interests of the donor conflict with the interests of the recipient? The problem becomes even more complex in the case of preimplantation genetic diagnosis (PGD). Here the embryo, which undergoes a test and at the beginning, is treated as a patient<sup>43</sup> and, if a genetic disorder is detected, will have eventually to be discarded. Whose informed consent is needed then? The CT does not provide any answer to these problems, leaving the solution to each of the Member States. The only limitation seems to stem from the obligation to respect and protect human dignity. The reasons have already been stated above. Moreover, it is also questionable whether such a detailed issue should be regulated at the constitutional level.

Personal and mental integrity goes along with the ban on the so-called commoditization of body parts. The need to prevent such a tendency has been also recognized in the above mentioned European Court of Justice (ECJ) decision, concerning EU Directive EC 44/98.<sup>44</sup> A prohibition of trafficking in human beings in Art. II-63 CT is said to stem directly from the cornerstone principle of respect for human dignity. The fact, however, that the Directive has been implemented only by a few countries raises the question of whether in the field of gene patenting it is possible to speak of common, European-wide standards? From a European perspective it can be hard to see how particular moral conceptions of the individual countries can feasibly be accommodated in a collective patent system. The ECJ did point out that the directive sets out the framework for the concept of the patentability. The directive regulates an area in which there are no actual authorities as yet. Thus, further jurisprudence of the ECJ will have to clarify the specific provisions. It is, however, at least arguable that the idea of human dignity constitutes a good reason for restraining certain forms of biocommerce. The Constitution, therefore, signals a European view that freedom of contract should be so limited.<sup>45</sup>

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<sup>43</sup> The case of PGD raises some confusion as to who is actually the patient. Is it the mother or the embryo? The answer to this question depends largely on the concept of the patient-doctor relation. A liberal approach will see the mother as a patient, whereas a more restrictive one will speak in favor of an embryo. See ZBIGNIEW SZAWARSKI, *Ethics and prenatal screening*, IN BIOPOLITIK GRENZENLOS- STIMMEN AUS POLEN 107-121 (Heidi Hofmann ed., 2005).

<sup>44</sup> Case C-377/98, *Netherlands v. EP and the Council*, 2001 E.C.R. I-7079, paras. 199-215.

<sup>45</sup> BEYLEVELD & BROWNSWORD, *supra* note 4, at 217.



As far as the ban on eugenic practices is concerned, it relates to situations “in which selection programs are organized and implemented, involving campaigns for sterilization, forced pregnancy and other acts deemed to be international crimes in the Statute of the International Criminal Court...”<sup>46</sup> It is, however, interesting that no reference has been made to prenatal testing and PGD, that may also lead to such an outcome. It is exactly the risk of discriminatory practices and negative eugenics that lies behind the controversies around PGD. Yet, if PGD for medical reasons can be justified under such provisions, would the same apply to sex selection for social reasons? The fact that in this respect the legislator did not follow the solutions provided by the Biomedicine Convention, banning the sex selection for non-medical reasons, may suggest that such an omission was intended. It is noteworthy that although such sex selection on social grounds is not permitted in any Member State, the number of adherents to this solution is gradually increasing.<sup>47</sup>

Unlike the former provisions, the absolute ban on reproductive cloning should be viewed positively. It is in fact the only issue, as to which the international community is able to reach a compromise. Its significance is therefore indisputable. However, one should not forget that its effect does not exceed the scope of Union law. It follows the solution of the additional protocol adopted on reproductive cloning by Council of Europe.<sup>48</sup> The Biomedicine Convention uses the term *person* in relation to the post-natal phase of human life, whereas the term *human being* seems to be broader and applies to the whole human species, regardless of the phase of its development. It means that by referring to “human beings”, the Charter prohibits the cloning not only of an existing person, but also the reproductive cloning of embryos. Real problems occur in respect of the so-called therapeutic cloning. The difference lies purely in the purpose of the procedure. Reproductive cloning aims at the birth of a cloned child, whereas the latter is used only for research purposes. The Charter neither authorizes nor prohibits any cloning other than reproductive forms of cloning. It means a more restrictive approach can be chosen by Member States. This provision is important insofar as embryo research programs include cloning of human beings, such as the program recently granted

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<sup>46</sup> The European Convention, *Updated Explanations relating to the text of the Charter of Fundamental Rights*, 828 CONV 1 (July 18, 2003).

<sup>47</sup> HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, SEX SELECTION: OPTIONS FOR REGULATION. A REPORT ON THE HFEA'S 2002-03 REVIEW OF SEX SELECTION INCLUDING A DISCUSSION OF LEGISLATIVE AND REGULATORY OPTIONS para. 84-92 (2003).

<sup>48</sup> Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Jan. 12, 1998, No. 168, 1 E.T.S. 2, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=168&CM=1&DF=&CL=ENG>.

to a team at the Newcastle University by the Human Fertilization and Embryology Authority in London.<sup>49</sup>

#### D. Conclusions

Ethical biopractice needs guiding values that cover those cases where the capacity for autonomous judgment is impaired or not yet developed. To put it another way, where there is respect for autonomy, autonomous actors can take care of themselves, but non-autonomous human life must be protected. The new European bioethics takes dignity, integrity and vulnerability to be the guiding protective values alongside autonomy. It becomes clear that its agenda, in correcting for the weight given to autonomy, is not about restoring physicians' power over their patients but about asserting collective control over individual choice. Thus, the "European bioethical project could be said to be both, ambitious and modest. Its ambitiousness resides in its attempt to articulate a vision of human dignity that commands acceptance across a region as pluralistic as Europe; its modest nature, by contrast, resides in its lack of concern with defensibility beyond acceptance – if X is accepted, then X requires no further justification. Or to put it another way, the project is more interested in breadth (of acceptance) than in depth (of justification)."<sup>50</sup> When the acceptance of a biopractice is broad enough within a community and later reaches the critical point within a state, then a change of legislation will follow. The same inference seems to have been applied to the supranational level. One could ask whether these traditional European value orientations, however worthy, have not already become merely out-of-date fashions.

