Herm.-Josef Blanke
Stelio Mangiameli
Editors

Governing Europe under a Constitution

The Hard Road from the European Treaties to a European Constitutional Treaty

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The contributions of the volume are mostly the output of the research project "Supranational integration and federative mechanisms. Constitutional issues in the current evolution process of the European Union".

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Preface

Most of the papers in this volume, *Governing Europe under a Constitution*, are the output of the Conference on the European Constitution held at the Villa Vigoni Italian-German Centre, at Loveno di Menaggio (Como), on 9-12 July 2003, under the aegis of Erfurt University and Teramo University, and under the Patronage of the President of the Italian Republic, *Carlo Azeglio Ciampi* who, in his message, stressed the importance of scientific cooperation between Germany and Italy for the development of a European spirit.

The idea of the Conference was also thanks to the contribution of *Dr Joachim Wuermeling* MEP, who monitored progress in the subsequent phases through to their conclusion.

The editors have asked the authors of the papers to constantly update them, to take into account the developments following the Thessaloniki European Council at which the results of the Constitutional Convention were officially announced. The formal drafting of the European Constitution had to come to terms with the difficulties which arose under the Italian Presidency, as a result of the stance taken up by the governments of Spain and Poland, and the rejection of the Treaty Establishing a Constitution for Europe in the referendums in France and the Netherlands after its signing in Rome on 29 October 2004.

However, these papers not only deal with the background and the substance of the Constitutional Treaty, but they also make an important contribution to addressing the issues of *current* European constitutional law. This can also be seen from the subtitle chosen (*"The hard road from the European Treaties to a European Constitutional Treaty"*), which points to the path that the European Constitution should take.

Now that this book is ready in its final form, a special word of thanks is due to *President Valéry Giscard d'Estaing* for having stressed the importance of the Villa Vigoni Conference as the first step forward in the European debate following after the conclusion of the Convention. The editors are grateful to all the authors of the papers for their contributions, and for the patient work of continuously having to revise them while awaiting publication. Special thanks are also due to Professor *Aldo Venturelli*, General Secretary of the Villa Vigoni Italian-German Centre, for having supported the staging of the Conference, *Professor Margot Horspool,* for carefully reading and revising the papers, and *Dr David Giddings* for the English translation. Special acknowledgements are also due to all our cooperators at the Chair of Public Law and European Integration of Erfurt University, and the Chair of Constitutional Law and European Constitutional Law of Teramo University, for their assistance in every stage in the production of this book.

The Conference and the publication of this book have also been possible thanks to the funding received from the Faculty of Economics, Law and Social Sciences

of Erfurt University, and the Faculty of Law of Teramo University. A major contribution was also made by the German Federal Minister for Home Affairs. The Italian Ministry for the Universities and Research also played its part in the various initiatives by funding the research project "Il riparto di competenze con gli Stati membri nel futuro dell'Unione europea".

Herm.-Josef Blanke
Stelio Mangiameli

Villa Vigoni, 17 September 2005

Préface

Le développement de l'Europe, de notre Europe, est remarquable, unique. Sortie de ses cendres après une guerre désastreuse, elle est devenue un modèle de succès. Depuis le 1er mai 2004, la maison européenne abrite 25 Etats membres !

L'intégration européenne a commencé par le contrôle commun des six Etats membres fondateurs sur le charbon et l'acier, destiné à interdire la course aux armements. La vision de Robert Schuman, Jean Monnet, Konrad Adenauer, Alcide de Gasperi, et d'autres était de faire de l'Europe un espace de paix, de liberté et de prospérité économique. Aujourd'hui, l'Europe fait partie intégrale de notre vie quotidienne : nous achetons des biens dans un autre Etat avec la même monnaie, nous traversons les frontières sans contrôles, nous pouvons librement circuler et travailler dans les différents Etats de l'Union.

Il est devenu indispensable de manifester notre confiance en l'Europe, en lui donnant une base durable. La notion du « Traité constitutionnel » définit bien la nature de l'Union européenne. Elle est davantage qu'un simple rassemblement d'Etats, davantage qu'une grande zone de libre échange. Elle est une union de peuples et d'Etats, qui se fixent des buts communs, adoptent des institutions communes, et défendent des valeurs identitaires communes.

Après 17 mois de débats intenses, la Convention sur le futur de l'Europe que j'ai eu le grand honneur de présider, a rédigé un texte qui mérite, je crois, l'adjectif d'« historique ». La procédure était révolutionnairement nouvelle. Des représentants européens et nationaux, au nombre desquels figurait Joachim Wuermeling, avec la participation de la société civile, ont menés une discussion transparente. Chaque débat était public. Personne ne pouvait s'abriter derrière les portes fermées d'une conférence intergouvernementale, comme c'était le cas auparavant. Je me réjouis de la foi et de l'élan des conventionnels qui ont rendu les débats très vivants.

La nouvelle méthode a porté ses fruits. Nous sommes fiers d'avoir trouvé le consensus sur un texte qui permet à l'Europe d'être mieux préparée à affronter les grands défis du 21e siècle, et la mondialisation. Chaque instrument politique, chaque mode de décision, a été scruté avec soin. Les réformes institutionnelles permettront à l'Europe d'agir avec 25, et bientôt 27 Etats membres. Dorénavant, l'Europe, grâce à la stabilité de la Présidence du Conseil, et l'institution d'un véritable Ministre des Affaires Etrangères, sera en mesure de jouer son rôle comme acteur politique dans le monde. En même temps, l'Europe se rapprochera des citoyens, car les décisions seront plus transparentes, et les pouvoirs du Parlement européen ainsi que ceux des parlements nationaux seront étendus.

Le débat sur l'Europe ne se termine pas avec la fin des travaux de la Convention : il faut continuer à débattre quotidiennement sur notre Europe !

La Convention a terminé ses travaux le 10 juillet 2004. La conférence de la Villa Vigoni du 9 au 11 juillet 2004 marque le début de cette réflexion « post-conventionnelle ». Je vous invite cordialement à y participer activement.

Paris, janvier 2005
Valéry Giscard d'Estaing

Foreword

The development of Europe, our Europe, has been extraordinary, unique. After emerging from the rubble in the wake of a devastating war, it became a model of success. Since 1st May 2004 the European home has taken in 25 Member States!

European integration began when the six founding Member States established joint control over coal and steel, as a means of preventing the arms race. The vision of Robert Schuman, Jean Monnet, Konrad Adenauer and Alcide de Gasperi and others was to make Europe an area of peace, freedom and economic prosperity. Today, Europe forms part and parcel of our daily lives: we buy products abroad using the same currency, we cross national borders without being checked, and we are free to travel around and work in all the Member States of the Union.

It has become essential to demonstrate our confidence in Europe by giving it a sustainable basis. The notion of the "Constitutional Treaty" clearly defines the character of the European Union. It is more than a mere gathering of State, more than a huge free trade area. It is a union of peoples and states, which set common goals, adopt common institutions and defend common identical values.

It has now become essential to demonstrate our confidence in Europe, but place it on permanent foundations. The notion of the "Constitutional Treaty" clearly describes the nature of the European Union. It is more than a mere grouping of states, and more than a large free trade area. It is a union of peoples and states, which set themselves common goals, adopt common institutions, and defend commion identical values.

After 17 months of intense debate, the Convention on the Future of Europe which I had a great honour of chairing drafted a document which, I believe, is nothing short of "historic". The novel procedure adopted was itself revolutionary. European and national representatives, including Joachim Wuermeling and with the participation of civil society, engaged in a transparent debate. Every session was held in public. No-one could hide behind the closed doors of an intergovernmental conference, as had previously been the case. I am delighted with the faith and the verve shown by the Convention members who made the debate so lively.

This new method bore fruit. We are proud to have achieved an agreement on a text which will better prepare Europe to face the great challenges of the 21st century and globalisation. Every political instrument and every decision-making procedure was carefully scrutinised. The institutional reforms will enable Europe to

act with 25, and soon with 27, Member States. From now on, thanks to the stability of the Presidency of the Council and with the institution of a fully-fledged Foreign Affairs Minister, Europe will be in a position to play its role as political actor on the world stage. At the same time, Europe will draw closer to the citizens, because decisions will be taken in a more transparent manner, and the powers of the European Parliament and those of the national Parliaments will be expanded.

The debate on Europe did not end with the adjournment of the Convention: the debate on our Europe must continue every day!

The convention concluded its deliberations on 10th July 2004. The Villa Vigoni conference on 9-11 July 2004 marks the beginning of this "post-Convention" debate. I cordially invite you to take an active part in it.

Paris, January 2005
Valéry Giscard d'Estaing

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Abbreviations

AC	Appeal Court (Court of Appeal)
AfP	Archiv für Presserecht
AJIL	American Journal of International Law
All ER	All England Law Reports
AöR	Archiv für Öffentliches Recht
Art.	Article(s)
BGBl.	Bundesgesetzblatt
Br.-Drs.	Bundesratsdrucksache
Bt.-Drs.	Bundestagsdrucksache
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidung des Bundesverfassungsgerichts (Decision of the German Federal Constitutional Court)
CCAA	Comunidades Autónomas (Autonomous communities)
CEPC	Centro de Estudios Políticos y Constitucionales
cf.	confer
CFR	Charter of Fundamental Rights of the European Union
CFSDP	
CFSP	Common Foreign and Security Policy
cit.	cited
CJEL	The Columbia Journal of European Law
CMLR (CMLRev.)	Common Market Law Review
CoE	Council of Europe
CoR	Committee of the Regions
CRE	Commission for Racial Equality
DDA	Disability Discrimination Act
Dem. e dir.	Democrazia e Diritto
Der. const.	Derecho constitucional
Dir. eccl.	Diritto ecclesiastico
Dir. intern.	Diritto internazionale
Dir. Lav. Rel. Ind.	Diritto del lavoro e delle Relazioni industriali
Dir. pubbl.	Diritto pubblico
Dir. soc.	Diritto e società
Dir. Un. Eur.	Diritto dell'Unione Europea
DÖV	Die Öffentliche Verwaltung
DPCE	Diritto pubblico comparato ed europeo

DVBl.	Deutsches Verwaltungsblatt
EAT	Employment Appeal Tribunal
EC	European Community
ECB	European Central Bank
ECBS	European Central Banking System
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice ("Luxembourg Court")
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights ("Strasbourg Court")
EC-Treaty	Treaty establishing the European Community
ed.	editor
eds.	editors
edn.	edition
edt. by	edited by
EEA	European Economic Area European Electoral Act
EEC	European Economic Community
e.g.	exempli gratia (for example)
EHRC	European Convention on Human Rights and Fundamental Freedoms
EHRR	European Human Rights Reports
EIB	European Investment Bank
ELJ	European Law Journal
ELRev.	European Law Review
Enc. dir.	Enciclopedia del diritto
EOC	Equal Opportunities Commission
EP	European Parliament
EPL	European Public Law
EPU	European Parliamentary Union
EqPA	Equal Pay Act
ESDP	European/Common Security and Defence Policy
Est. Pol.	Estudios Políticos
et al.	et alii (and others)
et seq(q).	et sequential, et sequentes
EU	European Union
EuGRZ	Europäische Grundrechte Zeitschrift
EuR	Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
ex p.	ex parte
FAZ	Frankfurter Allgemeine Zeitung
FCC	Federal Constitutional Court
Fil.	Il Filangieri
fn.	footnote

Foro it.	Foro italiano
GEDP	General Economic Policy Guidelines
GG	Grundgesetz
Giur. cost.	Giurisprudenza costituzionale
GNP	Gross National Product
GNI	Gross National Income
GVBl.	Gesetz- und Verordnungsblatt
HL	House of Lords
HQ	Head Quarters
HRA	Human Rights Act
ibid.	ibidem
IC	Constitution of the Italian Republic
ICR	International Court Reports
i.d.	idem
i.e.	id est
IGC	Intergovernmental Conference
INAP	Instituto Nacional de Administración Pública
Integration	Jahrbuch der europäischen Integration
IRLR	Industrial Relations Law Reports
Ist. Fed.	Le Istituzioni del Federalismo
IVAP	Instituto Vasco de Administración Pública
JöR	Jahrbuch des Öffentlichen Rechts
JZ	Juristen Zeitung
KB	King's Bench (for older cases pre-1953)
Lav. inf.	Lavoro e informazione
loc. cit.	locus citatus
MEP	Member of the European Parliament
MP	Member of Parliament
MR	Master of the Rolls
NATO	North Atlantic Treaty Organisation
NJW	Neue Juristische Wochenschrift
No.	Number
NVwZ	Neue Zeitschrift für Verwaltungsrecht
nyr	not yet reported
ÖZöR	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (Austrian journal of public and international law)

OJ	Official Journal
OJC	Official Journal (Communications)
OJL	Official Journal (Legislation)
op.cit.	opus citatus
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
p.	page(s)
para.	paragraph
passim	mentioned before
Pol. Dir.	Politica del diritto
pp.	pages
QB	Queen's Bench
QC	Queen's Counsel
QMV	qualified majority voting
Quad. cost.	Quaderni costituzionali
Quad. fior.	Quaderni fiorentini
Quad. rass. sind.	Quaderni Rassegna Sindacale
Racc.	Raccolta della giurisprudenza della Corte di giustizia e del Tribunale di primo grado
Rass. parl.	Rassegna parlamentare
RDCE	Revista de Derecho Constitucional Europeo
RDE	Rivista di diritto europeo
RDILC	Revue de droit international et de legislation comparée
RDPE	Rassegna di diritto pubblico europeo
RDSS	Rivista del Diritto della Sicurezza sociale
RDUE	Revue de droit de l'Union européenne
REDC	Revista Española de Derecho Constitucional
REP	Revista de Estudios Políticos
Riv. it. dir. pubbl. com.	Rivista italiana di diritto pubblico comunitario
Riv. dir. intern.	Rivista di diritto internazionale
Riv. stor. it.	Rivista storica italiana
Riv. trim. dir. pubbl.	Rivista trimestrale di diritto pubblico
RMC	Revue du Marché commun
RRA	Race Relations Act
RTDeur/RTDE	Revue trimestrielle de Droit européen
RV	Reichsverfassung
s	section
S&P	Scienza & Politica
scil.	scilicet
SDA	Sex Discrimination Act
SEA	Single European Act
ser.	series
SpC	Spanish Constitution

STC	Sentencia del Tribunal Constitucional (judgment of the Spanish Constitutional Tribunal)
SSTC	judgments of the Spanish Constitutional Tribunal
TDS	Teoria del diritto e dello Stato
TEC	Treaty establishing a Constitution for Europe
TEU	Treaty on European Union
ThürVerwBl.	Thüringer Verwaltungsblätter
UEF	Union Européenne des Féderalistes
UK	United Kingdom
US	United States
USA	United States of America
v/v.	versus
VAT	Value Added Tax
VerwArch	Verwaltungsarchiv
Vol.	Volume
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WD	Working Document
WHI	Schriften zum Wirtschafts-, Handels- und Industrierecht
WRV	Weimarer Reichsverfassung
WTO	World Trade Organisation
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZevKR	Zeitschrift für evangelisches Kirchenrecht
ZfV	Zeitschrift für Verwaltung
ZG	Zeitschrift für Gesetzgebung
ZÖR	Zeitschrift für öffentliches Recht (Austrian journal of Public and International Law)
ZRP	Zeitschrift für Rechtspolitik
ZSR	Zeitschrift für Schweizerisches Recht

Introduction

Hermann-Josef Blanke and Stelio Mangiameli[1]

I. The constitution and the nature of the European Union

1. The European Constitution and the crisis in the procedure for ratifying the Treaty establishing a Constitution for Europe

When the Treaty establishing a Constitution for Europe was solemnly signed on 29 October 2004 in the Sala degli Orazi e Curiazi at the Campidoglio in Rome,[2] few people, looking beyond the rhetoric of the occasion, felt that this would prove to be an event to change the course of European history, marking a new process of unification of the old continent. For there were many people, holding differing positions, who drew attention to varying degrees to the limitations of the process that had just been concluded, while at the same time pointing to new and greater dangers already facing the fragile European Union following its enlargement to 25 members. European public opinion was therefore immediately split between those who feared and those who enjoyed the prospect of the failure of the Treaty ratification process.

It is true that the deliberations of the Convention did not proceed as planned in the wake of the *Laeken* declaration, and whereas this declaration demanded clarity and simplification, the Treaty establishing a Constitution for Europe (TEC) made provision for a complex institutional system and procedures that were hard to follow and difficult to put into practice.

One wonders whether the citizens' call "for a clear, open, effective, democratically controlled Community approach, developing a Europe which points the way ahead for the world" in a renewed Union have actually been met with the drafting of a treaty that claims to be a Constitution, and which is divided into four parts, with two Preambles and as many as 448 articles, plus 36 protocols, 2 annexes and 50 declarations.

And it was because of this, although not this alone, that when the first referendums were held, in France on 29 May and in the Netherlands on 1 June 2005, support by the citizens of the Union for the Constitutional Treaty collapsed.

But even before the French referendum was held, public opinion was already asking what would happen to Europe if France rejected the Treaty. In a warning to his fellow nationals, the academic, *Jean d'Ormesson* said that, "If the opponents win, the continent will not move towards a future of reconciliation, but will waver,

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1 Parts I and V are by Stelio Mangiameli, and parts II, III and IV by Hermann-Josef Blanke.

2 Treaty establishing a Constitution for Europe http://europa.eu.int/constitution/en/lstoc1_en.htm.

and we shall be responsible"; and "a successful 'no' vote will not change anything in the French situation, but the French will be cut off from a Europe to which they belong".[3] This has obviously not happened, and this rather dramatic warning to French citizens did not prove very helpful.

But in the aftermath of the referendum, how many people dashed in to declare that Europe was dying? Many, too many. *The Economist*, for example, entitled its cover page, illustrated with the picture of *Jean Paul Marat* dead in his bath, "*The Europe that died*".[4] The less drastic critics spoke of a "freezing" of the Constitutional Treaty. The United Kingdom, through its Prime Minister, hurriedly suspended the referendum. Only little Luxembourg stood up in defence of Europe, and its Foreign Minister, *Jean Asselborn,* declared, "We will reverse the situation," and the referendum on 10 July ended in the opposite result.

The constitutional future of Europe appears uncertain, and the 17 June 2005 European Council, with the crisis over the adoption of the Community budget for 2007-2011, certainly did nothing to help overcome the state of constitutional need the Union has long experienced.

But the science of European public law is duty-bound to explain constitutional phenomena and institutional crises, not emotionally and on the back of public opinion affected by such problems as unemployment, the value of the Euro and the lack of economic growth in Europe, which have wrongly been pinned onto the Constitutional Treaty, but to do so thoroughly and, if the intention is to be prescriptive, with the capacity to link the recent events to the history of the institutions in order to draw lessons for the future.

2. The constitutionalisation of Europe

From this point of view, the first question has to do with the search for the European Constitution. It is true that the new treaty, using an expression fraught with meaning, is entitled "Treaty establishing a Constitution for Europe" and for the first time, with reference to Europe, it used the term "Constitution", which triggered a wide-ranging, and - perhaps - futile debate on the legal nature of the document: Treaty versus Constitution. But the constitutional issue in Europe certainly did not come into being with the signing of this latest instrument, and neither is it perhaps strictly linked to the most recent developments regarding it.

For decades, the Court of Justice, as everyone knows, has been ruling that Europe is not only "a new kind of legal order in the field of international law" (*Van Gend in Loos*, 1963) but it is also a "Community of law", with "a basic Constitutional Charter, which is the Treaty" (*Les Verts*, 1986). This concept was subsequently reiterated in the assertion that "the EC Treaty, although concluded as an international agreement, is nevertheless the Constitutional Charter of a Community of Law" (*Opinion* 1/91, relating to the Agreement creating a European Economic Area).

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[3] Le Figaro, 26 April 2005.

[4] The Economist, June 4th-10th 2005.

Part of the literature and some of the officials of the institutions followed up these statements a long time ago, by reconstructing a corpus of European constitutional law. But even though the international law approach has since been abandoned, the constitutional law school of thought has not yet become fully established. It is this which has given rise to the problems deriving from the analyses of the European system and the proposals advanced for reforming it.

We may usefully reflect on the fact that the constitutionalisation of Europe, along the lines laid down by the founding fathers (*Robert Schuman*) who decided against an immediately political approach to integration, has gradually developed across the years, and in order to start, the first condition was to consolidate the European institutions. This is mainly being achieved through the case law of the European Court of Justice, and has taken several years. In some of these judgments that have become so famous as to be cited by name and recognised as keystones in the European legal system, the European Court has ensured the establishment of treaty law and secondary law, the principle that Community law prevails over domestic law and a European system of fundamental rights.

In 1964, *Walter Hallstein* clearly identified this constitutional trend in the European legal system very clearly when he said that "*plus qu'une convention classique du droit des gens, ce Traité-cadre de politiques vivantes, base d'institutions aux pouvoirs étendus, générateur de droit et d'obligations pour chaque citoyen comme pour les Autorités les plus hautes des Etats, n'évoque-t-il pas la constitution d'un Etat moderne et nous permette en citoyen d'une république fédérale de ne pas hésiter sur la nature de cette Constitution?*".

But a statement by itself is not sufficient to produce a constituent legal effect, neither could (or can) the constitutional order be anchored only to an instrument possessing the formal nature of an international public law treaty.

For the purposes of creating the European Constitution, the Law of Treaties has certainly not been unambiguous, in either form or substance, but it cannot be said that it is purely international law; it is directed specifically to the citizens as well as to the Member States; it has adopted procedures to ensure the effectiveness of European legal rules which have not only superseded international law procedures, but above all have made it possible for the various legal systems to mingle through the rule of competence; it has made it possible for the European legal order to evolve on the basis of a functional rationale, and the implicit powers clause ; it has been expanded through successive international law instruments, whose substance has by no means been the result of free international negotiations, but the result of actual practice within the European legal order, as evidenced from the policies pursued at the European level, initially in the absence of any clear statutory basis, and subsequently consolidated as a result of the revisions of the treaties.

However, the constitutionalisation of Europe must not be confused with the expansion of European competences, even though in terms of quantity and quality these are able to design a Community which is no longer a one-purpose Community but a general-purpose Community, or with the direct effectiveness of Community law in the Member States. For, in formal terms, one can always say that all the European competences are subject to the rule of the principle of conferral,

which can be traced back to the provisions of the Treaty, namely the will of the Member States, rather than the will of the European level; it could also be argued that the effectiveness of European law in the internal legal system of the Member States is based on the system for implementing state laws and not directly on the Treaty itself; lastly, one could consider the anomaly of the European provisions giving citizens their rights to be an effect of the state order that enables those provisions to have domestic effectiveness. These are arguments that are widely found in Italy in the case law of the Constitutional Court, and in Germany in the case law of the *Bundesverfassungsgericht*.[5]

It is precisely because of the discrepancy between these phenomena and their interpretation that makes it evident that the process of constitutionalising Europe has already been achieved, to a certain extent, while the explanation for it is still waiting to be more fully developed.

The constitutional idea of a European Union as an autonomous entity, with its own features - albeit common to the legal systems of all the Member States - has certainly been consolidated by article 6.1 TEU. For this provision, which makes no reference to instruments or sources outside the Union as Article 6.2 TEU does to a certain extent, dealing with fundamental rights, by declaring that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, gives the Union a form which can only be drawn up by constitutional law, in which the Member States are parties over which the Union exercises its "shaping" powers. For while Article 6.1 ends by stating that the founding principles are "common to the Member States", such that one might construe the whole provision to be a description of the identity in principle of the European Constitution and the identity of the Member States, the following article 7 TEU makes it clear that the "*communion*" of principles in Article 6.1 is prescriptive, because the Treaty empowers the Union to judge, and in specific cases to impose penalties in respect of the conduct of the Member States.

This is not the place to consider which procedure should be used to specify the principles addressed in Article 6.1 TEU, also for the purposes of judging whether they are being honoured or violated by the Member States. But what we do have to emphasise here is that the constitutionalisation process brought about by this provision, and safeguarded by the protection mechanism in Article 7 TEU, is difficult to ascribe comprehensively to the idea of the external legitimation of the Member States as the "masters of the treaties".

To put it another way, constitutional elements have also long been present and codified in the treaties during the process of European integration, signifying that the European legal order is self-affirming, making it an autonomous and dialectical reality within the complex system of relations between the Union and the Member States. For it is all of these constitutional elements that underpin a complex and well-articulated structure of power exercised by the Institutions within the limits of compliance with fundamental rights, as general principles of the European order according to the provisions of Article 6.2 TEU. This latter provi-

[5] On this regard, see *S. Mangiameli*, Integrazione europea e diritto costituzionale, Milano, 2001.

sion, which after many years of judgments issued by the European Court, has taken up an autonomous system built up through the common constitutional tradition of the Member States and the ECHR, which makes the European constitutional issue circular, even though, with the codification of the rights by the Nice Charter, the European protection of fundamental rights must be considered to be prevalent over national constitutional guarantees.

3. The European Constitution and the legitimation of the European order

From what has been said so far, the constitutional crisis which Europe seems to be passing through with the split caused by the French and Dutch referendums, appears problematic, but not in the sense that has been somewhat sensationally driven by the mass media of the imminent end of the supranational institution, let alone the impossibility of giving it a Constitution. For the European Union already has a Constitution, obviously not in the formal sense of the term, but as it has gradually developed in practice; and the scientific issue that European public law has to address, on which the writers in this book have reflected, is not primarily the possible outcomes of the ratification of the Constitutional Treaty but rather the relationship that can exist between the (material) European Constitution and the Treaty establishing a Constitution for Europe with all its specific contents.

The problem is therefore primarily the concept of "Constitution" itself, around which the debate has always been particularly heated. But whatever one's position on the doctrine of the State,[6] suffice it here to point out that in both ordinary and specialised technical language, the term *"Constitution"* is used with different meanings, and expresses an ontologically ambiguous concept, referring as it does to designate both what is being constituted and what has already been constituted.[7] In legal terms, the notion of constitution has often, historically speaking, taken on different meanings because across time it has been used to describe differing concepts and, from the political point of view, instead of referring to the elements on which the Community is based, it has often taken on a connotation of value by entailing specific contents and also particular forms.

This consideration appears to be necessary here because the debate regarding the existence or otherwise of a European constitution, and the debate around the need to give Europe a Constitutional Charter - which has now become the separate issue of understanding the legal nature that should be attributed to the "Treaty establishing a Constitution for Europe" - seems to be fuelled by an "underlying bias" according to which the term drags in its train the historical contents of *constitutionalism,* with the result that it is not the phenomenon of a constitution itself around which the scientific debate should hinge, but the presence or absence of certain features and certain procedures, with the result that the idea of a European Constitution must be rejected, in the absence of any element of constitutionalism.

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6 *V. Crisafulli*, Costituzione, in: Enc. Novecento, Roma, 1975, 1030.

7 *M. Dogliani*, Introduzione al diritto costituzionale, Bologna, 1994, 11.

But this bias, which tends to take the form of a fully fledged postulate, according to which there is necessarily a relationship of *cause and effect*[8] between the notion of *constitutionalism* and the notion of a *European Constitution,* ends up by distorting the representation of the situation. For it cannot be denied *constitutionalism* lies at the heart of the constitutional elements that the European Union has taken on as the *founding* elements of its own legal order, in that the latter are linked to the *doctrines, norms* and *institutions* "adopted by most States in which, starting in the final years of the 18th century, a government was introduced, called a constitutional government in contrast to absolute government, which had been wholly predominant until then", one of whose best-known features was "limiting governmental authority by law (...) and specifically establishing the restrictions therefore instituted which were enshrined in written constitutions ."[9]

Thanks to the work of giving tangible form to these principles by the European nations and their governments, who first claimed the Constitution and later endowed it with particular types of guarantees, *constitutionalism* did not remain only some abstract theory, but became a school of thought, reflecting ways of life, thanks to which Europe's citizens today can enjoy and rightly claim to be the depositories of "the European constitutional heritage",[10] based on freedom and democracy. Even the newly acceding Member States to the enlarged Union, coming from on recent institutional experiences going in the exactly opposite direction, such as Communism, can identify with this heritage, because the European constitutional tradition is at all events part of their history. And it is their own (rediscovered) tradition that enables them to reconsider their history following the collapse of the ideology.

This common *heritage* has certainly inspired the contents of the European Constitution, to the point that in order to endow them with meaning, any authority required to interpret and implement the European legal system cannot ignore the cultural baggage of *constitutionalism.*

Despite all its peculiarities, the Treaty establishing a Constitution for Europe appears to be a product of Western constitutionalism, at least as far as the subject matters governed by it are concerned (principles, competences and powers, sources, rights, procedures and guarantees).

But although this may be obvious, it would be an error of judgment to infer from this that on to say that the features of *constitutionalism* are more or less slavishly linked to the "European Constitution".

Accordingly, there are writers, such as *Maurizio Fioravanti,*[11] who has tried to demonstrate that a treaty cannot be equated with a constitutional treaty, and has set

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[8] *M. Dogliani*, Può la Costituzione europea non essere una Costituzione in senso moderno?, in: www.costituzionalismo.it: "This position is obviously polemic with those who substain the inapplicability of the categories of classic constitutionalism to the current events of community law."

[9] *C. Ghisalberti*, Costituzionalismo (premessa storica), in: Enc. dir., XI, Milano, 1962, 130 et seq.

[10] *A. Pizzorusso*, Il patrimonio costituzionale europeo, Bologna, 2002.

[11] *M. Fioravanti*, Un ibrido fra "trattato" e "costituzione", in: Fil., 2004, 207 et seq.

out down "a kind of borderline beyond which it is not possible to go, except by transcending the theoretical and historical borders of what we call Constitution", and naturally reaches the conclusion that the Treaty establishing a Constitution for Europe cannot be considered to belong to the category of "constitutions". But in so doing he demonstrates that he is referring to certain possible contents of the Constitution, but not to its substance.

When *Dieter Grimm*[12] says that "the constituent power of the people is an essential component of constitutionalism", and concludes that "examined in the light of this notion, the draft Treaty establishing a Constitution for Europe" fails to meet this condition, because "the Convention was not chosen by the citizens of the union. They have no say in the adoption of the draft. It cannot be attributed to them". And he identifies a *constitution* with an instrument that is adopted following a specific procedure, flying in the face of everything we know from historical experience, and even with reference to Germany's Basic Law itself.

In the debate, European constitutionalists obviously take account of the fluid nature of the European situation, and are convinced that integration, which can obviously experience crises and standstills, thanks to its dynamic character can also take on different connotations. Even the authors cited here talk in terms of "missing elements" which would be needed for it to be a constitution, and certainly do not ignore those which are present. But their positions ultimately fit into the cultural context of *constitutionalism*, to get as far as possible away from interpreting the legal element which, from the point of view of constitutional law, determines what makes a "constitution".

Dieter Grimm, for example, rightly notes that "the parties are the source of constitutional law, that is to say, the community, whether it is called the 'people', 'society' or 'nation', which constitutes a political entity in its own right".[13] But in order to operate, this source must elect a Constituent Assembly or hold a subsequent European referendum, as others writers have also maintained; for the people "do not play the part of proposers in the constituent process, but the very different role of giving *de facto* legitimacy to the Constitution created by others. A legitimation ... which is quite different from the (*ex post*) approval of the Constitution", because "popular legitimation is expressed firstly in widespread and inarticulate ways" and "is subsequently legitimised by the same legal system to which that Constitution refers".[14]

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[12] *D. Grimm*, Trattato o Costituzione, in: Quad. cost., 2004, 163 ss.; also in *Id.*, Una Costituzione per l'Europa?, in: *G. Zagrebelsky - P. P. Portinaio - J. Luther*, Il futuro della costituzione, Torino, 1996, 339 et seqq., spec. 353 et seqq.

[13] *D. Grimm*, Trattato o Costituzione, op. cit., 163.

[14] *A. Pace*, La dichiarazione di *Laeken* e il processo costituente europeo, in: RTDP, 2002, 622-623.

4. The legal nature of the Union and the question of sovereignty: International law - European law - The Constitutional law of the Member States

The Constitution therefore owes its existence not to the presence of certain elements or specific procedures, which are naturally important for the purposes of understanding what *type* of Constitution has been produced, but to the reality of an autonomous and original legal system; the real issue regarding the European Constitution therefore has to do with the question of the sovereignty of the Member States and of the Union, and therefore relates to the legal nature of the Union.

Fioravanti rightly considers that the "key concept of sovereignty" is a way of classifying instruments "which appears to be infallible", since "one might say that a 'Constitution' exists precisely because a State is generated", such that between a *treaty* and a *constitution* "no hybrid is possible: *tertium non datur*".[15] But to this one might reply that despite the sound premise, the conclusion does not apply to the case of the European Union. The fact is that his argument, which is closely linked to state public law, fails to consider that even though relations between Member States and the Union are external to the national legal system and are created by international treaties, they cannot be seen simply in terms of international law, any more than relations between the Member States within the European system.

It must therefore be accepted that in the field of European law the question of sovereignty is an open issue, and it cannot be considered decisive as it usually is when staking out the spheres of constitutional law and international law. The structure of the Union presupposes a permanent "dual political existence", as a result of the interplay between cohesion and cooperation to attain the political purposes of the European system, with its multiplicity of States - as individual political units - which can only remain in existence if a balance is struck under enabling the European Union to continue existing as such, without the authority (or better still, the sovereignty) of the Union being able to be withdrawn at any moment.

If we accept this to be the real institutional situation of the European Union, we may rightly conclude that the Member States have a federative status, and that the Union itself is configured as the "federation" in the sense *Carl Schmitt* has defined it: "it is of the essence of a federation that sovereignty always remains an open question as between the federation and its member states, and the federation as such exists alongside the member states as such", it being the case that "neither the federation plays the part of the sovereign in relation to the member states, nor *vice-versa*".[16]

It is no coincidence that the most widely credited position for explaining the development of the European system has been the idea that those who focus on the

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[15] *M. Fioravanti*, Un ibrido fra "trattato" e "costituzione", op. cit., 209-210.

[16] *C. Schmitt*, La dottrina della Costituzione, (1928), (Italian translation), Milano, 1984, 486, 494. Note that the meaning *Schmitt* gives to the term "federation" is broader than the distinction between a Confederation of States and a Federal State (see p. 477).

positive aspects of the process of European integration may decline to answer the question of sovereignty, "because in view of the reality of the Community integration it does not represent a problem anymore" ["*denn angesichts der Realität der Vergemeinschaftung ist sie keine Frage mehr*"][17].

Describing the Union as a *federation* can certainly raise a few eyebrows, because in the theory of the State, it is a term with a very powerful meaning, because it indicates the level of supranational unification that might threaten State identities.

It is no coincidence that attempts are being made to interpret the phenomenon of Europe in the weak sense, in which it is possible to retain the statehood and the sovereignty of the Member States, while also giving Europe a Constitution without simultaneously vesting it with a legal character of its own. The whole construction rests on the possibility of agreeing to "a Constitution without a State", because the notion of *constitution* would not refer, as is the case in the classical theory of constitutional law, to the State and to its sovereignty, but simply to the "legitimacy of public power", and the "legitimacy of European public power" would reside "in the idea of a European 'social contract' on which European integration is based."[18]

But apart from the fact that this argument is not sufficiently persuasive when it denies that European constitutional law has the capacity to generate homogeneity,[19] it would only try to "reconcile the constitutional elements present in the supranational approach with the undeniable and continuing existence of the constitutional systems of the Member States".[20]

At all events, it is no longer possible to continue thinking that the real basis of the European order lies in the constitutions of the Member States, as the European Constitutional Courts have long been telling us, when they have ruled that they can declare an order implementing treaties to be unconstitutional whenever they find a provision of Community law to be in violation of the provisions of the national Constitution.

But in the event, however, these Courts have never declared any aspect of European law to be unconstitutional, even a violation of fundamental rights has been claimed in the secondary legislation, and it has long since become part of their case law to uphold the principle that it is the State legislator that must guar-

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[17] *H.P. Ipsen*, Europäisches Gemeinschaftsrecht, Tübingen 1972, 227 et seq., who then goes on to say „Darin läge dann der Beitrag der Gemeinschaftsrechtslehre zur Souveränitätskritik" (p. 233).

[18] *I. Pernice/F. Mayer*, La Costituzione integrata dell'Europa, in: *G. Zagrebelsky* (ed.), Diritti e Costituzione nell'Unione Europea, Roma-Bari, 2003, 43 et seq., who do not say specifically what the Union is, and attempt to incorporate it into "a constitutional system comprising a national level and a supranational level of legitimate public power, which influence one another, creating a *Verfassungsverbund*.

[19] See *S. Mangiameli*, La clausola di omogeneità nel Trattato dell'Unione europea e nella Costituzione europea, in: L'ordinamento europeo, I, I valori dell'Unione, Milano, 2005, 1 et seq.

[20] *I. Pernice/F. Mayer* (note 18), 53.

antee compatibility between national law and Community law. Moreover, that European law also conditions the substance of the individual constitutions of the Member States, which are revised even to take account of the rulings of the Court of Justice, with the result that "it is becoming increasingly more difficult to argue that the Member States today are the masters of their own constitutions".[21]

Ultimately, even though it is quite understandable that the issue of sovereignty may continue to be raised, fuelling constant observations regarding the European integration process, it is unacceptable to invoke it as if represented political unity, such that noting that it is absent in the case of the Union, because there are also Member States represented on the Council and are capable of acting by virtue of this fact, one may conclude that it is the Member States alone that possess sovereign powers. For a static concept of sovereignty, in the sense of state sovereignty, certainly appears to be inadequate, and perhaps even obsolete, if applied to the European Union.

This is not the appropriate place to re-examine the terms within which sovereign powers are divided and shared between the European Union and the Member States: whether, for example, the most substantial part of "foreign policy powers" remains with the Member States or has been shifted to the Union, or whether the "common trade policy" or the "common security and defence policy" has the greatest clout for these purposes and in the present situation.[22] It should, however, be emphasised that Spain's Constitutional Court accepted this historical status, regarding the relations between the Union and the Member States, by ruling on a case of a possible clash between Article I-6 of the Constitutional Treaty and Article 9.1 of the Spanish Constitution,[23] and the interpretation of the provisions governing fundamental rights in the Constitution and the Charter, in which it based its ruling on a linguistic device, drawing a distinction between "supremacy" and "primacy".[24] The same applies to the ruling of the French *Conseil Constitutionnel*, referring specifically to the rights set out in the Charter, issued an adjusting interpretation to obviate any conflicts with the French constitutional tradition, holding that the principle of the *primauté du droit de l'Union* (Article I-6 TEC) was balanced against the principle that the *Union respecte l'identité national des Etats membres* (Article I-5.1 TEC).[25]

But whatever ways exist for regulating this tension between the Union and the Member States, by expanding or reducing the European competences, including or excluding concurrent powers over specific matters of particular importance, such as fundamental rights, if the Member States agree to accept the persistence of the

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21 *I. Pernice/F. Mayer* (note 18), 56.

22 See on this point. *F. Chaltiel*, La Souveraineté de l'État et l'Union Européenne, l'exemple français. Recherches sur la Souveraineté de l'État membre, Paris, 2000, 259 et seq. and 391 et seq.; *N. McCormick*, La sovranità in discussione, (Italian translation), Bologna, 2003.