On the other hand, from the sociological perspective, it is unlikely that society's acceptance of the alliance between state and technology will lessen, as long as the instrumentalization of "humanity's inner nature"<sup>51</sup> can be medically justified by the prospect of better health and a prolonged lifespan. The wish to be autonomous in the conduct of one's own life is always connected with the collective goals of health and the prolongation of lifespan. The history of medicine, therefore, strongly suggests a skeptical attitude toward any attempt at "moralizing human nature".<sup>52</sup>

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<sup>49</sup> The Treaty establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 163 [hereinafter EC Treaty], *available at* [www.europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html).

<sup>50</sup> BEYLEVELD & BROWNSWORD, *supra* note 4, at 248.

<sup>51</sup> HABERMAS, *supra* note 3, at 48.

<sup>52</sup> HABERMAS, *supra* note 3, at 32 (*quoting* W. VAN DEN DAELE, DIE NATUERLICHKEIT DES MENSCHEN ALS KRITERIUM UND SCHRANKE TECHNISCHER EINGRIFFE (2000)).

Nevertheless, it ought to be remembered that no science will relieve common sense, even if scientifically informed, of the task of forming a judgment on the latest achievements of the biotechnological revolution.<sup>53</sup> If J. Habermas is right, and this seems to be the tendency, a further liberalization of the European legislation should proceed.

Paradoxically, the Union's motto, "Unity in diversity", expressed in Art. I-8 of the CT could enable this process.<sup>54</sup> It seems to reflect particularly the approach taken in the document as regards the most controversial issues. Together with the principles of subsidiarity and proportionality underlined in a number of instances, it leaves space for differentiation and will presumably be used by Member States to preserve sovereignty. Within modern societies, however, there is a plurality of values and competing views about the notion of good life among different groups, local communities and cultures. Democratic pragmatism describes the mental state of a many-voiced public, where the arguments of both majority and minority should be heard. The modern state is premised on the axis: right of individual – safeguarding of individual rights. As a response the European Constitutional Treaty underlines, in a number of different ways, the fact that the Union is a community of shared values. "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."<sup>55</sup> At the same time, the Constitutional Treaty aims at making it possible for different groups and subgroups to live together under shared law. They have to resolve their conflicts through the medium of law, while the Union remains, in principle, neutral regarding different conceptions of the good life.

Nevertheless, the Constitutional Treaty sets out a common standard, to which all state-parties had to assent. Moreover, the framework for deliberative processes in the Constitutional Treaty itself, even if extremely complex, has been set. The increasing role of the European Parliament constitutes an important element of the development of a common sphere, where an open and unconstrained dialogue could be undertaken. Critics have often pointed out that the Constitutional Treaty, due to its ambiguity and complexity, does not meet its primary goal of bringing the Union closer to the citizen. Still, despite its limited scope of application, the significant role of the Charter is not merely symbolic. It should not be forgotten that, after all, through their incorporation into the CT fundamental rights will

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<sup>53</sup> HABERMAS, *supra* note 3, at 109.

<sup>54</sup> Art I-8 CT.

<sup>55</sup> Art I-2 CT.

become legally binding. Apart from what has been said, there is the possibility that the rights and principles set out in the Constitutional Treaty will in practice impinge on national policy and practice and limit the freedom of Member States even in areas that remain clearly within their competence. It may prove difficult for a state to resist pressure to change and to align itself with the Charter. Where the competences are mixed and even where the Union has a supporting competence, the "higher" Union standard will inevitably exert pressure on national governments.<sup>56</sup>

Moreover, Art. II-112 CT indicates three sources for the content of Charter's rights, namely EU law, the ECHR and national law. The still existing lack of efficiency and cohesion resulting from the parallel application of three systems of human rights protection will most probably be reduced by the accession of the EU to the ECHR, as provided by Art. I-9 CT.<sup>57</sup> Thus, a further approximation can be expected, especially now that para. 5 of the Preamble of the Constitutional Treaty opens the possibility for the extension of the sources from which the ECJ will draw inspiration. This could also result in future harmonization. This process is obviously reciprocal, since impulses run in two directions: from the Member States to the Union and from the Union to the states. There is no reason why this should change with the new Constitution. Thus, the conclusion cannot be revolutionary. The Constitutional Treaty may not be perfect, yet it constitutes progress. It is the only possible compromise that could be reached at this point of time and at this level of unification. For this reason its significance should not be underestimated. Whether pragmatism will be the guiding principle of biomedicine in the enlarged European Union in the future is still to be seen.

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<sup>56</sup> Lords Select Committee on the EU, 6<sup>th</sup> Report: The Future Status of the EU Charter of Fundamental Rights, 2003-3, H.L. Paper 48 at 98-99.

<sup>57</sup> The European Convention, Working group 2, "Incorporation of the Charter/Accession to the ECHR", Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR 17-22, 116 CONV 02 (Jun. 18, 2002).