23 According to which "los ciudadanos y los poderes públicos están sujetos a la Constitución y al resto del ordenamiento juridico".

24 Declaración del Tribunal Constitucional, DTC 1/2004, 13 December de 2004.

25 *Conseil constitutionnel*, Décision n° 2004-505 DC, 19 November 2004.

"political dualism" without resolving it,[26] the federative structure of the Union will continue to exist and, from the existential point of view, it can certainly considered to be a *permanent* situation. Aside from *peace*, which was the original political basis of the Union, we can now no longer ignore the integrating power of international trade underlying the Community, and which has created an increasing interdependence between societies through the free movement of people, services, goods and capital, making the option for Europe now seem *irreversible*.[27]

What the evolution of the integration process seems to be indicating, then, is that, particularly since the Union is no longer a "single-purpose" organisation, it cannot be considered a mere supranational entity governed by an international law treaty, even if this is the legal form of the instruments that govern the purposes, organisation, powers and sources of the European order.

Ever since the six Member States established the first European Community, which was subsequently joined by the United Kingdom, Greece, Spain, Portugal, Ireland, Denmark, Finland, Sweden and Austria, which jointly created the European Union, and the 10 countries that entered with enlargement on 1 May 2004, an agreement[28] was concluded under which the Member States decided that all their relations, and not only their economic relations, would no longer be governed by international law, but by a common legal system to which they agreed to submit loyally and on an equal footing. It is in view of this agreement, therefore, that one can speak about the Union as a *federation*, and identify its positive *constitution* as something autonomous and distinct from the constitution of each Member States.

5. The European Constitution and the Treaty establishing a Constitution for Europe

If we examine the *Treaty establishing a Constitution for Europe* from the point of view of the European legal order as it really is, the debate on its juridical nature can take on a different tone. For even without referring to the distinction made by *Carl Schmitt* between Constitution and a Constitutional Act, the *Treaty* can be viewed it as a stage in the European constitutional process as it has developed since 1957.

Apart from the claims suggested by its title, which for the first time expressed the constitutional need of the European Union, there is no debate about its legal

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[26] It is obvious that that if the problem of sovereignty is solved, for example, in favour of the supranational level, it would no longer be a *federation* but, if anything, a unitary federal State, and the federative nature of the Union would no longer exist if the Member States were to weaken its role to the status of the organisations established under international law. "The purpose of the federation is to maintain the political existence of all its members within the federation" (*C. Schmitt* (note 1), 480).

[27] See *M. Kotzur*, Wechselwirkungen zwischen Europäischer Verfassung und Völkerrechtslehre, in: Verfassung im Diskurs der Welt. Liber Amicorum für Peter Häberle, Tübingen, 2004, 292.

[28] *C. Schmitt* (note 16), 90, defines it as "the pure constitutional contract".

nature as an international law treaty, but rather about its contents - that is to say, the constitutional elements that it reorganises, codifies or introduces within the context of the European Constitution. This being so, the Treaty does not create a good impression. Indeed, its formulation is more akin to a restyling of the earlier treaties rather than a fully-fledged *constitution.*

This is not to say that it has not introduced novelties. One only has to think of the incorporation of the Charter of Rights or the institution of a Minister for Foreign Affairs, or the new Presidency of the Union, and the different way of dealing with certain policies and forms of cooperation, as in the case of the common defence policy.[29]

But taken as a whole, the output of the Convention appears flawed and incomplete, as if the Member States had been reluctant to address the real problems in the European system, deferring solving then - in contrast to the *Laeken* declarations - to later stages in the integration process. One need only cite the issue of the efficiency and transparency of the decision-making process, the need to clarify the distribution of competences between the Union and the Member States, and the problem of the democratic deficit, which had not been fully resolved in the decisions adopted for the Treaty, even though had been identified as the main cause of public disaffection with the idea of Europe.

In addition to this, there is a particularly important problem of method. For the needs stemming from a common foreign and security policy, including the combating of terrorism, and the needs arising from a European economic policy,[30] cannot be addressed using the intergovernmental method, because this is conditioned by the unanimity rule, or by the Community method, because of the limited legitimation deriving from the democratic deficit.

The difficulties facing the European Union, since the referendums in France and the Netherlands, therefore have nothing to do with the merits of the integration process, any more than with the dangers stemming from the failure to bring into force the Treaty establishing a Constitution for Europe, because the Member States would at all events be bound to pursue the objectives and policies of the treaties currently in force. It is therefore a matter of resolving the contradiction that seems to exist, particularly since enlargement, between a European Union that is able to condition the world political stage, and a Union intent on stabilising itself on what are essentially economic foundations, focused on developing the internal market and on the gradual incorporation of the new Member States.[31]

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[29] See on this point the paper by *Rudolf Streinz*, in: *Streinz, Ohler, Herrmann* (eds.), Die neue Verfassung für Europa. Einführung mit Synopse, München, 2005.

[30] At least for the countries adopting the Euro. For the lack of a European economic policy could jeopardise the equilibrium of the whole system, since the Stability Pact increasingly appears to be an inadequate instrument, particularly for the purposes of reviving the economies of the European countries, and the establishment of a coherent social policy.

[31] See *U. Draetta*, La Costituzione europea e il nodo della sovranità nazionale, in: Dir. Un. Eur., 2004, 525.

This dilemma was criticised by *Tony Blair*[32] in his speech to the European Parliament on 23 June 2005, but there still remains the problem affecting both the coordination of the European system and its axiological aspects. The proposals for dealing with the stalemate caused by the failure of the referenda in France and the Netherlands must take account of this.

II. Coordination in the multilevel system

1. The European Union as a multilayered fundamental rights community

The extension of the protection of fundamental rights in the European Union documents the enlargement of the Union to a community of rights and attests to the integrative power of law.[33] At first it took place through the legal practice of the Court of Justice in Luxembourg, then through the transfer clause of Article 6 (2) TEU ("respect" for human rights as embodied in general legal principles) and finally in the Constitution by means of insertion of a Charter of Fundamental Rights in conjunction with the decision of the European Union to join the European Convention of Human Rights as well as the (continued) transfer clause (Article I-9 TEC). The national guarantees of fundamental rights in the Member States, the ECHR and the Charter of Fundamental Rights of the European Union are binding in their collectivity on the Union by virtue of Article I-9 TEC. In addition, Article I-9 (3) TEC allows the standard of fundamental rights in the Union to keep up with the advances made by ECHR and the common constitutional traditions.[34] The Constitutional Treaty therefore also authenticates fundamental rights thus, it acknowledges the coexistence and plurality of interlocked but at the same time competing sets of basic rights. Articles II-112 and II-113 TEC take account of that factor by referring to these jurisdictions in respect of their contents and barriers (Article II-112) and by trying to prevent collisions (Article II-113). The more strongly national and European law are interlinked in the "European constitutional confederation" (*I. Pernice*), the more indispensable is a certain degree of structural homogeneity of the legal systems as a precondition for their functional ability in

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[32] "The issue is not between a 'free market' Europe and a social Europe, between those who want to retreat to a common market and those who believe in Europe as a political project." PM's speech to the EU Parliament: full text, 23 June 2005; in http://www.number-10.gov.uk/output/Page7714.asp.

[33] *W. Hoffmann-Riem*, Kohärenz der Anwendung europäischer und nationaler Grundrechte, EuGRZ 2002, 473 et seq.

[34] On this new function, see Article 9 (3) of the TEC which corresponds to Article 6 (2) TEU, cf. *Chr. Grabenwarter*, Auf dem Weg in die Grundrechtsgemeinschaft, EuGRZ 2004, 563 (568 f.). He rightly criticises the power of judicial law-making of the ECJ in the area of fundamental rights intended by this provision, as set out in the explanations by the Presidency (draft Article 1 – 16 of the Constitutional Treaty dated 6.2.2003, CONV 528/03).

an integrated Europe.[35] This pluralism of fundamental rights is institutionally reflected in the specific institutions for legal protection of the Member States, the European Court of Human Rights (the Strasbourg Court) and the European Court of Justice (the Luxembourg Court).

a) Coherence safeguards

The existence of competing fundamental rights systems on a national and supranational level may result in a conflict between the courts that are appointed to safeguard these fundamental rights. In the European Court of Human Rights' decision in the case "Caroline von Hannover"[36] there was a call for "fine-tuning" between the different jurisdictions "concerning their mission and competence".[37] For coherence of the law – in terms of the external and internal coherence of interlinked jurisdictions but not as absolute homogeneity – is a requirement of legal certainty.[38]

The relationship between European jurisdiction and the national constitutional jurisdiction is shaped after the principle of shared responsibility. Hence, there are also disjoint spheres exposed to incoherence. However, the German Federal Constitutional Court (Bundesverfassungsgericht) has supported the primacy of the European Court of Justice by means of accepting it as the statutory judge (Article 101 para 1.2 GG), as far as the compliance with obligatory references for preliminary rulings under Article 234 EC are concerned.[39] Thus, coherence guarantees are primarily procedurally protected. The French *Conseil Constitutionnel* in a decision of 10 June 2004 has qualified the duty to implement European directives as a constitutional obligation ("exigence constitutionnelle").[40] European law is thereby distinguished from any other international law – i.e. the law that comprises the ECHR. An exception in regard to this constitutional implementation duty is seen by the *Conseil Constitutionnel* in the case of an explicitly converse constitutional

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35 Cf. *W. Hoffman-Riem* (note 33), EuGRZ 2002, 474, who considers it a difficult task to achieve a coherent set of rules on fundamental rights, also as "law in action" in the ten new Member States;cf. also on the contributions of *H.-J. Papier, M. Wyrzykowski, R. Romboli, D. Thürer, Lord Rodger of Earlsferry, V. Skouris* and *L. Wildhaber* on the occasion of the 3rd European Jurists' Forum in Geneva from 7 to 9 September 2005.

36 ECtHR, judgment of 24.06.2004 – case No 59320/00, NJW 2004, 2647. The appeal to the ECtHR was preceded by "Bundesgerichtshof" decision of 19.12.1995 (BGHZ 131, 332) and a decision by the Federal Constitutional Court of 15.12.1999, Caroline of Monaco (BVerfGE 101, 361).

37 *H.-J. Papier*, „Straßburg ist kein oberstes Rechtsmittelgericht", FAZ No 288 of 9.12.2004, p. 5, cf. also *R. Jaeger*, Menschenrechtsschutz im Herzen Europas, EuGRZ 2005 193/198 et seqq., 202 et seqq.

38 Cf. *W. Hoffman-Riem*, (note 33) EuGRZ 2002, 473.

39 BVerfGE 73, 339 (366 f.).

40 *Conseil Constitutionnel* décision 2004 – 496 DC, 10.6.2004, *Loi pour la confiance dans l'économie numérique*, Recueil p 101, Journal Officiel 22 Juin 2004, p. 1004, 1118, cf. on this *F.C. Mayer*, Europarecht als französisches Verfassungsrecht, EuR 2004, 925 (929 et seqq.)

provision ("une disposition expresse contraire de la Constitution"). In addition, "adjustment and amalgamation processes"[41] are stimulated by public expectations.[42]

b) The position of the ECHR in national legal systems

The degree of adjustment of the national legal systems by the ECHR and the case law of the Strasbourg Court of Justice is distinguished according to the status of the Convention in the national legal system.[43] The ECHR can have a derogative impact compared to domestic sources which share a similar position with it. Only in Austria does the Convention have constitutional status. All rights of the Convention can be asserted before the Constitutional Court (Verfassungsgerichtshof) like genuine domestic fundamental rights. The Convention enjoys greater progressive primacy in the Netherlands, where it has more weight than all national law including Constitutional law. However, for most of the Member States of the extended European Union the Convention is only overriding in regard to national statutes but not to the national constitution. An exemplary provision is contained in the French Constitution concerning the position of public international treaties in the national legal system (Article 55). Therefore, ordinary and administrative courts in France often declare provisions which infringe the ECHR as unlawful and hence inapplicable.[44] The Convention has a similar "directional effect"[45] in the United Kingdom because of the Human Rights Act which according to the specific British constitutional tradition allocates an exceptional position to it. In Section 2 the national courts are committed to have regard to the decisions of all Convention bodies. In both models the directly effective substantive provisions of the ECHR are applied daily by national administrative authorities and courts and they develop direct effect. Germany – like Italy and the Scandinavian states – on the other hand provides an example for a "soft" normative regime corresponding to the Federal Constitutional Court's adopted "leading interpretative role of the ECHR".[46] Here, the Convention and the (additional) Protocols rank as a federal law. Thus, the Convention is included in the priority of law and has to be taken into consideration by the judiciary as well.[47]

Insofar as the national competent court has access to the Convention in the model of a mere interpretative guidance by the ECHR, this occurs via the perspective of the national law and only insofar as the coherence of the national funda-

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41 *H. Dreier*, Grundgesetz, Kommentar, Bd. 1, 1996, preliminary remark para 24.

42 Cf. *W. Hoffman-Riem* (note 33), EuGRZ 2002, 474 et seq.

43 Cf. on this *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, Munich, XXIV, 2003, p. 18 et seqq.

44 Cf. *M. Fromont*, Die Bedeutung der Europäischen Menschenrechtskonvention in der französischen Rechtsordnung, DÖV 2005, 1 (2 et seq.).

45 Cf. *G. Ress*, Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, EuGRZ 1996, 350.

46 Cf. BVerfGE 74, 358 (370).

47 Cf. BVerfG, 2 BvR 1481/04, FamRZ 2004, 1857 para 31, 53.

mental rights regime is not in danger. The second Senate of the *Bundesverfassungsgericht* has acknowledged, in a judgment of 14 October 2004 that in a constitutional complaint (Verfassungsbeschwerde) infringement of the ECHR or infringement of the obligation to consider judgments of the Strasbourg Court can be asserted. "The commitment to statute and law (Article 20.3 GG) includes consideration of safeguards of the Convention to protect human rights and fundamental freedoms and of decisions of the European Court of Human Rights in line with methodically justifiable interpretation of statutes... The nature of the binding effect depends on the field of activity of governmental organs and the margin that is left by overriding applicable law.[48] They are obliged to terminate a clear and "continuous breach" of the Convention and to restore a situation in line with the Convention.[49] Infringements of these obligations may constitute a breach of national fundamental rights in conjunction with the principle of the rule of law.

c) The "relationship of cooperation" between national courts and the European Court of Justice

A lack of coherence between the law of the European Union may develop, if secondary Community law, as far as it is the legal basis for the actions of national courts or authorities, is presented to a national court to give a ruling. The dispute concerning the scope of the competence of examination and rejection of the judiciary of the Member States is marked by three judgments of the Federal Constitutional Court, which are known as "Solange I",[50] "Solange II"[51] and "Maastricht".[52]

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48 BVerfG, 2 BvR 1481/04 (note 47), Leitsatz 1 and para 30, 32: BVerfG BvR 2790/04 of 28.12.2004

49 BVerfG, Beschluß der 1. Kammer (decision of the 1st chamber) from 05.04.2005, 1 BvR 1664/04, para 14 et seq.

50 BVerfGE 37, 271 (285): "The result is: As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court in the Federal Republic of Germany to the *Bundesverfassungsgericht* in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 [scil.: Article 234 EC] of the Treaty, is admissible and necessary if the German court regards the rule of the Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Constitution."

51 BVerfGE 73, 339 (387)

52 BVerfGE 89, 155 (174f.): "The Federal Constitutional Court by its jurisdiction guarantees that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution, and in particular the Court provides a general safeguard of the essential content as against the sovereign powers of the Community as well (see BVerfGE 73, 339 (386)) Acts done under a special power, separate from national powers of the Member States, exercised by a supranational organisation also affect the

However, the banana market case before the Federal Constitutional Court of 7 June 2000 then unambiguous clarified that the barriers of admissibility within the German constitutional procedural law already make such a conflict improbable.[53] Constitutional complaints and submissions of courts which assert the infringement of fundamental rights through regulations of secondary Community law are only admissible if after a detailed confrontation of the protection of fundamental rights on a national and Community level it is found that the European development of law compared to the German protection standards "cannot be regarded as substantially equal".[54] It is sufficient, if the essential content of the fundamental rights is generally "guaranteed"; a congruent protection is therefore not postulated.[55] An intervention by the Federal Constitutional Court would only be considered, if an act were to "generally" fall below that standard. The postulated essential comparability "in conception, content and effectiveness"[56] is not reliant on the coherence of the two fundamental rights systems. It is for the Luxembourg Court to deal with the problem of coherence when applying its own relevant legal standards. The battle with the incoherence of relevant legal norms should be fought out by the competent court in the Member States with its own law in mind and without support or a sustainable risk of intervention by the other competent court.[57] Thus the national courts will keep an adequate sphere of activity in the protection of human rights, what will help to lease the burden of the European courts.[58]

d) The interaction of ECtHR and ECJ on fundamental rights safeguards

The danger of divergent interpretation of fundamental rights in relation to the Strasbourg and the Luxembourg Courts has been eased by the fact that the ECJ has hitherto acknowledged the leading role of the Strasbourg Court in many ways.[59] Thus it has endeavoured to take the case law relating to fundamental rights

holders of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the Constitutional Court, the object of which is the protection of constitutional rights in Germany – in this respect not merely as against German state bodies (diverging from BVerfGE 58, 1 (27)). However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a "relationship of co-operation" with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standards that cannot be dispensed with (see BVerfGE 73, 339)."

53 BVerfGE 102, 147 (163 et seq.).

54 BVerfGE 102, 147 (162 et seq.).

55 BVerfGE 102, 147 (164).

56 BVerfGE 73, 339 (378 et seqq.).

57 Cf. *W. Hoffmann-Riem* (note 33), EuGRZ 2002, 476 et seq.

58 Cf. *R. Jaeger* (note 37), p. 194.

59 Cf. *Chr. Grabenwarter/K. Pabel*, Grundrechtsschutz in der Rechtsprechung des EuGH und des EGMR, in: K. Stern/P.J. Tettinger (eds.), Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich, 2005, p. 81 (88 et seqq.).

as an orientation in its own practice with fundamental rights. In all likelihood, the insertion of the Charter of Fundamental Rights into the legal system of the European Union will prompt the Luxembourg Court to place its task of ensuring legal unity when interpreting Community law (Article III-369 TEC) in the service of independent clarification of fundamental rights questions. The accession of the Union to the ECHR entails at the same time a consistent responsibility for fundamental rights in the European area, namely a congruity between the Union as originator of an intervention in fundamental rights and its public international responsibility as well as the coherence safeguard between the two European courts with the Strasbourg Court taking priority. Functionally, it becomes a constitutional court of the Union by virtue of Article 53 ECHR whose competence however is limited to questions of fundamental rights. In this position the Court is charged to ensure that in Europe – for over 700 million citizens – a minimum standard of safeguard for human rights through a public international "final supervision"[60] is granted. The reference to the ECHR in Article II-112 (3) TEC is to be understood in this context. Not only does it have the function of a plain positive rule but in addition serves primarily the purpose to avoid infringements of public international law.[61] Thus, the Strasbourg Court becomes an engine for the "common European development of fundamental rights",[62] a guarantor of the "ordre publique" of a common European human rights protection system.[63]

At the same time this means that the Strasbourg Court in fundamental rights protection proceedings guaranteed by the national courts, intervenes only, if there exists a fundamental misinterpretation of a freedom right. This has been implicitly acknowledged by the European Court of Human Rights in its judgment on the legal preclusion of reassignment of disseized property and businesses in eastern Germany.[64] This complies also with the subsidiary role of the Convention in Article 53 ECHR whereby the national legal system – including Community law – may protect fundamental rights more than the ECHR and consequently the ECHR cannot have unlimited effect. Coherence efforts of national (constitutional) courts would then be based on the judiciary combination of Strasbourg and Luxembourg Courts.[65] This virtually implies the completion of a commitment which the German Federal Constitutional Court has recently again emphasized in its case law; namely "in line with its competence... to prevent or remedy as far as possible infringements which are based on a defective application or non-observance of public international commitments by German courts and which may establish a

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60 Cf. *Krüger/Polakiewicz*, Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa, EuGRZ 2001, 92 (100).

61 Cf. *Chr. Grabenwarter* (note 34), EuGRZ 2004, 563 (566).

62 Cf. BVerfG, 2 BvR 1481/04 (note 47), para 62.

63 Cf. *H.-J. Papier* (note 37).

64 Cf. decision of the ECtHR from 30.03.2005 on the appeals No 719167/01, 71917/01 and 10260/02, http://www.echr.coe.int/fr/Press/2005/mars/Décisionirrecevabilitévon Maltzanetautres30032005.htm.

65 Cf. *w. Hoffmann-Riem* (note 33), p. 478.

public international responsibility of Germany".[66] Coherence may be facilitated by the painstaking process of comparative parallel judicial assessment on different levels of jurisdiction, which attempts the legal answer on facts according to parallel guarantees in the European constitutional confederation. The Luxembourg judges as well as the Strasbourg judges are confronted with the task of including the assessment of national legal systems in the interpretative discourse on the Charter and the Convention. But in the light of obvious inconsistencies which are to be observed within the European Constitutional Confederation in regard to similar protected issues, e.g. freedom to choose a profession and property rights, it cannot be excluded that many particularities of national fundamental rights systems will be absorbed in the long run.[67]

2. The allocation of rights and duties between Union and Member States

a) Coordination versus disentanglement

The draft Treaty establishing a Constitution for Europe has avoided labelling the Union as a "federal" entity.[68] In a rather demure diction it merely states there that the Member States of the European Union "confer competences to attain objectives they have in common...the Union shall coordinate the policies by which the Member States aim to achieve these objectives and shall exercise on a Community basis the competences they confer on it" (Article I-1.1 TEC). "Transparency", "strengthening of responsibility" at the different levels of the European constitutional confederation accordant to the subsidiarity principle, but most notably "disentanglement" of the competences between European Union and Member States are the parameters which are submitted to the European reform legislator[69] and which have become decisive for the Title III of the first part of the constitutional draft. Already the Lamassoure report as well as the report of the working group of the European Convention about "complementary competences"[70] were marked by

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66 Cf. BVerfG, 2 BvR 1481/04 (note 47), para 61.

67 Cf. *W. Hoffmann-Riem* (note 33), p. 479 et seqq.

68 Still different in Article 1 second indent of Part B (summary description) of the Preliminary draft Constitution Treaty of 28.10.2002, CONV 369/02 which describes the Union as "a Union of European states which, while retaining their national identities, closely coordinate their policies and administer certain common competences on a federal basis". Anyway, later it was said, that in the European Union the policies of Member States are administered in a co-ordinated and federal way.

69 Cf. *W. Clement*, Europa gestalten – nicht verwalten. Die Kompetenzordnung der Europäischen Union nach Nizza, Lecture within the series Forum Constitutionis Europae of the Humboldt-University Berlin on 12.2.2001, sub VII. in fine

70 CONV 375/1/02 from 04/11/2002.

the "guiding idea" of "transparency" and "clarity"[71] as well as "the basic delimitation of competence in each policy area".[72]

Then again, considerable scepticism prevails in the scholarly literature in respect of the regulative power of such federal regulating ideas for a European Constitution, notably concerning the aim of responsible transparency via disentanglement of the decision levels.[73] The constitutional practice of the Federal Republic of Germany already could not develop any guidance force for the development of the federal state[74] and has been thwarted by the domination of the executive powers and a system of informal cooperation between the governments of the *Länder*. Also in the political reform debate of the Federal Republic of Germany the notion of competence-related and financial disentanglement to contain unitary tendencies, thus, constituting the driving force of a necessary federal competition, is only gradually breaking through.[75] How controversial the European legal debate about the vital question of delimitation of competences proves to be may be clarified by the fact that the precise complexity of governmental decision levels with the integrated level in the Union is seen as the strength of the European system of competence allocation and therefore not the federal key note of "disentanglement" but rather a "network of interlinked levels under simultaneous horizontal and vertical separation of powers" is raised to the functional principle of modern governance in the European Union. Thus, the system of entwined sovereignty exercise which at all times defines the relationship between Community and its Member States is explicitly confirmed and selectively considered as reform requires.[76] Because it is the German model of complexity and not the American model of division that is implemented in the Union, the competences of the different authorities are mani-

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71 CONV 375/1/02, No 3: the European Paliament asserts in lit. A of his motion for a resolution, A5-0133/2002, that "the current system of division of competences in the Treaties is characterised by a complex interweaving ("Politikverflechtung") of objectives, substantives and functional competences".

72 CONV 375/1/02, No 3: the European Paliament, loc. cit., lit. M and No 1, 2 speaks about "enhancement" as well as "update" and "improvement" of the division of competences between the Union and its Member States.

73 To a certain extent considered as possible by *A. v. Bogdandy/J. Bast*, Die vertikale Kompetenzordnung der Europäischen Union, EuGRZ 2001, 441 (445, 450).

74 The impossibility of elevating the German federal constitutional regime, or any other, to a model for a European Union, is pointed out by *H.-P. Schneider*, Föderative Gewaltenteilung in Europa, in: Cremer/Giegerich/Richter/Steinberger, Tradition und Weltoffenheit des Rechts, Fs. Steinberger, 2002, p. 1401 (1406 et seq.), sowie *D. Thürer*, Kompetenzverteilung zwischen Union und Mitgliedsstaaten – aus Schweizer Sicht, in: N. Michel (ed.), Une Constitution pour l'Europe – Eine Verfassung für Europa, 2003, p. 9 et seq.

75 Cf. the contributions in *Herm.-J. Blanke/W. Schwanengel* (eds.), Zustand und Perspektiven des deutschen Bundesstaates, 2005.

76 Cf. *R. Bieber*, Abwegige und zielführende Vorschläge: Zur Kompetenzabgrenzung der Europäischen Union, Integration 24. Jg. (2001), p. 308 (310 et seq.).

fold, based on each other and interlinked.[77] For this purpose Article I-1.1 TEC is a distinct record by establishing the coordination of the national policy according to the implementation of intentions of the Union as a competence category of the Union besides the exercise of the assigned competences.[78]

There is, therefore, no regular coincidence of the roles of legislative, executive and judiciary on the Union level as regards an assigned factual competence. In fact, the execution, i.e. the implementation and application of legislative norms generally (Article I-37.1 TEC)[79] rests with the Member States which act according to their respective constitutional provisions, in compliance with the Treaties and under the control of the Commission, the national courts as well as the European Court of Justice. Hence, the Union is reliant on the interaction with its members while performing supranational duties in diverse ways.[80]

b) Flexibility as a basic principle

The flexibility of the competence regime was not mentioned in the Convention. The danger of a centralised Brussels was attributed by the members of the Convention to the competence exercised rather than to the legal basis itself. However, in the end they managed only partly to transfer the competences of the Union into a sophisticated total system.[81] With all due praise for the predominant intelligibility, certainty and transparency of the competence catalogue in Articles I-13 et seqq. TEC it is not to be ignored that even in a constitutional treaty-based Union supranational policy is conditioned in its precise shape by the provisions of the third part of the draft. All the more important against this background is the question, as to how the competence in Article III-130 TEC (Article 95 EC-Treaty) which only sets objectives, with no factual delimitations, in this functional core of the draft constitution will legally determine further integration policy. The provisions on the competence of the Union in the first part of the draft Constitution ultimately do not reform the Union in terms of a fundamental paradigm shift from complexity to disentanglement but will at most provide legal certainty and a graduated set of competences.

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77 Cf. *v. Bogdandy/Bast* (note 73), EuGRZ 2001, 445; *I. Pernice*, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 2000, 866 (817, 873), he speaks about „cooperative separation of powers".

78 On the concept of coordination as one category of competence and form of action cf. *S. Krebber*, Die Koordinierung als Kompetenzkategorie im EU-Verfassungsentwurf aus dogmatischer Sicht, EuGRZ 2004, 592, (595 et seq.).

79 On subsidiary competences of the Union of Article 202, third indent and 211, fourth indent TEC.

80 Cf. *H.P. Ipsen* (note 17), Tübingen 1972, chap. 9 para 10.

81 Cf. on this *Everling*, Quis custodiet custodet ipsos?, EuZW 2002, 357 et seq., who has very early on said that the catalogue model was unsuitable because of this difficulty.

c) Subsidiarity culture

More than ever in the history of European integration have the members of the Convention emphasized in various provisions the importance of regional and local governments in this constitutional unity. With it they have laid the foundation of a subsidiarity culture which in a Union of 25 and with more Member States soon to join, because of complexity this entity will frame the legislative and functional action of its organs. Thus, the draft Constitution organises compliance with the subsidiarity principle in the form of European inter-parliamentary cooperation and therefore empowers national parliaments to participate in the monitoring of European legislation ("parliamentary unity"[82]). To what extent the interweaving of the subsidiarity principle with the procedures of parliamentary control and judicial supervision may moderate the exercise of Union competences within the different policy areas depends also on whether the organs of the Union are more likely prepared to think and act with reference to a constitutional contractual multilevel-system. Article I-5.1 TEC, which obliges the Union to respect the national identities of its Member States and for this reason also the national constitutional identity, must prompt it to take the bipolar position of the competence regime behind the founding Treaties seriously. Therefore, the question also arises to what extent the Member States may realise their general belief in the common good which may well differ from the European competition ideal and the guarantees of the economic and financial conditions invoked in Article III-122 TEC assigns to the Union for the first time a specific legislative competence in the area of determining the principles and conditions which concern the functioning of services of general economic interest. Its aim is "that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfill their missions". Thus, Community constitutional law performs a reversal of the considerations in competition law in order to guarantee and develop its capacity to act in a way which complies with the particular tasks of social welfare.[83]

d) The Common Foreign and Security Policy

The Union is empowered to constitute and conduct a common Foreign and Security Policy including the progressive framing of a common defence policy (Article I-16, 40 TEC). Just as for economic and employment policy it is also characteristic for the foreign, security and defence policy that the competence of the Union is

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[82] Cf. *K.-P. Sommermann*, Europäische Rechtsetzung und mitgliedstaatliche Beteiligung, in: ibid. (ed.), Aktuelle Fragen zu Verfassung und Verwaltung im europäischen Mehrebenensystem, 2003, p. 87 (100).

[83] Cf. *Th. von Danwitz*, Die Rolle der Unternehmen der Daseinsvorsorge im Verfassungsentwurf, in: J. Schwarze (ed.), Der Verfassungsentwurf des Europäischen Konvents – Verfassungsrechtliche Grundstrukturen und wirtschaftsverfassungsrechtliches Konzept, Baden-Baden 2004, p. 251 (258 et seq., 264 et seq.); cf. further on the contribution of *H. Schweitzer*, Die Daseinsvorsorge im Verfassungsentwurf des Europäischen Konvents – Ein europäischer Service Public?, ibid, p. 269 et seq.

aimed at executing actions which shall support, coordinate and supplement the actions of the Member States, without superseding their basic competence in these areas (Article I-12.5 TEC). The draft Constitution codifies two significant reforms in the area of foreign and security policy which the Treaty of Nice has established. Under certain conditions and within the scope of a common strategy and a common policy respectively, collective external actions may be adopted by qualified majority (Article III-300.2 TEC). However, the draft constitution also still provides for unanimous decision-taking in the CFSP framework (Article I-40.6, III-300.1 TEC). This also applies to decisions concerning the transition from unanimity to qualified majority in matters which are not already listed in Article III-300.2 TEC ("Passerelle clause" – Article I-40.7, III-300.3 TEC). Enhanced cooperation also applies to actions in relation to Foreign Affairs (Article III-419.2 TEC). Furthermore, the draft Constitution provides in the run up to a common defence that a part of the EU Member States may establish "structured cooperation" (Article I-41.6 in conjunction with Article III-312 TEC). Permanent structured cooperation can be established by qualified majority (Article III-312.2.2 TEC). However, further decisions within structured cooperation then require unanimity (Article III-312.6 TEC). However, the most important progress in the scope of CFSP, provided there is an effective ratification of the draft constitution, concerns an institutional dimension in the shape of the creation of a European Minister for Foreign Affairs (Article I-28, III-296 et seqq. TEC). He not only makes proposals towards the foreign policy of the Union and implements them on behalf of the Council but he also acts in the area of the common security and defence policy. As member of the Commission, he coordinates the remaining aspects of external actions of the Union. Since the European Council President acts as external representative of the Union, the role of the Minister for Foreign Affairs insofar this can be ascertained will be to act "as catalyst of this policy in terms of the formation of opinion and its implementation".[84] Since the present 25 members of the Union cannot agree on the main features let alone the details of a European foreign policy, the institutionalisation of the office ties in with the hope that it will entail a common policy.

3. The institutional arrangement

The duty to protect the federal balance between supranational power and its components is first of all on the Commission as owner of the right of initiative as well as on the European Parliament and the Council as legislator of the Union. Not until then – but increasingly in view of the growing relevance of the principle of qualified majority – the European Court of Justice must act as the guardian of the actions of the organs of the future Union and legal provisions enacted by them. Core functions of the European Parliament are strengthened through the draft

[84] Cf. *D. Vernet*, Die Union als außenpolitischer Akteur - Skizze einer Standortbestimmung, EuGRZ 2004, 584 (586).

constitution,[85] namely the legislative function because the procedure of joint decision is established as an ordinary legislative procedure (Article I-34, Article III-396 TEC). In the budget procedure the Parliament will also be strengthened because the distinction between obligatory and non-obligatory expenditure will be abolished. The creative function of the Parliament obtains its final approval because from now on it elects the President of the Commission on proposal of the European Council (Article I-27.1 TEC) and as is the case now has to approve the remainder of the Commission members (Article I-27.2 TEC). Against this background the European Parliament has been referred to as "the clear winner of the institutional reform via the draft constitution".[86] Then again others view in the assessment of the constitutional gain in power the European Council as the winner.[87] As a result the political organs have been enhanced overall to preserve the institutional balance.[88] Nevertheless, the parliamentary (Article I-46.2.2 TEC) and legal control of this institution remains moderate even though it will now be subject to the supervision of the European Court of Justice (Article III-365.1, 367 TEC) – with the emphatic exception of wide areas of the Common Foreign and Security Policy (Article III-376.1 TEC). The claim to leadership of its President who is not answerable to the Parliament is positioned next to that of the President of the Commission and will enter into a "power struggle" with both of them.[89]

The Council of Ministers as a central decision and control organ of European policy remains on the bedrock of a Union composed of national states of the Union. In contrast to the European Council, which under Article I-21.4, III-239.1 TEC as a rule decides through consensus, Article I-23.1 TEC stipulates the qualified majority as the voting rule of the Council of Ministers, "except where the Constitution provides otherwise". The quorum of the qualified majority– as agreed by the governmental conference – under Article I-25.1 TEC must correspond to 55 % of the members of the Council – comprising at least 15 members– and representing at least 65 % of the population ("double majority"). The requirement of a population majority of 65 % is due to the determination of the President of the Convention to revalue the Member States with larger populations. This constitutes adequate compensation for the way in which members of the European Parliament are elected according to an imperfect application of the principle of degressive proportionality to the number of votes per country. Moreover, the principle of double majority represents the population also at decisions of the Council of Min-

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85 *J. Schoo*, Das institutionelle System aus der Sicht des Europäischen Parlaments, in: J. Schwarze (note 83), p. 63 et seq.

86 Cf. *J. Wuermeling*, Mehr Kraft zum Konflikt, EuGRZ 2004, 559 (562); *J. Schwarze*, Der Verfassungsentwurf des Europäischen Konvents – Struktur, Kernelemente und Verwirklichungschancen, in: J. Schwarze (note 83), p. 489 (528).

87 *Chr. Calliess/M. Ruffert*, Vom Vertrag zur EU-Verfassung?, EuGRZ 2004, 542 (549).

88 Cf. *J.-P. Hix*, Das institutionelle System im Konventsentwurf eines Vertrags über eine Verfassung für Europa – Der Ministerrat und der Europäische Rat, in: J. Schwarze (note 83), p. 75 (98 et seq.).

89 Critical *Chr. Calliess/M. Ruffert* (note 87), EuGRZ 2004, 542 (549).

isters, which are taken outside the regular legislation (Article 35, 34.2 TEC).[90] If the Council does not decide on the basis of a proposal by the Commission or the Minister for Foreign Affairs, the quorum will be raised to 72 % of the members of the Council which represent at least 65 % of the Union's population.

The Convention's proposed model reflects the double legitimization of the Union as a confederation of states and an alliance of citizens. It facilitates the formation of majorities to shape policy and at the same time it reduces in a Union of 25 – soon to be 27 – Member States the amount of possible blocking coalitions. Despite the fact that the transitional provisions existing until 2009 (Article 2 of the Protocol on the representation of citizens in the European Parliament and the weighting of votes in the European Council and the Council of Ministers) the Council of Ministers looks to be closer to a Chamber of States while simultaneously upgrading the European Parliament. This confers a context and legal character to the guidelines from the European Council. These tasks are identified in the draft Constitution as "policy-making" and "coordination" (Article I-23.1 second indent TEC). The Council of Ministers is together with the European Parliament appointed as legislator of the European Union in Article I-23 TEC. In tandem with the latter it also exercises the budgetary competence.

III. The pre-legal conditions of the European Union

1. The need for a political commitment of the Union's citizens

The legal connection of the Union through the Constitution has to coincide, however, with an extra-legal commitment of its citizens. European citizens and peoples of the Member States constitute a public forum for political discourse on the European common based on of agreed aims and values.[91] A networking of different public levels is already possible as the debate about the introduction of the Euro has shown.[92] However, the ratification procedure of the Treaty shows there is a large deficit in the dialogue between politicians and citizens. The project on European integration appears to have become a subject of the European elites without it being sufficiently imparted to the citizens. The discourse between European citizens about the perception of common problems, of experiences, successes and events in Europe is rather rare.[93] "Europe...is not a communication society,

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90 *J. Schwarze* (note 86), p. 489 (536).

91 *I. Pernice* Der Europäische Verfassungsverbund auf dem Wege der Konsolidierung. Verfassungsrechtliche Ausgangslage und Vorschläge für die institutionelle Reform der Europäischen Union vor der Osterweiterung, JöR 48 (2000), 205 (213).

92 Cf. *A. Beierwaltes*, Sprachenvielfalt in der EU - Grenze einer Demokratisierung Europas? ZEI-Discussion Paper C 5/1998 des Zentrums für Europäische Integrationsforschung Bonn, 1998, p. 12 et seqq..; *Chr. Dorau*, Bedarf und Inhalt einer Verfassung für die Europäische Union, in: F. Ronge (ed.), In welcher Verfassung ist Europa - Welche Verfassung für Europa?, Baden-Baden 2001, p. 174 et seq.

93 Correct *W. Schäuble*, Europa vor der Krise, FAZ Nr. 132 from 8.6.2000, p. 10.

hardly a community with a common memory and a community with only limited experience".[94] It is merely a "collective term for a number of neighbouring communities with a common communication, memory and experience",[95] whose common politically and socially based identity is doubted.[96]

In the context of the European constitutional process the political parties are more than ever committed to refining the European societal substructures.[97] With regard to their mission to evolve a "European consciousness" and to express the political will of the citizens of the Union (Article 191 EC-Treaty) they have therefore on a European level been constitutionally institutionalized as an important factor of identity building (Article I-46.4 TEC). This includes primarily also a method of financing its supranational ambitions.[98] The European press, too, as the "Fourth Estate" bears a huge responsibility in border-crossing reporting of national political events. The system of organized interests, too, is inadequately developed on a European level. Here, the influence of lobbyists and social movements is considerably weaker than on the national level. Because of the fragmented multilevel system, in which binding decisions are dependent on intergovernmental negotiations and inter-institutional bargaining, the associations are more heterogeneous than on a national level and in view of the complexity of decision-making processes they have only a limited capacity to act.[99]

The demand for communication in one language, which was made a condition for a Constitution,[100] however, is evidence of the merely national parameter aligned and therefore non-historic understanding of supranational integration processes. Admittedly, English will more than ever play the role of lingua

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94 *P. Graf Kielmannsegg*, Lässt sich die Europäische Union demokratisch verfassen?, in: W. Weidendeld (ed.), Reform der Europäischen Union, Gütersloh 1995, p. 235.

95 Cf. *H. Walkenhorst*, Europäischer Integrationsprozess und europäische Identität: Die politische Bedeutung eines sozialpsychologischen Konzepts, Baden-Baden 1999, p. 112.

96 Cf. *A.-K. Fischer*, Legitimation der Europäischen Union durch eine Verfassung, Münster 2004, p. 64 et seqq.

97 Whose total failure is alleged by *D. Grimm*, Braucht Europa eine Verfassung?, JZ 1995, 581 (587 et seqq.): *H.H. Rupp*, Europäische „Verfassung" und demokratische Legitimation, AöR 120 (1995), 269 et seqq. Such a "development" of the pre-legal conditions required for an effective democracy is still considered possible by the Federal Constitutional Court: BVerfGE 89, 155.

98 Cf. Article 191 (2) EC-Nice as well as Declaration 11 of the Nice intergovernmental conference; cf. Regulations governing European political parties, Commission of the European Community Brussels, 12.7.2000 COM (2000) 444 final, http://europa.eu.int/comm/archives/igc2000/offdoc/com444_en.pdf which came into force in 2004.

99 Cf. *B. Kohler-Koch*, Organized Interests in the EC and the European Parliament, in: European Integration online Papers (EIoP), Volume 1 (1997), issue 9, http://eiop.or.at/eiop/texte/1997-009a.htm.

100 Cf. *D. Grimm*, A re-valuation of the EP is not sufficient. The democratic deficit in the EC has structural causes. Jahrbuch zur Staats- und Verwaltungswissenschaft Bd. 6 (1992/93), p. 13ff.; *Rupp* (note 97), AöR 120 (1995), 269 et seqq.

franca.[101] If the institutions in order to function were first to require an ideal social and political environment before obtaining full responsibility, this would mean misjudging the importance of alternating impulses for the development of a political system.[102] However, the expectations of public interest in the work of the Convention were not fulfilled. True, the meetings of the constitutional Convention – as earlier the Herzog Convention which established the emergence of the European charter on fundamental rights – were public and a great many documents were available on the internet but these opportunities were predominantly used by an interested part of the public. For the general public the existence of the Convention remained unknown.[103] The governments of some Member States, whose constitutions provide for a referendum on the ratification of the draft Constitution were therefore confronted with the problem of communicating the political advantages of the agreement to their nation.[104] It is not until the public discourse of the Constitution reaches communities, that it will be decided whether the constitution is capable of achieving an integrative effect.[105]

2. Homogeneity through a value consensus

The draft Constitution already includes in the preamble (first recital) the universal legal principles of the European constitutional traditions but it is doubted whether they are suitable to formulate a political unity distinctive of other political unities.[106] The particular national collective identity remains decisive as a point of

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[101] *F. Debus*, Sprachenprobleme im Vereinigten Europa, in: J. Seifert (ed.), Vereinigtes Europa und nationale Vielfalt - Ein Gegensatz?, Göttingen 1994, p. 47 (52 et seqq.); cf. on this also *Herm.-J. Blanke/M. Kuschnick*, Bürgernähe und Effizienz als Regulatoren des Widerstreits zwischen Erweiterung und Vertiefung der Europäischen Union, DÖV 1997, 45 (50).

[102] Cf. *R. Bieber*, Steigerungsform der europäischen Union: Eine Europäische Verfassung, in: J. Ipsen et al. (ed.), Verfassungsrecht im Wandel: Wiedervereinigung Deutschlands, Deutschland in der Europäischen Union, Verfassungsstaat und Föderalismus, Köln 1995, p. 291 (302).

[103] Cf. European Commission, Eurobarometer 59. Public Opinion in the European Union, (Spring 2003), Abbildung 8.2., http://europa.eu.int/comm/public_opinion/archives/eb/eb59/eb59_rapport_final_en.pdf.

[104] *F. Hollande*, in: F. Hollande/N. Sarkozy, "Grand Débat RTL-'Le Monde'", extracts in: Le Monde v. 06/04/2005, p. 16: "Sur la Constitution européenne, il ne faut pas laisser penser que ce serait la catastrophe avec le non. Ce serait la poursuite de l'Europe telle qu'elle est, avec tous les défauts et sans la capacité politique de faire le changement espéré."

[105] Cf. *H. Vorländer*, Integration durch Verfassung? Die symbolische Bedeutung im politischen Integrationsprozess, in: ibid (ed.), Integration durch Verfassung, Wiesbaden 2002, p. 9 (20 et seq.); *A.-K. Fischer* (note 96), p. 100 et seqq.

[106] Cf. *M. Kaufmann*, Verfassungspatriotismus, substantielle Gleichheit und Demokratieprinzip im europäischen Staatenverbund, in: A. Brockmöller et al. (ed.), Ethnische und

reference for the peoples of the Union. Thus, the integrative power of universal principles as they may be found in the current primary law, is not sufficient to act as "bonding agent" for nationally fragmented European peoples.[107] As they cannot generate a collective European identity on their own, the principle of majority (Article I-23.3 TEC) still stands politically on unsecured terrain. Acceptance for this purpose by the European peoples will only be attained if the Union's organs strictly apply the principle of subsidiarity.

Compared to the previous Union's Treaties the draft Constitution represents already a stronger identity-creating frame of reference for debate about the Union's constitutive rules and values. Since the "homo oeconomicus" stands no longer in the centre of the future polity but in a much more comprehensive sense the Union people as "zoon politikon", the Union exists not only as a Union of basic rights but also through a "Charter of Fundamental Rights" (Article I-2 TEC). Respect for human dignity, freedom, democracy, equality, constitutional legality and protection of human rights secure the individuals' right vis-à-vis the Union's power. Pluralism, non-discrimination, tolerance, justice, solidarity and gender equality are to determine their relationship within society. It has been stated that the European Constitution is more significant as a value regime than the functional order formulated under it (*Lothar Späth*). It seems rather questionable whether through the cataloguing of the ideals as to purpose the peoples of Europe may be persuaded to accept integration (Article I-2, 3 TEC). The consensus on value and procedure which the draft Constitution introduces must also be represented and visualised by means of symbolic forms. Flag, anthem and motto of the Union (Article I-8 TEC) are capable of strengthening a European "sense of us" and of developing a "post-national identification" (*R. M. Lepsius*) with Europe.

IV. The enlargement and the boundaries of Europe

The enlargement of the Union by ten accession states on 1st May 2004 can only be consolidated successfully if in particular the institutional provisions of the draft Constitution come into force after its ratification. Enlargement and consolidation of the Union must even after those conditions have been fulfilled, continue to be understood as a dialectical unity, particularly through fundamental reforms in the area of agricultural policy und the European structural Funds.

According to Article 49.1 of the TEU and the corresponding provision in the Treaty establishing a Constitution for Europe (Article I-58) "...every European State which respects the principles (of democracy, human rights and fundamental freedoms as well as constitutional legality), ... may apply to become a member of the Union". This open phrasing leads to the question as to when the boundaries of the capacity for enlargement of the Union are reached. For the Union to stay gov-

strukturelle Herausforderungen des Rechts, Archiv für Rechts- und Sozialphilosophie, 1997, Beiheft 66, p. 40 (59).

[107] Cf. *A.-K. Fischer* (note 96), 2004, p. 101.

ernable a certain degree of homogeneity and consistency of its political structures must remain safeguarded. The necessity of demarcation arises also inherently from the function of the external borders of the European Union: They serve the control of migration and are security barriers at the same time. The easiest element for the determination of the Eastern boundaries of Europe would be geographic: The Bosporus, Mediterranean and Atlantic form the natural boundaries of Europe which at first sight also offer a justification for admission to the Union.

But with the Helsinki decision of the European Council in December 1999 to make Turkey a candidate for candidate status in the Union and its further decision of December 2004 to commence accession negotiations on 3 October 2005 if certain conditions are fulfilled, this objective criterion has been rejected. A debate about the legitimacy of an admission of Turkey from the point of view of whether it may be classified as a European state has not been conducted within the European Council. In contrast, the heads of State and Government referred solely to the compliance with the "Copenhagen criteria" of 1993.[108] As well as providing for the realisation of market economy and freedom of competition they stipulate that states "as a condition of membership...must have achieved institutional stability as a guarantee of democratic and constitutional order for the safeguard of human rights as well as for the respect and protection of minorities". The accession of Turkey is not recommended out of interests of European policy,[109] but out of consideration concerning the shaping of external relations with Islamic countries. However, the integration of Turkey would move the European border somewhere near Syria, Iraq, Iran, Armenia, Azerbaijan and Georgia, thereby making its stabilisation more complex and problematic.[110] The question about the political boundaries of Europe is too delicate for the policy makers to surrender it to the geographers. Technical considerations are thus prevented from dominating the debate. Will the Union become "boundless" in the East so that the suspicion is confirmed which already arises when contemplating the Euro banknotes?

Bulgaria and Romania will join the Union of 25 Member States in 2007. Turkey is already an accession candidate; this with the emphatic support of the Catholic accession State of Poland whose admission to NATO was promoted by Turkey at the time. The five Balkan states including four successor states of the defunct Yugoslavia were given a political assurance on joining at the summit of the European Council in Zagreb in the year 2000. Since then, Croatia has made the biggest progress. In the case of Serbia, Kosovo and Montenegro it remains uncertain whether it concerns the same state. Georgia has expressed its wish to join. Further Caucasian states may follow. The European Parliament also gave consideration to a potential accession of Israel and Palestine within the time frame of 2010. King Mohammed VI of Morocco has announced a candidacy of his country once the

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[108] Cf. conclusion of the Copenhagen European Council, Bull.EG 6-1993, I.13.

[109] Cf. *Chr. Langenfeld*, Erweiterung und infinitum? – Zur Finalität der Europäischen Union, ZRP 2005, 73 (74, 76).

[110] Cf. *M. R. Lepsius*, The ability of a European Constitution to forge identity → p. 23 (27) of this book.

projected tunnel to be routed beneath Gibraltar is completed.[111] Because all geographic "criteria" which were applied in the case of Turkey also fit on these states one actually wonders who shall explain Moroccan, Armenian and Israelis that they are not Europeans. Notwithstanding the fact that they, too, became part of the privileged action of the European Union with a view to the creation of a free trade area by the Barcelona Declaration of 28 November 1995.[112] All in all in the next 20 years up to ten states may hope for an admission to the Union. But thereby the European Union will outgrow Europe.[113] Is the European Union on the way to a Eurasian-Maghrebinian Union?[114]

The question about the boundaries of Europe has affected our Continent for more than a thousand years without it ever having been necessary to determine fixed borders. A recourse to the social-cultural demarcation of the year 1054 in which the schism between the Christians of the Orient and of the Occident happened, thus between a Catholic Western and Central Europe on the one hand and an Orthodox Eastern Europe on the other hand, would turn Europe into a "Papist club". But it is also true that the boundaries of Europe may only be defined under the guidance of historians and thereby on the basis of the historical self-conception of Europe.

If one makes Latin Christianity the decisive axiom of the determination of European identity then the Eastern border of our Continent would be constituted by the outer ring of the last Gothic churches.[115] It encloses Finland, the Baltic states, Poland, Hungary, Croatia and Slovenia. The present Europe of 25 is congruent with this demarcation.

Joseph Weiler, a legal scholar from the New York University Law School has expounded this idea of a Christian Europe. According to this, "the Christianity is to be acknowledged as an essential element within the development of its own civilization".[116] However, doubts on the practicability of this parameter for a definition of a "European state" are appropriate for that reason alone because the Constitutional Convention and the governments of the Member States could, as is known, not even reach a consensus about the reference to God ("nominatio dei") in the "symbolic language" of the preamble to the European Constitution. Thus, the Judeo-Christian inheritance of Europe remains unmentioned even though it

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[111] Morocco's application to join was rejected on the grounds that it was not a European State, cf. Europaarchiv, 1987, Z 207.

[112] Cf. the section on "Economic and financial partnership" of the "Barcelona Declaration and Euro-Mediterranean partnership" in the version of 26.03.2003, http://www.europa.eu.int/ scadplus/leg/en/lvb/r15001.htm.

[113] Cf. *St. Marchand*, L'Europe est mal partie, 2005, p. 273et seqq.

[114] The question on the development of the Union into a "Eurasian Union" is also posed by *R.M. Lepsius* (note 110), p. 23.

[115] Cf. *St. Marchand* (note 113), p.276 et seq.

[116] Cf. *J.H.H. Weiler*, Ein christliches Europa, 2004. The author is described as of the Jewish faith.

was Christian humanism from which freedom, democracy, equality and the rule of law have been developed.[117]

Number five of the Copenhagen criteria to be considered as applicable law states: "The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries".[118] In accordance with this often disregarded "internal perspective"[119] accession requests by other states must be examined notably under the aspect of ensuring normative power and enforceability of Community law in all Member States, their loyalty and willingness to follow, as well as an adequate homogeneity of the Union. The "internal cohesion" is not only conditioned by political, economic or institutional factors but decisively determined by spiritual, intellectual and religious movements and traditions. They constitute the living inheritance for the future of Europe.[120] Perhaps the sole convincing criterion for the Eastern demarcation of the European Union ultimately remains only its own political survival.[121] The question about the boundaries of the Union is not a mere intellectual game of marbles.

V. Entry into force of the Treaty establishing a Constitution for Europe

1. Issues relating to the procedures for ratifying the Treaty Establishing a Constitution for Europe

The Treaty establishing a Constitution for Europe would give the European Union not so much a Constitution as a re-casting of its constitutional elements. This fact alone makes the entry into force of the Treaty particularly important; and the need for ratification to follow each individual Member State's own constitutional pro-

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[117] Cf. *K. Hübner*, Das Christentum im Wettstreit der Weltreligionen, 2003.

[118] See Presidency conclusions – Copenhagen European Council (21./22. June 1993), www.europarl.eu.int/enlargement_new/europeancouncil/pdf/cop_en.pdf.

[119] Rightly pointed out by *Chr. Langenfeld* (note 109), ZRP 2005, 73. The Laeken Declaration appears to be unconcerned when solely concentrating on the external perspective when it states under the Title "The role of Europe in a globalised world" with respect to political unconditionality: "The only border drawn by the European Union is that of democracy and human rights. The Union is only open to countries which share its basic values, such as free elections, respect for minorities and the rule of law."

[120] On the "graphs of common values" of Europeans cf. already *W. Röpke*, Internationale Ordnung – heute, 2. edition 1954, p. 66 et seqq.; an important view is contained in the Declaration of the Bishops' conference of the European Community: "The future of Europe. Political responsibility, value and religion. Contribution to the debate on the future of the European Union in the European Convention".

[121] Cf. *St. Marchand* (note 113), 2005, p. 279.

cedures[122] under Article IV-447 TEC, implies that a comprehensive view is taken of the constitutional instruments of each of the 25 Member States. Some of them can ratify the Treaty by an ordinary Act of Parliament, others have to meet more stringent conditions in procedures considered to be equivalent to passing a Constitutional Act, while others require a referendum, a revision of the Constitution and an Act of Parliament, following complex procedures already been set in motion.[123]

Seen against this background, the negative outcome of the referendums in France and the Netherlands are a source of particular concern, because they will obviously prevent those Member States[124] from ratifying the Treaty, even though these two Member States have not put themselves outside the European Constitution as it has by now become established.[125]

Apart from relations with European public opinion, which ought to be based on a more thorough discussion of the changes in the global economy and a greater understanding of the stances taken up by the citizens of the Union, and improved communications capabilities on the part of Europe's political leaders to show the need for European integration to proceed, the present situation in Europe regarding the ratification of the Treaty establishing a Constitution for Europe suggests a number of ideas that could prove useful for finding a way out of the impasse caused by the referendum results in France and the Netherlands.

Firstly, it is necessary to reflect on the value of ratification procedures from the point of view of establishing the European linkage and in relation to the internal linkage. But this part of the procedure is the one which is most specifically related to public international law and to the constitutional law of the Member States. It comprises the following acts: the signing of a multilateral treaty and the deposit of the instruments of ratification, completing the formation of the act, and the realigning of domestic law so that the international obligations are able to deploy their effects in the domestic system.

These procedures express the formal nature of the Treaty as an international law instrument, and they can be used in support of the idea that the whole Euro-

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[122] On this point see the summary by *M. Cartabia*, Il Trattato che adotta una Costituzione per l'Europa, X, La ratifica, in: Foro it., V, 2005, 34 et seq.

[123] See http://europa.eu.int/constitution/ratification_en.htm for overview of the Member States' ratification procedures.

[124] The consequences of the "national ratification crisis" have been examined by *B. de Witte*, La dimensione nazionale della revisione dei Trattati europei, in: Quad. cost., 1/2005, 39 et seq.; on the possible future scenarios, see also *J. Ziller*, La ratification des traités européens après des référendums négatifs: que nous disent les précédents danois et irlandais?, in: Riv. it. dir. pubbl. com., 2/2005, 365 et seq.

[125] On the French situation see most recently *M. Jopp, G. Kuhle*, Wege aus der Verfassungskrise - die EU nach den gescheiterten Referenden in Frankreich und den Niederlanden, and *J. Schild*, Ein Sieg der Angst - das gescheiterte französische Verfassungsreferendum, both in: Integration, 3/2005; The results of the French referendum can be found in *Proclamation des résultats* announced on 1 June by the *Conseil Constitutionnel,* reporting that of the 41,789,202 eligible voters, 12,808,270 voted in favour and 15,449,508 had voted against; for a commentary on this, see *R. Jacques,* Un gâchis référendaire (29 mai 2005), in: RDP, 2005, 839 et seq.

pean system is based on the legal systems of the Member States; to a certain extent, this appears obvious and essential if the intention is to maintain the federative, rather than the unified, character of the European Union. Where the first problems emerge is in the claims underlying a role vested in the Member States, not simply as the parties that give legitimacy to a common constitutional decision, but as parties that can *individually* verify, at any time, the substance of the Treaty and make it ineffective.

The idea is that the domestic constitutional systems of the Member States prevail over the constitutional elements that have been established in European law. For example, the ratification of the Treaty by an ordinary Act of Parliament could at all events permit the Constitutional Court of any Member State to rule on whether or not any provisions of the Treaty are lawful in terms of compliance with the national constitution.[126] The fact that some Member States' constitutions provide for the Treaty to be subjected to prior constitutional review to rule on its compatibility with the Constitution and, if it is not, require Parliament to revise the Constitution beforehand, without which ratification would otherwise be impossible,[127] might be used to support a general view of the relationship between the constitutions of the Member States and the Constitutional Treaty, with the prevalence of the former providing the basis for the latter, whose constitutional character would then derives from this special relationship with the national constitu-

[126] This, to certain extent, has been Italy's experience. For the Italian Constitutional Court has upheld the principle that the Act implementing Community law is subject to constitutional review. However, it has limited the judgment on constitutionality to cases in which there is a conflict with the fundamental principles of the Italian constitutional system and a violation of inviolable human rights, thereby equating the constitutional judgment on laws implementing European treaties to the judgment on constitutional laws and laws revising the Constitution. See Corte cost., 27 December 1973, no. 183, in: Giur. cost., 2401 et seq, 2420; see in this connection Corte cost., 27 December 1965, no. 98, in: Giur. cost., 1965, 1322 et seq, 1339 et seq.; on the so-called "counter-limitations" see, in the literature, *P. Barile*, Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane, in: Com. intern., 1966, 14 et seq., now in: Scritti di diritto internazionale, Padova, 1967, 701 et seq., 713; or more broadly *M. Cartabia*, Principi inviolabili e integrazione europea, Milano, 1995, 95 et seq.

[127] Cases include the Spanish Constitutional Court judgment (DTC 1/2004 of 13 December 2004) and the French *Conseil Constitutionnel* judgment (Décision 2004-505 DC of 19 November 2004), which were adopted on the basis, respectively, of Article 95 of the Spanish Constitution and Article 54 of the French Constitution: these decisions can be found at www.associazionedeicostituzionalisti.it with the account by *A. Schillaci*; commenting on the French and the Spanish judgments see, among others, respectively, *F. Chaltiel*, Une première pour le Conseil constitutionnel - Juger un Traité établissant une Constitution, in: RMC, 2005, 5 et seq.; *L. Azoulai, F. Ronkes Agerbeek*, Annotation, in: CMLR, 3/2005, 871 et seq., and *A. C. Becker*, Vorrang versus Vorherrschaft. Anmerkung zum Urteil des spanischen Tribunal Constitucional DTC 1/2004, in: EuR, 2005, 353 et seq.

tions.[128] Lastly, it has to be said that these considerations would also arise if it were possible to adopt more stringent procedures for enacting the ratification Act[129] or, as some have advocated for Italy, the enactment of Constitutional laws.[130] In both these instances, the Constitutional Treaty, insofar as it can be considered to be a special source of law, or even a constitutional source of law from the point of view of domestic law, such that it has a different status from ordinary laws and can validly derogate from the constitutional principles of the Member States, would nevertheless always remain subject to the national constitution and to the limits to which any revision of the Constitution is subject in a given legal system.[131]

For the Member States have been able to opt for Europe on the basis of the constitutional possibility to conclude international agreements (Article 11 Italian Constitution; Article 24 GG; Article 88 French Constitution)[132] such that the ra-

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[128] *I. Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur wahrung der Verfassungsordnung, in: *R. Bieber/P. Widmer*, L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area, Zürich, 1995, 225 et seq.; most recently *Id.*, Zur Finalität Europas, in: *G. Folke Schuppert/I. Pernice/U. Haltern* (eds.), Europawissenschaften, Baden-Baden 2005, p. 21 (the text is also available in PDF format at www.whi-berlin.de; the references in this paper are to this version); for more details regarding this position see *A. Peters*, Elemente einer Theorie der Verfassung Europas, Berlin 2001, 205 et seq.

[129] The German case seems to apply here in particular, for Article 23 GG provides the possibility for the federal law, under which the *Hoheitsrechte* (sovereign powers) are transferred to the European level using the ordinary bicameral procedure ("by a law with the consent of the *Bundesrat*"), or, in certain situations ("the establishment of the European Union, as well as changes in its treaty foundations and *comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible*"), using the same procedure and within the same limits that apply to revising the Constitution under paragraphs (2) and (3) of Article 79, or, as some have argued for the Italian case, using the more stringent procedures that apply to the enactment of Constitutional laws.

[130] *M. Cartabia*, "Ispirata alla volontà dei cittadini degli Stati membri", in: Quad. Cost., 2005, 9 et seqq.

[131] Its basis, however, would always be the national Constitution, and the courts could always declare it to be unconstitutional in terms of the national constitution, if it were to violate the limits imposed by it. This limitation is clearly evident in the German case where Article 23 (1) GG refers to Article 79 (2) GG for the bicameral procedure requiring a two thirds majority, and Article 79 (3) GG with particular reference to the restrictions on revising the Constitution, which would also apply to the special federal law transferring powers to the European level, modifying or completing the *Grundgesetz*; this also applies to the Italian case where the limitations on revising the Constitution coincide with the limits within which an ordinary Act of Parliament governed by Article 11 of the Constitution can derogate from the Constitution (see Constitutional Court judgment 1146 of 1988 in: Giur. Cost., 1988, I, 5565 et seqq).

[132] In this regard see *K. Vogel*, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit, Tübingen, 1964, spec. 42 et seqq.

tionale of the supremacy of the Member States' Constitutions has been used historically to explain the basis and the start-up of the European integration process, although it appears unsuitable for justifying it once it has reached the present level of institutionalisation, albeit amid difficulties and caveats.[133] For if the European order is deemed to be a permanent part of the organisation of the Member States and not reversible or able to be immediately denounced, the international law procedures through which primary European law is revised have lost their real significance as being freely negotiated between sovereign states, and seen more simply as a mere instrument - perhaps the only one possible at the present time – that enables them to regulate the commitments they have jointly undertaken within the European Union and on which the European organisation is already interacting autonomously, following the treaty revision processes, concurring in determining the substance, and conditioning the decisions taken by the Member States' governments.

In the case of instruments revising the European treaties, which must include the Treaty establishing a Constitution for Europe, we are faced with what is formally an international law procedure, but one which essentially produces the same effects as a procedure to revise the Constitution.[134]

2. The European Constitution and the procedures for revising the Treaty

What has just been said is also confirmed from a historical overview of the way in which federations have been established and developed across time. It is generally agreed that the preamble to the Constitution of the German *Reich* of 16 April 1871 much more closely resembled an international treaty than a fully-fledged Constitution,[135] and that the rules governing the revision of the Constitution in Article 78 were closely bound up with the role of the Member States within the federation.[136]

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[133] The unsuitability of these clauses for justifying the progress made in the current integration process also appears obvious judging from the fact that many Member States have introduced, and are in the process of introducing, specific "European" clauses into their constitutions; the literature is nevertheless divided on what these express in terms of legitimation, namely, whether they are the cause or - as this writer believes - the consequence, of the integration process; in this connection see *I. Pernice*, Zur Finalität Europas, cit., 4 et seqq.

[134] See, recently, *C. Pinelli*, Ratifica e referendum: verso la conclusione del processo costituente europeo?, in: Pol. dir., 2005, 69 et seq.

[135] This was pointed out by *R. Smend*, Ungeschriebenes Verfassungsrecht im monarchisches Bundesstaat, in: Festgabe für Otto Mayer zum 70. Geburtstag, Tübingen, 1911, 245 et seq., and now in: Staatsrechtliche Abhandlungen und andere Aufsätze, 2. ed., Berlin, 1968, 39 et seq.

[136] Under Article 78.1, for example, it could be revised by legislative instruments, but with a minority blocking vote of 14 members of the Bundesrat (Amendments of the Constitutions shall be made by legislative enactement. They shall be considered as rejected when fourteen votes are cast against them in the Federal Council [*Veränderungen der*

Similar considerations also apply to the Constitution of the United States of America, whose origins in international law are stated plainly in article VII, which sets out the conditions for ratifying the Constitution.[137] Contractual elements still persist in the American Constitution, however, in article V which describes the procedure for amending the Constitution.[138] This provision provides two methods for proposing amendments: in the first case, two thirds of the legislatures of the Member States may request the convening of a convention to examine the amendments, and in the second case Congress can propose an amendment with a two-thirds majority vote of each House. The amendments provided by the Convention or the Congress must at all events be ratified by three-quarters of the Member States before coming into force.[139]

In the case of the European Union, the evolutionary process from a revision of the treaties to a constitutional revision, was formally set in motion even before the

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Verfassung erfolgen im Wege der Gesetzgebung. Sie gelten als abgelehnt, wenn sie im Bundesrate 14 Stimmen gegen sich haben]). Furthermore, paragraph (2) provided that the rights of each State could not be affected without their consent (The provisions of the Constitution of the Empire by which fixed rights of individuals States of the Confederation are established in their relation to the whole, shall only be modified with the consent of the State of the Confederation which is immediately concerned [*Diejenigen Vorschriften der Reichsverfassung, durch welche bestimmte Rechte einzelner Bundesstaaten in deren Verhältnis zur Gesammtheit festgestellt sind, können nur mit Zustimmung des berechtigten Bundesstaates abgeändert werden*]).

137 It should not be forgotten that the Constitution was originally proposed as an amendment to the Articles of the Confederation, which required ratification by all thirteen states before any changes could be made. Article VII of the Constitution required ratification by only nine of the thirteen states in order to become effective (*The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same*). Constitutional literature resolved this contradiction by maintaining that once the ninth state had ratified the Constitution, thereby bringing it into effect, those nine states automatically seceded from the Confederation to establish a new and distinct federal Union in its place. According to this theory, the States which did not ratify the Constitution remained part of a separate nation which subsequently ceased to exist, once the Constitution had been ratified by all the States.

138 Article V "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, *when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof*, as the one or the other Mode of Ratification may be proposed by the Congress" (see *A. la Pergola*, Residui "contrattualistici" e struttura federale nell'ordinamento degli Stati Uniti, Milano, 1969).

139 At the present time, Article V only restricts the power of amendment: no amendment may deprive any State of equal representation in the Senate without the consent of that State ("and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

aforementioned arrangements were established.

Article 48 TEU, which should have applied in the case of the Treaty establishing a Constitution for Europe, but which in reality was disregarded, provides a different type of procedure to negotiating and concluding the traditional type of international treaty, in which elements of international law, although certainly present, are interwoven with a revision initiative and examination forming part of the structure of the European Union itself.[140] For this reason, the literature has emphasised that Article 48 TEU is already a mechanism *sui generis,* which is concurrent with, and not alternative to, international negotiations; it may therefore be said that the Member States, at the present stage of development, have been given the power to use both the special procedure provided by Article 48 TEU or the traditional negotiating procedure under international law, or also a procedure which we might consider to be even more anomalous in many respects, which, while not taking the form of an international law negotiation, remains outside the scope of Article 48 TEU, even though it can always be considered a valid procedure.

This latter event, in particular, occurred with the procedure that opened at *Laeken*, based on the idea of convening a Convention, along the lines of what had already been tried out for the drafting of the Nice Charter of Rights. But the Constitutional Treaty was designed to codify this practice *pro futuro*, with the provisions of Article IV-443 under which the ordinary and general procedure for the revision of European primary law (of the Constitutional Treaty) gains a little more autonomy from international law. For it is almost unanimously agreed that, by requiring the convening of a new Convention (paragraph 2) for the general revision of the Constitution, which would have to adopt a recommendation to be submitted to the representatives of the Member States' governments, this provision marks a considerable shift of emphasis away from the canons of international law.[141]

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[140] For Article 48 TEU provides that the initiative lies with the Member States (as parties to the Union) and, equally, to one of the organs of the Union, namely, the Commission; but it is always addressed to one of the Union's organs, the Council, which must consult yet another Union organ, the European Parliament, and perhaps also a third organ, the Commission itself; or even a fourth, the European Central Bank, when the institutional amendments relate to the monetary sphere. But all events, it is the Council which has the power to decide whether to proceed or whether to halt the revision procedure; in the first case, the President of the Council convenes *a conference of representatives of the governments of the Member States*, "for the purpose of determining by common accord the amendments to be made to those Treaties". This means that the conference would combine a federal rationale with elements of international law. However, the most important international element is found in Article 48(3), which requires that "The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements." above all until all the Member States have duly ratified them to make them binding on them all.

[141] With regard to the other issue of the adoption and revision of the Treaties in international legal experience, see the critical remarks by *C. Pinelli*, Ratifica e referendum, op. cit., 74 et seq., 76 et seq.

The Treaty establishing a Constitution for Europe, however, also interacts with the issue of revising existing European treaties; first of all, because it tends to constitute a fresh departure in the European order;[142] secondly, because it provides very particular provisions with anticipated effects for the ratification and entry into force of the Treaty, overlapping with Article 48 TEU. In particular, it is not so much Article IV-447 that causes concern, whose contents resemble current provisions governing the revision of the treaties, as the Declaration on the ratification of the Treaty (no. 30). For this Declaration provides that "if, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council".

Regardless of the practicality of referring the issue to the European Council in the cases of France and the Netherlands, which seems to depend on new events arising that could affect both European policy and the specific policy of both the Member States themselves, the idea that the Council might intervene regarding the limitations of the ratification procedures would draw on past experience with the Danish ratification of the Maastricht Treaty (1992-1993) and mark a further step forward towards the acquisition of autonomous instruments for regulating European affairs. Paragraph (4) of Article IV-443 moves in the same direction, adding that "if, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council."

Declaration 30 and the provisions of Article IV-443.4, both of which provide that once a given number of ratifications, but not all, have been completed, the text of the Treaty being revised would not be abandoned but referred to the Council for a decision to be taken on it; this, in embryonic form, is the signal for possible transition, if not to a fully-fledged constitutional revision procedure, at least an autonomous procedure, closely bound up with a European constitutional process. For it suggests that achieving a given majority of ratifications with reference to the act of revision produces a given legal effect, namely, the effect of requiring the European Council to take a decision, even though the solution that the Council might take on such a case is an open question.[143]

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[142] This is provided by Article IV-437 TEC on the repeal of earlier Treaties, and Article IV-438 TEC on the *European Union established by this Treaty* as the successor to the *European Union established by the Treaty on European Union and to the European Community*, and the "legal continuity" of the external relations and functions of the Union's institutions and the organs.

[143] The possible solutions have already been discussed in European legal literature (v. *G.L. Tosato, E. Greco*, Riflessioni in tema di ratifica e anticipazione del trattato costituzionale per l'Europa, in: IAI, 2004), and if negotiations with the non-ratifying States were to fail, the possible scenarios range from acquiring asymmetrical forms through enhanced co-operation to establishing a different, and more restricted, European Union with the ratification of the European constitution. "But the future events of Europe are still in the lap of the gods."

3. The ratification of the Treaty as a constituent political fact and as a juridical act

European constitutional law has therefore numerous further steps to take and the Treaty establishing a Constitution for Europe is only one stage in this process. On this subject, reference has been made to the historical type of "granted constitution" – *octroyée* - which is not yet able to achieve its full self-legitimating capacity. Some have maintained that the dual unanimity rule required for revision would make the procedure heavily dependent on the will of the Member States (through international law).

But even these ideas overstate the case. For it is obvious that if the revision of the treaties eventually made provision for a majority of ratifications to suffice, not to refer the matter to the European Council but to bring about the entry into force of the revised provisions of the European Constitution, along the lines of the provisions of the United States Constitution, the revision processes would gain sufficient autonomy (in constitutional terms) to be able to show even those who believe that the European Constitution is granted by the Member States, that the European Union must now be considered a fully-fledged federal State, with its own revision procedure.[144]

That this has not yet been achieved does not, however, mean that the provisions of the Treaty establishing a Constitution for Europe are not constitutional in scope. For the Treaty forms part of the constitutional process with its own specific features, essentially comprising two elements: first, in the European order it superimposes on the issue of the "material constitution" the issue of the "formal constitution", and for the first time, expressly and unconditionally introduces the supremacy of the European Constitution over the Member States' laws, including their constitutional law (Article I-6 TEC). These are changes which bring out more clearly not only the question of the "European Constitution" but also the legal nature of the Union itself, with the recurrent and ever-unsatisfied demand for "sovereignty".

No further summary of the numerous problems that the European issue will encounter in the near future, when the fate of the Treaty establishing a Constitution for Europe is decided, seems to be possible, and this is not this the appropriate place to address them in the introduction to a book on the European constitutional process; but, merely to show that the role of European constitutional law is not being placed in doubt, we would do well to call to mind the words of *Carlo Esposito*: "the Constitution... establishes a fact, rather than rule"; in other words, the Constitution "sets out a valid and effective order (...) or more succinctly, indicates the point where law and facts meet", because "constitutional provisions, unlike all other legal provisions, not only have to do with the legal conditions for their validity, but also to *de facto* conditions and effectiveness; and they apply not

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[144] This question is addressed, among others, by *A. Weber*, Zur föderalen Struktur der Europäischen Union im Entwurf des Europäischen Verfassungsvertrags, in: EuR, 2004, 841 et seqq.; *J.-C. Piris*, L'Union européenne: vers une nouvelle forme de fédéralisme?, in: RTDE, 2/2005, 243 et seqq.

only by virtue of being legally imposed in the statutory forms, but also if they are also able to be actually enforced on the supreme organs of the State".[145]

This seems to be the way which we should view the future conduct of the institutions, the Member States and, above all, the citizens of Europe.

[145] *C. Esposito*, La validità della legge. Studio sui limiti della potestà legislativa, i vizi degli atti legislativi e il controllo giurisdizionale, Milano, 1934, 205.

European integration through constitutional law

Rudolf Streinz

I. Introduction

On 20 June 2003, the "Convention on the future of Europe", which was convened by the European Council in the Laeken Declaration,[1] presented the "final document" it had been asked to produce. Since a consensus had been achieved, this final document contained "recommendations", rather than merely "options", as a point of departure for the work of the subsequent Intergovernmental Conference meeting,[2] held with the full involvement of the countries which acceded to the European Union on 1st May 2004,[3] which drew up the definitive resolutions. Following the collapse of the Brussels European Council in December 2003,[4] its result was fundamentally uncertain, but it was finalised following the agreement on a compromise under the Irish Presidency at the Brussels European Council on 18 June 2004.[5] The "Provisionally consolidated version of the "Treaty establishing a Constitution for Europe",[6] prepared on the basis of the resolutions passed in Brussels, still required some editorial revision before the TEC could be signed by the Heads of State and Heads of Government in Rome, the home of the 1957 "Treaties of Rome", on 29 October 2004.[7] In order to enter into force, the Treaty must be ratified by all the Member States (currently 25) in accordance with their respective constitutional requirements (Art. 48(3) TEU).

The Thessaloniki European Council "welcomed" the "Draft Constitutional Treaty" presented to it by the President of the Convention, the former French Head of State *Valéry Giscard d'Estaing*. The Council described the presentation

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1 European Council (Laeken), 14/15 December 2001, Presidency Conclusions, Annex I, III, Bull. EU 12-2001, p. 9 (21/25); EU news, documentation No. 3/2001, p. 16 (24 et seq.).

2 European Council (Thessaloniki), 19/20 June 2003, Presidency Conclusions, No. 1.5 (4th sentence); Bull. EU 6-2003, EU news, documentation No. 2/2003, 5.3 (3).

3 Accession Treaty of 16/04/2003, OJ L 234/1 (16 et seq.), in force since 01/05/2004.

4 Cf. on this EU news No. 44/2003, p. 1; on the "summit" itself cf. European Council (Brussels) 12/13 December 2003, Presidency Conclusions, EU news, documentation No. 5/2003.

5 European Council (Brussels), 17/18 June 2004, contribution to Presidency Conclusions, EU news, documentation No. 2/2004, p. 2 et seq.

6 Conference of representatives of governments of the Member States, IGC 2003/2004, Document IGC 86/04 of 26/06/2004.

7 Bull. EU 10-2004, p. 10 (No. 1.1.1).

as "a historical step in the direction of furthering the objectives of European integration". It brought "the Union closer to its citizens" and strengthened "the Union's democratic character".[8] It marked the completion of the missions conferred upon the Convention in Laeken.[9] The wording of the "Draft Constitutional Treaty" formed "a good basis for starting in the Intergovernmental Conference", which should "complete its work and agree the Constitutional Treaty as soon as possible" and "in time for it to become known to European citizens before the June 2004 elections for the European Parliament".[10] As we know, this did not come about, and this fact may well at least have contributed to the fact that the turnout at the European Parliament elections on 13 June 2004[11] was modest (overall, although the situation of course differed considerably in the individual Member States, even ignoring the fact that voting is compulsory in Belgium and Malta).[12]

The European Council evidently believes that the TEC will have a highly integrative effect on the thus unified European Union.[13] In institutional terms, everything possible was done to achieve this, with the Convention model[14] selected following the negative experiences of the Nice Summit.[15] The reason for this is

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8 European Council (Thessaloniki), EU news, documentation No. 2/2003 (note 2), No. I.2.

9 Ibid., No. I.4.

10 Ibid., No. I.5.

11 Cf. the arrangement of the results of the elections in EU news, No. 23/2004, p. 8 et seqq.

12 Cf. on the analysis of the European Elections, ibid. p. 1. This was probably not without influence on the agreement reached by the Heads of State or Government, cf. EU news, documentation No. 2/2004, p. 3

13 Cf. Art I–1 (1); Art. I-6, Art. II-1; Art. IV-2 draft Constitutional Treaty (CONV 97/1/03 REVI), presented in Thessaloniki (cf. note 2). The draft was revised and presented to the Presidency on 18/07/2003 (CONV 850/03; OJ 2003 No. C169/1). The final draft of the European Convention is also printed in EuGRZ 2003, p. 389 et seq., with reference to EuGRZ p. 358 et seq., and showing the amendments in Parts I and II in EuGRZ 2003, p. 447 et seq. The Articles quoted above were moved to Art. IV-2 and Art. IV-3 by the insertion of Art. IV-1 ("The Symbols of the Union"). After the failure of the IGC at the Brussels summit in December 2003 the text of the draft was further revised and also amended in essential points. The references in the text of this paper will concern the Treaty on a Constitution for Europe which was signed at Rome on 29 October 2004 (see note 7) after the revision of the provisional version of the Constitutional Treaty after the agreement in principle at the Brussels summit of 17/18 June 2004 (see note 6). The IGC had agreed to number the "Constitution" consecutively; in order to clarify the subdivision of the Constitution in four parts, the Roman numeral of the part concerned will precede these Arabic numerals. The symbols of the Union are now laid down in Art. I-8 TEC.

14 Cf. on this *Otto Schmuck*, Die Beteiligung der Zivilgesellschaft – notwendige Ergänzung der Konventstrategie, Integration 26 (2003), p. 162 (163); *Dimitris Th. Tsatsos*, Die Europäische Unionsgrundordnung, 2002, p. 194.

15 Cf. on the method used by the Convention e.g. *Andreas Maurer*, Die Methode des Konvents – Ein Modell deliberativer Demokratie?, Integration 26 (2003), p. 130 et seqq.;

that it involves not only the governments of Member States and the Commission, but also the elected representatives of both the European Parliament and the national parliaments, this being a significant feature with a view to acceptance of the TEC which is to be adopted by consensus both by the members of the Intergovernmental Conference and by the national parliaments (including those of the Accession States) which are to be involved in the ratification procedure. The (electronic) public nature of the consultation process also opened up the possibility of involvement by what is termed the "civil society".[16] However, in substantive terms we must question the extent to which constitutional law in general, and, within the context of a supranational community (I welcome the opportunity of using this beautiful term once again), the European Union in particular can actually develop integrative force.

II. The constitutional concept within European integration

1. The concepts of integration and constitution within the history of European integration

The drafts which have been produced since the late Middle Ages, all of which shaped the foundations of the idea of Europe and consequently European integration, through concepts such as securing peace, supranationality, the promotion of commerce and trade and the preservation of power, may all be considered to be "constitutional elements" in the broadest sense.[17] *Immanuel Kant's* 1795 treatise "Towards eternal peace",[18] which obviously was not directed specifically towards Europe, but had a universal dimension, was groundbreaking, at least within the history of the development of theories which culminated in the Charter of the United Nations, in which many of his concepts reappear. According to the "first definitive article towards eternal peace", the civil constitution within every state should be republican, i.e. power-sharing,[19] with the aim, according to the second

On the combination of the preparation by a Convention with the Treaty amendment procedure under Art. 48 TEU as an appropriate form of drafting a European Constitution, which, in contrast to the classic, state-related Constitution – making must be done on both national and European levels, cf. *Ingolf Pernice*, Europäische Grundrechte-Charta und Konventsverfahren. Zehn Thesen zum Prozess der europäischen Verfassung nach Nizza, Integration 24 (2001), p. 194 (196), These 8; *Hartmut Bauer*, Europäisierung des Verfassungsrechts, Juristische Blätter 2000, p. 749 (756 et seqq.).

16 Cf. on this *Schmuck* (note 14), p. 164 et seq.

17 Cf. on this *Michael Schweitzer/Waldemar Hummer*, Europarecht, 5th edn. 1996, para. 22 et seqq.; *Thomas Oppermann*, Europarecht, 2nd edn. 1999, para. 3 et seqq.

18 *Immanuel Kant*, Zum ewigen Frieden, Königsberg 1795 (here quoted following *Immanuel Kant*, Werke in sechs Bänden, Vol. 6 1995, p. 279 et seqq.).

19 *Ibid.*, p. 287 et seqq.

definitive article, of founding international law on a federalism of free states.[20] Other documents worthy of mention are the "Entwurf eines europäischen Staatenbundes" (Draft of a European Federation of States) by *Karl Christian Friedrich Krause*,[21] the treatise by Count *Claude Henri de Saint-Simon* and his student *Augustin Thierry* "De la réorganisation de la société européenne ou de la nécessité des moyens de rassembler les peuples de l'Europe en un seul corps politique en conservant à chacun son indépendance nationale"[22] presented at the 1814 Vienna Congress, and those of the representatives of the Italian Risorgimento, in particular *Guiseppe Mazzini*,[23] and the famous speech by the French poet *Victor Hugo*, who presided over the 1849 World Peace Congress in Paris, in which he declared that he saw the day coming on which the United States of America and the United States of Europe would stand "face to face" and would "extend their hands to one another across the ocean".[24] The model of the United States of America is also visible in the titles of the works of *Charles Lemonniers*,[25] *William T. Stead*[26] and finally also *Jacques Novicow*.[27] Some form of going together of the democratic peoples accorded with the spirit of the revolutionary masses in the mid 19th Century.[28] At the Hambach Festival on 27 May 1832, *Johann Georg August Wirth* toasted the "Confederated Republican Europe" three times.[29] The international law drafts produced by *James Lorimer*[30] and *Johann Caspar Bluntschli*[31] are also worthy of mention.

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20 *Ibid.*, p. 292 et seqq.

21 *Karl Christian Friedrich Krause*, Entwurf eines europäischen Staatenbundes als Basis des allgemeinen Friedens und als rechtliches Mittel gegen jeden Angriff wider die innere und äußere Freiheit Europas, 1814 (newly edited and prefaced by *Hans Reichel*, 1920).

22 Cf. on this *Hans Wehberg*, Ideen und Projekte betr. die Vereinigten Staaten von Europa in den letzten hundert Jahren (with an introduction by *Frank Boldt* and an epilogue by *Karl Holl*), Bremen 1984, p. 13.

23 *Guiseppe Mazzini*, La Giovine Italia, Marseille 1832.

24 The French version quoted by *Ch. L. Lange*, Histoire de la Doctrine Pacifique et de son Influence sur le Développement du Droit International, Academie de Droit à La Hague. Recueil des Cours 1926, vol. 13, p. 171 (375); in German version in *Wehberg* (note 22), p. 19 et seq.

25 *Charles Lemonniers*, Les Etats-Unis d'Europe, Paris 1872.

26 *William T. Stead*, The United States of Europe, London 1899.

27 *Jacques Novicow*, La Féderation de l'Europe, Paris 1901.

28 *Wehberg* (note 22), p. 16.

29 Cf. *Wilhelm Herzberg*, Das Hambacher Fest, 1908, p. 119.

30 *James Lorimer*, Proposition d'un congrès international, basé sur le principe de facto, Revue de Droit international et de Législation comparée 1871, p. 1; *Lorimer*, Le problème final du Droit international, Revue de Droit international et de Législation comparée 1877, p. 161. Cf. on this *Wehberg* (note 22), p. 39 et seqq.

31 *Johann Caspar Bluntschli*, Die Organisation des europäischen Staatenvereins, die Gegenwart, 1978, No. 6, p. 8; published in Bluntschli, Gesammelte Kleine Schriften, Vol. 2, 1881, p. 279 et seqq. Cf. on this *Wehberg* (note 22), p. 43 et seqq.

Despite the broad awareness and postulations, even by statesmen, of the need to cooperate in order to secure peace and prosperity,[32] Europe slid into the First World War, in the famous words spoken by the man who was later to become the British Prime Minister, Lloyd George.[33] The experiences of this disaster and Europe's resulting loss of importance, led to ideas such as those of Count *Richard N. Coudenhove-Kalergi*, whose book "Pan-Europa", which was published in 1923, opened with the words: "This book is intended to salvage a major political movement, which is slumbering in all the peoples of Europe".[34] He proclaimed the objective of this movement to be the integration of the pan-European states into a politico-economic federation. The Paneuropean Union, which he founded in 1923, and the movement which it triggered, still exist today.[35] However, the even greater disaster of the Second World War was needed before the European idea was able to become a reality.[36]

2. Draft constitutions for Europe

The Europe movement during and after the Second World War produced detailed draft constitutions, in addition to a number of political studies and manifestos.[37] Even during the War, incitement in this direction came from all nations. Of the studies and manifestos which resulted in draft constitutions, we would mention here only *Altiero Spinelli's* pamphlet "Gli Stati Uniti d'Europa e le varie tendenze politiche" from October 1941,[38] *Arnold Brecht's* minimum requirements of a European Constitution, of February 1942[39] and the manifesto of the French Resis-

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32 Cf. the references in *Wehberg* (note 22), p. 60 et seqq.

33 "None of the leaders of that era really wanted the war. They more of less slid into it, or rather they stumbled or fell into it, perhaps out of stupidity". In German in: *Karl Dietrich Erdmann*, der Erste Weltkrieg, *Gebhardt*, Handbuch der Deutschen Geschichte, Vol. 18, 4 edn. 1983, p. 94 et seq. For the causes of the First World War cf. e.g. *Norman Davies*, Europe. A History, 1996, p. 879 et seqq.

34 *Richard Nicolaus Graf Coudenhove-Kalergi*, Paneuropa, Wien 1923.

35 On the efforts to achieve European integration at the time of the League of Nations, *Wehberg* (note 22), p. 70 et seq.

36 Cf. on this *Oppermann* (note 17), para. 12 et seqq.; *Schweitzer/Hummer* (note 17), para. 29 et seqq.

37 See on this in depth *Walter Lipgens*, 45 Jahre Ringen um die Europäische Verfassung. Dokumente 1939 bis 1984. Von den Schriften der Widerstandsbewegung bis zum Vertragsentwurf des Europäischen Parlaments, 1986.

38 Illegal first edition together with the „Manifesto di Ventotene" in: *A. Spinelli/E. Rossi*, Problemi della Federazioni Europea, Rom 1944, p. 31 et seqq.; in German translation at *Lipgens* (note 37), p. 71 et seq.

39 *Arnold Brecht*, European Federation – The Democratic Alternative, Harvard Law Review 55 (1942), p. 561 (563 et seqq.). German translation in: *Lipgens* (note 37), p. 82 et seqq.

tance "Combat", of September 1942.[40] As examples, detailed draft constitutions were presented in 1940 by the Oxford constitutional lawyer *Ivor Jennings*,[41] in 1942 by the Europa Union[42] and in 1944 by the Legal Committee of the Paneuropean Conference.[43] The Europa Union, which was founded in Germany in 1946, joined up with the existing Europe movements, e.g. the Italian Movimento federalista a Europeo, in 1946, to form the Union Européenne des Féderalistes (UEF).[44] A "Groupe parlementaire fédéraliste français" was established in France on its initiative. A "Federalist Group of the House of Commons" had already been formed in the British Parliament. About the same time when similar groups from the parliaments of Greece, Italy, Luxembourg, Belgium and the Netherlands were founded, the "European Parliamentary Union (EPU)" was formed as an umbrella association. At the Gstaad Congress on 9 September 1947, it called for a constitutional European assembly to be convened as a democratic act of foundation.[45] At the end of 1947, many of the existing European associations were co-ordinated within the "International Committee of the Movement for European Unity". The most important activity of this committee was the Congress on Europe held in The Hague on 7 – 10 May 1948 under the Presidency of *Winston Churchill*, which was attended by 750 delegates, including several former Prime Ministers, a number of Ministers and Members of Parliament and leading political, economic and cultural personalities from all the countries of Europe, plus 250 "observers" and journalists.[46] In 1948, under the auspices of the EPU, the former French Justice Minister *François de Methon* devised the draft of a federal constitution of the United States of Europe, which begins with the words: "We, the peoples of the countries of Europe, in the solidarity of a common cultural heritage, represented by our respective governments".[47] The preliminary draft of a European Constitution of the 2nd Congress of the UEF in Rome in 1948 incorporated a Charter of Fundamental Rights, which preceded the constitutional act and which defined the political, economic and social rights of individuals, groups of individuals and statutory

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40 Combat, Organe du Mouvement de Libération Francaise, No. 34, German translation in: *Lipgens* (note 37), p. 91.

41 *Ivor Jennings*, A Federation for Western Europe, 1940. Appendix: Rough Draft of a Proposed Constitution for a Federation of Western Europe, p. 160 et seqq., German translation in: *Lipgens* (note 37), p. 44 et seqq.

42 Europa-Union: Entwurf zur Verfassung der Vereinigten Staaten von Europa, Europa. Organ der Europa-Union, XV (1948), Nr. 7, p. 3 et seqq., printed in: *Lipgens* (note 37), p. 94 et seqq.

43 Draft constitution of the United States of Europe. Issued by the Pan-European Conference and the Research Seminar for European Federation, New York 1944, German translation in: *Lipgens,* (note 37), p. 158 et seqq.

44 Cf. on this *Oppermann* (note 17), para. 13.

45 Vers un parlement de l'Europa, Gstaad (1947), p. 13, German translation in Lipgens (note 37), p. 225 et seq.

46 The Hague Congress Verbatim Report, Political Committee Plenary Session, p. 87 et seqq. Cf. on this *Lipgens* (note 37), p. 240 et seqq.

47 Cf. the German translation at *Lipgens* (note 37), p. 243 et seqq.

corporations.[48] In 1949, *Ronald Mackay* prepared the draft of a constitution for the Council of Europe,[49] in 1951 the UEF Constitutional Commission in Lugano prepared draft statutes and a memorandum,[50] and in 1951 the Constitutional Committee for the United States of Europe, which comprised 72 members of the Council of Europe, prepared the preliminary draft of a European Federal Constitution.[51] Further initiatives and drafts followed,[52] despite the disappointment resulting from the fact that the governments of the six Member States of the ECSC had allowed the draft constitution, which the Parliament of the European Coal and Steel Community in 1952 had solemnly requested, to disappear without trace within the Ministries.[53] The draft by *Max Imboden* is worthy of note, because he feared that the EEC attempt to achieve unity "through the community exercise of functions" is bound to be unsatisfactory, so that he attempted to "produce a sound political frame for the specific elements of functional content which are still difficult to grasp ... a system which harbours in itself the ability to secure internal and external permanence for the European Community over and above successes and failures triggered by specific situations".[54] The efforts made in the Seventies at improving the institutions and mechanisms of the EEC, which had proven to be inadequate,[55] finally led, via the *Spinelli* report,[56] to the draft of a Treaty establishing the European Union, which was adopted by the European Parliament on 14 February 1984.[57] When it passed its resolution on 10 February 1994, the European Parliament called for "the project on a European Constitution".[58] The subsequent efforts principally involved harmonisation of the treaties, which consisted of the TEU and the Treaties establishing the European Communities (i.e. the European Economic Community EEC) now referred to as the European Community (EC), the European Atomic Energy Community (Euratom) and the (now expired) European Coal and Steel Community (ECSC), following the "formation" of the European Union which arose out of European Political Cooperation (EPC). I only men-

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48 La Documentation Francaise, Notes et études, No. 1081, Paris 1948. German translation in: *Lipgens* (note 37), p. 255 et seqq.

49 *Ronald W.G. Mackay*, Western Union in Crisis, London 1949, p. 118 et seqq., see on this *Lipgens* (note 37), p. 274 et seqq.

50 Lettre fédéraliste, No. 1, Oct. 1951; La République Fédèdrale, 3 (1951), 17, p. 21 et seq., see on this *Lipgens* (note 37), p. 299 et seqq.

51 See on this *Lipgens* (note 37), p. 307 et seqq.

52 See on this *Lipgens* (note 37), p. 319 et seqq., 329 et seqq., 335 et seqq., 410 et seqq.

53 Cf. *Lipgens* (note 37), p. 383 et seq.

54 *Max Imboden*, Die Verfassung einer europäischen Gemeinschaft, 1963, p. 2 et seq., cf. on this *Lipgens* (note 37), p. 455 et seqq.

55 Cf. on this *Lipgens* (note 37), p. 509 et seqq.

56 Cf. on the development from the initiative of the Italian MEP *Altiero Spinelli* until the draft by the European Parliament *Lipgens* (note 37), p.657 et seqq.

57 European Parliament, Protocol of the session of 14 February1984, (BE 88842), p. 27 et seqq., published in German in: Integration, 7 (1984), special edition, cf. on this *Lipgens* (note 37), p. 711 et seqq.

58 OJ 1994 No. C61/155.

tion in this paper the draft constitution devised under the auspices of the European University Institute in Florence.[59]

In summary, the concept of a European Constitution was developed and promoted as a means of integration in particular by private initiatives, in which mainly scholars but also politicians, including those in government office, were involved. Amongst the institutions, it was the European Parliament which took the initiative, with the draft constitution which it produced in 1984. Great regard was paid to this at the start, and in conjunction with the European elections in 1984, but it achieved no lasting effect. With the exception of political "Sunday speeches", the governments of the Member States reacted with some degree of reticence. However, in the end they could not avoid reacting to the European constitutional movement, when it became evident, at the latest at the Intergovernmental Conference in Nice, that the present situation harbours deficiencies, which prejudice the continued existence of the Community / the Union, not only with respect to enlargement.

3. The TEU / EC-Treaty as the "Constitution" of the European Union / European Community

The existing treaties establishing the European Communities and the European Union are also described as the "Constitution" of the European Union / European Community. The ECJ talks of the "Basic constitutional charter [of the Community], the Treaty".[60] This is not a new concept.[61] As early as 1960, *Joseph H. Kaiser* spoke of a "second constitutional legislator" ("zweiten Verfassungsgeber"),[62] instituted in Art. 24 (1) of the Basic Law of the Federal Republic of Germany, the provision which allowed the transfer of sovereign powers (now Art. 23 (1) Basic Law). He pointed out that constituting the EC through the means of the international treaty "together with the constitutional legislators of other Member States" amounts to (international) constitutional legislation, with the peoples of the states combined within the Community being the agencies of "pouvoir constituant".[63] *Peter Badura* also spoke of the "constitutional character" of the act

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[59] European University Institute – Robert Schuman Centre, Report to the European Parliament, No. IV 95/59, 1996 (Rapporteur: *Armin von Bogdandy*; Co-ordinator: *Claus Dieter Ehlermann*) on a uniform and simplified model for the European Community Treaties and the Treaty on European Union in one single Treaty.

[60] Case 294/83, Parti Ecologiste "Les Verts" v. Parliament [1986] ECR 1339.

[61] Cf. on this *Ingolf Pernice*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), p. 148 (150 et seq.).

[62] *Joseph H. Kaiser*, Zur gegenwärtigen Differenzierung von Recht und Staat, Staatstheoretische Lehren der Integration, ÖZöR 10 (1960) p. 414 (416).

[63] *Joseph H. Kaiser*, Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften, VVDStRL 24 (1964), p. 1 (17 et seqq.).

of founding the EEC.[64] The objections brought against this,[65] which focus on the fact that the EC lacks the capacity of a state, prompt clarification of the original point of view but are not decisive. If we acknowledge that the term "constitution" is related to the state primarily because the state was the form of political authority which had to be and must be ordered and held in check with the aid of the constitution, and if we relate this to all the manifestations of institutionalised political authority, then this favours a broad definition of the concept of the constitution, which also covers the primary law of the EC / EU, since this is intended to order and to restrict the public power of the EC / EU in the interests of its citizens.[66] We must however remain aware of the special features of the EC/EU, in particular the manner in which it differs from a state, and must not develop the worst type of analytically jurisprudential ("begriffsjuristisch") deductions out of the concept of the constitution, a risk which is unquestionably associated with "dynamic" Community law.[67] This risk is without doubt also the reason for some allergic reactions to the use of the term "constitution" within the context of the EC / EU, similarly to the use of the terms "federal state" or "federalism", although in the latter case, this is frequently due to a misunderstanding or different understanding of the term "federalism".[68]

4. National "European constitutional law" of Member States as a necessary supplement

The European Communities and the European Union were not only founded by the Member States, they are still based on them, and need the authority granted under constitutional law, notwithstanding all the special features of this unique integrated community, in particular the primacy of Community law (now explicitly laid down as the primacy of Union law in Art. I-6 of the TEC[69]).[70] This is not

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64 Cf. *Peter Badura*, Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften, VVDStRL 34 (1964), p. 34 (64).

65 Cf. e.g. *Dieter Grimm*, Braucht Europa eine Verfassung?, Juristen-Zeitung 1995, p. 581 (587); *Christian Koenig*, Ist die Europäische Union verfassungsfähig?, DÖV 1998, p. 268 (275); further references in: *Peter M. Huber*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), p. 194 (197 et seq.); on the debate cf. e.g. *Cristoph Dorau/Peter Jacobi*, The Debate over a "European Constitution"; is it solely a German concern? European Public Law 2000, p.413 et seq. and *Christoph Dorau*, Die Verfassungsfrage der Europäischen Union. Möglichkeiten und Grenzen der europäischen Verfassungsentwicklung nach Nizza, 2001, p. 11 et seqq.

66 Cf. *Huber* (note 65), p. 198 et seq.

67 On the concept of the unique status of the EC / EU, cf. *Rudolf Streinz*, Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht, 1989, p. 88 (114 et seq., 123); further examples in: *Huber* (note 65), p. 198.

68 Cf. on this *Rudolf Streinz*, (EG-)Verfassungsrechtliche Aspekte des Vertrags von Nizza, ZÖR 58 (2003), p. 137 (139) with further proofs.

69 Art. I–6 TEC.

least proved by the need for ratification by Member States of all amendment treaties "in accordance with their respective constitutional requirements" (Art. 48 (3) TEU), which will not be varied even after amendment of the procedure for drawing up the treaty texts by the convention procedure, as provided for in Art. IV-443 (2) TEC.[71] However, in order to permit integration, the constitutions of the Member States must be made capable of accepting this arrangement and must take account of the special features and requirements of the European Union. In particular, they must not only enable the transfer of sovereign powers, but must also accept the consequences thereof. The German Federal Constitutional Court, which is sometimes chided for its jurisdiction, (which is sometimes misunderstood and is perhaps also capable of misunderstanding), properly expressed this as early as 1971: Art. 23 (1) Basic Law (now Art. 23 (1) sentences 1 and 2 Basic Law) states that "if properly interpreted", not only "the transfer of sovereign powers to international institutions is entirely permissible, but also the sovereign acts of their institutions ... are to be recognised by the originally exclusive sovereign agency".[72] I concur with *Peter Häberle*, that the relevant provisions of the constitutional law of Member States, e.g. Art. 23 Basic Law, may be described as "European constitutional law".[73] These are those constitutional law provisions of the EC Member States which allow them to cooperate with the EC / EU, but also make such cooperation dependent on a specific procedure and subject to substantive restrictions.[74]

"Constitutional law of Europe" and "European constitutional law" are interrelated. The constitutional requirements for the cooperation of individual Member States with the EU are linked to their "constitution", albeit in different forms and levels of intensity.[75] Existing protection of fundamental rights (Art. 6 (2) TEU) in the EU and also future protection thereof relates to the constitutional traditions common to the Member States, i.e. "pan-European constitutional law".[76] For according to Art. I-9 of the TEC, the Union recognises not only the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II (paragraph 1) and also seeks to accede to the European Convention for the Pro-

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70 Cf. on this *Rudolf Streinz*, Europarecht, 6th edn. 2003, para. 203.

71 Art. IV-443 of the Draft Constitutional Treaty (note 2).

72 BVerfGE 31, 145 (174).

73 *Peter Häberle*, Europaprogramme neuerer Verfassungen und Verfassungsentwürfe – der Ausbau von nationalem „Europaverfassungsrecht", in: Festschrift für Ulrich Everling, 1995, p. 355 (372 et seqq.)

74 *Streinz* (note 68), ZÖR 2003, p. 139.

75 Cf. on this *Ingolf Pernice*, in: *Horst Dreier* (ed.), Grundgesetz. Kommentar, Vol. II, 1998, Art. 23 (8) et seqq.; *Claus Dieter Classen*, in: *von Mangold/Klein/Starck*, Das Bonner Grundgesetz, Art. 23 (2) fn. 7; *Rudolf Streinz*, Verfassungsvorbehalte gegenüber Gemeinschaftsrecht – eine deutsche Besonderheit?, in: Festschrift für Helmut Steinberger, 2002, p. 1437 (1458 et seqq.).

76 This concept was developed by *Peter Häberle*, Gemeineuropäisches Verfassungsrecht, EuGRZ 1991, p. 261 (262); *Häberle*, Gemeineuropäisches Verfassungsrecht – „Verfassung" der EG, in: *Jürgen Schwarze* (ed.), Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas, 1998, p. 11 (18 et seq.).

tection of Human Rights and Fundamental Freedoms (ECHR) (paragraph 2 sentence 1), but the fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law (para. 3). Art. II-112[77] TEC seeks to coordinate this protection of fundamental rights which originates from three sources, by supplementing by additional paragraphs the corresponding article of the Charter of Fundamental Rights which is incorporated into the text.[78]

The interaction of "European constitutional law" and the constitutional law of the Member States is increasingly recognized. The appropriated functional approach to the concept of the Constitution[79] demonstrates that the administrative function of national constitutional law is becoming less significant, and must be replaced by the equivalent at European level. The national and the "union" (as it is uniformly to be called in the future) levels need to be incorporated into a constitutional union.[80]

5. The 2003 TEC: old wine in new bottles or a substantial innovation?

Even in its draft version drawn up by the Convention, the TEC is referred to in the preamble (Recital 6), and in Art. I-1 (1) sentence 1, and permanently in Part I and Part III, as this Constitution".[81] The general and final provisions of Part IV refer throughout to the "Treaty establishing a Constitution for Europe" or the "Treaty".[82] This distinction between a "Constitution" and a "Constitutional Treaty" is not in any way a "querelle d'Allemand" (quarrel about nothing), as it has sometimes been described, but expresses the fact that in the final analysis, the

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77 After re-numbering (note 13) the former Art. II-52 became Art II–112, as 59 Articles of the first Part have been added, with, in addition, Art. I–5a and Art. I–6a, but taking out Art. I–10.

78 Cf. on this *Rudolf Streinz*, in: *id.* (ed.), EUV/EGV-Kommentar, 2003, Art. 52 GR-Charta, para. 13. Art. II-112 TEC adds four paragraphs to Art. 52 of the European Charter of Fundamental Rights.

79 Cf. *Konrad Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th edn. 1995, para. 5.

80 See in agreement *Huber* (note 65), p. 199 et seqq.; *Pernice* (note 61), p. 163 et seqq. See also *Werner Schroeder*, Das Gemeinschaftsrechtssystem, 2002, p. 489 et seq. On the "constitutional Europe of today" as a "constitutional Community" in the making, cf. *Peter Häberle*, Europäische Verfassungslehre, 2001/2002, p. 208 et seqq. (3rd edn. 2005).

81 See e.g. Art. I-3 (5), Art. I-4, Art. I-5, Art. I-6, Art. I-9 (2) sentence 2, Art. I-11 (2); Art. III-124 (1), Art. III- 125, Art. III-130 TEC.

82 See Art. IV-437, Art. IV-438, Art. IV-440, Art. IV-441, Art. IV-442, Art. IV-443, Art. IV-446, Art. IV-447, Art. IV-448 TEC (former Art. IV-2, Art. IV-4, Art. IV-5, Art. IV-6, Art. IV-7, Art. IV-7a, Art. IV-7b, Art. IV-7c, Art. IV-8); for a system behind this cf. *Rudolf Streinz*, Überblick über den Vertrag über eine Verfassung, in: *Streinz/Ohler/Herrmann*, Die neue Verfassung für Europa. Einführung mit Synopse, 2005, p. 18 et seq., p. 19.

Member States hold, and as demonstrated, retain constitutional authority. However, it is questionable whether the content of what the Convention has achieved is a "Constitution" and whether it differs from the former "Constitution", namely the bundle of foundation treaties, i.e. whether it represents a substantial innovation or simply "old wine in new bottles". An admission of the latter has no negative connotations, since simply securing the contents in a strong or more manageable vessel may be extremely valuable.

This would also meet one of the Laeken missions, namely to simplify the Treaties in the interests of greater transparency.[83] The TEC combines the Treaty establishing the European Community and the Treaty on European Union, and also the legal acts and treaties supplementing or amending these, which are listed in the protocol attached to the TEC, and repeals these.[84] Obviously not everything could be integrated. As an example, the protocols attached to the TEC are integral parts of the Treaty.[85] The Euratom Treaty still survives as such and only a few points have been amended.[86] Moreover, a great deal remained to be done following the Thessaloniki Summit and even following the agreement at the Brussels Summit in June 2004: it had been more than questionable whether the extremely short deadline for "purely technical work", which had to be concluded by 15 July 2003 at the latest, could seriously be adhered to. For contrary to the conclusions of the President of the Thessaloniki European Council, it was not only the wording of Part III which required such "technical work", which, as experience has proven, can never remain purely technical. Even a first glance at the text showed linguistic divergences, duplications (which perhaps cannot be avoided) and inconsistencies, only some of which have only partially been eliminated to date, i.e. by the time of preparation of the provisional version of the TEC and even the final text of the Treaty of Rome which can only be adopted or not by the Parliaments and, if necessary, by the peoples of the Member States. It is especially questionable whether the entire "acquis communautaire" which is to be adopted, in particular the complicated "Schengen acquis", has really been incorporated into the text of the Treaty. This is not a criticism of the work of the Convention, which has achieved something quite remarkable in a short time. The Brussels European Council rightly allowed more time, namely four months, for the editorial revision work. But it is questionable if everything has been done well.

The Laeken mandate required the convention to examine a number of problems.[87] In terms of its content, the TEC brings innovations in the institutional area in particular, e.g. in relation to the President of the European Council,[88] the For-

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83 Cf. EU news, documentation No. 1/03/2001 p. 22.

84 Art. IV-437 TEC.

85 Art. IV-442 TEC.

86 Protocols annexed to the TEC and its Annexes I and II, Addendum 1 to document IGC 86/04 part A No. 36: Protocol to amend the Euratom Treaty, now OJ 2004 No. C310/391.

87 Bull. EG 12-2001, Annex 1, Part II; EU news, documentation No. 3/2001, p. 20 et seqq.

88 Art. I-22 TEC, there is a declaration by the IGC 2004, Addendum 2 to document 86/04, declaration No. 3 (now OJ 2004 No. C310/420.

eign Minister,[89] the resolution procedure in the Council (double qualified majority including representation of the population of the Union),[90] the delimitation or categorisation of competences[91] and the procedural reorganisation of the subsidiarity protocol with the involvement of the parliaments of Member States,[92] the Treaty amendment effected via combination of the Convention procedure with the international law procedure,[93] and the right to (controlled) withdrawal from the Union which is explicitly laid down.[94] The legal acts have been renamed, and in some cases they have been simplified, whilst in others further distinctions have been drawn.[95] The European Charter of Fundamental Rights has been incorporated into Part II, although some of its provisions have been altered. For example, in the German version the term "Person" is generally replaced by the term "Mensch", which brings up the question of an extension to legal entities (which is not explicitly dealt with), inasmuch as they are not explicitly included (as they are in Art. II-102, II-103, II-104 TEC: Right of access to documents, Ombudsman, Right to petition). A few amendments have already attracted attention in Part III, which essentially incorporates the TEC, e.g. with respect to the requisite majority resolution in matters related to asylum and immigration, which could lead to disputes. The prognosis that the TEC should not be allowed to fail and will not fail on this basis, seemed for a time very doubtful, although eventually it proved correct, as regards the Intergovernmental Conference. As has consistently been the case throughout the history of European integration, "it was finally possible to pull things together". However, regardless of how fruitful the time limits set during the development of European integration have proved to be (even those not strictly adhered to), the Treaty will have to have met the objective of transparency and coherence and of clarity of content before it will become capable of signature and ratification. The real problem lies in ratification, since in at least ten Member States, referenda are either constitutionally required or are at least possible and politically desired, and the results of these cannot be foreseen.[96]

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89 Art. I- 28 TEC.

90 Art. I-25 TEC (before re-numbering Art. I-24 which changed the original version in accordance with the compromise reached in the IGC 2004; see also the declaration No. by the IGC, OJ 2004 No. C310/421.

91 Art. I-12 TEC to Art. I-17 TEC. Before re-numbering Art I–11 (categories of competence) Art. I-12 (areas of exclusive competence) Art. I–13 (areas of shared competence), furthermore Art. I–14 (the co-ordination of economic and employment policies), Art. I-15 (common foreign and security policy) and Art. I–16 (areas of supporting, co-ordinating or complementing action).

92 Art. I-11 (3) (before re-numbering Art. I–9 (3)) linking with Protocol No. 2 on the application of the principles of subsidiarity and proportionality (now OJ 2004 No. C310/207. On the protocols, see note 87.

93 Art. IV-443 TEC; furthermore, simplified procedures of Treaty amendment were introduced, cf. Art. IV-444, Art. IV-445 TEC.

94 Art. I-60 TEC.

95 Cf. Art. I-33 TEC; cf. on this *Streinz* (note 70), para. 375, 375 a.

96 On 29/05/2005, the French people (turn out 69,7 %) rejected the ratification of the TEC by 54,87 to 45,13 %; on 01/06/2005 the Dutch people (turn out 63 %) rejected the rati-

III. The integrative effect of constitutions

1. The concept of integration within political theory

a. The doctrine of integration within the political sciences and constitutional theory

According to *Konrad Hesse*, the constitution is the legal basic order of the community. It determines the guiding principles on the basis of which political unity is intended to be established and state missions safeguarded. It regulates procedures for dealing with conflicts within the community. It orders the organisation and procedure of the formation of political unity and the functioning of the state. It lays the foundations of the general legal system and defines its basic features.[97] It is "the fundamental structural plan, orientated towards specific guiding principles, for the legal structure of a community".[98] *Hesse*[99] founds his statement on the theory of integration put forward by *Rudolf Smend*,[100] and also by *Hermann Heller*,[101] *Richard Bäumlin*,[102] *Werner Kägi*[103] and *Horst Ehmke*.[104]

b. The special feature of the constitutional state

According to the theory of the "constitutional state", the term constitution does not cover every set of rules governing a community. It must meet certain criteria. According to the traditional definition in Article 16 of the Declaration of Human and Citizens' Rights of 26 August 1789, which is an integral part of the current constitution of the Republic of France of 4 October 1958, "a society in which the observance of the law is not assured, nor the separation of powers defined, has no

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fication of the TEC by 61,7 to 38,3 %. Only in Spain on 20 February 2005 76,7 % of the voters (turn out 42,3 %) and in Luxembourg on 10 July 2005 56 % (turn out 42 %) on were in favour for the TEC.

97 *Hesse* (note 79), para. 17; more detailed on this *id.*, Verfassung und Verfassungsrecht, in: *Ernst Benda/Werner Maihofer/Hans-Jochen Vogel* (Hrsg.), Handbuch des Verfassungsrechts, 2nd Ed. 1995, § 1, para. 4 et seqq.

98 *Alexander Hollerbach*, Ideologie und Verfassung, in: *Werner Maihofer* (ed.), Ideologie und Recht, 1969, p. 37 (46).

99 *Hesse* (note 79), para. 4.

100 *Rudolf Smend*, Verfassung und Verfassungsrecht, in: *id.*, Staatsrechtliche Abhandlungen und andere Aufsätze, p. 189; cf. on this *Stefan Korioth*, Europäische und nationale Identität: Integration durch Verfassungsrecht?, VVDStRL 62 (2003), p. 117 (123).

101 *Hermann Heller*, Staatslehre, 1934, p. 228 et seqq.

102 *Richard Bäumlin*, Staat, Recht und Geschichte, 1961, p. 17, 24.

103 *Werner Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, 1945, p. 40 et seqq.

104 *Horst Ehmke*, Grenzen der Verfassungsänderung, 1953, p. 88 et seq.; *id.*, Prinzipien der Verfassungsinterpretation, VVDStRL 20 (1963), p. 61 et seqq.

constitution at all".[105] The "constitutional state", as it is understood by the political legal doctrine aimed at free democracy, has a certain idea of the constitution, which includes a substantive schedule of rules, which is generally formally embodied in a constitutional document, or if applicable in a number of constitutional documents.[106] Therefore the type "constitutional state" exhibits common features, which have acquired increasing significance during recent European developments. In this respect the term circumscribes points of reference for an understanding and development of the constitution within the meaning of "common European constitutional law".[107]

c. The relevance of the constitution for identity building

The constitution of the constitutional state is ascribed special integrative force and ability to enhance the citizens' identification with a state by some, in particular under the theory of "constitutional patriotism"[108] a concept proposed by *Dolf Sternberger*. In Germany, this "constitutional patriotism" was consciously preached as a replacement for the concept of "nation" which was so discredited by National Socialism, which raises the question of its general applicability.[109] In general terms, the assessment of the potential of the constitution to endow identity has been seen in somewhat sceptical terms.[110] Although the effect of major sporting events may not be especially enduring, the 3:2 victory over Hungary in the World Cup Final in the Wankdorf Stadium in Bern on 4 July 1954 unquestionably contributed more to the German "identity building" after the Second World War than did a sense of pride in the Basic Law.[111]

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[105] Quoted from the HUMAN AND CONSTITUTIONAL RIGHTS RESOURCE PAGE, maintained by the Arthur W. Diamoind Law Library at Columbia Law School, http://www.hrcr.org/docs/frenchdec.html.

[106] Cf. on this *Josef Isensee*, Staat und Verfassung, in: *Josef Isensee/Paul Kirchhof* (eds.), Handbuch des Staatsrechts, Vol. I: Grundlagen von Staat und Verfassung, 2nd edn., 1995, § 13, para. 121 et seqq. (3rd. edn. 2004, Vol. II § 15, para. 166 et seq.).

[107] Cf. on this *Häberle* (note 76), EuGRZ 1991, p. 269 et seq.

[108] *Dolf Sternberger*, Verfassungspatriotismus (1979) in: *id.*, Schriften, Vol. 10, 1990, p. 13 (13.): „Das Nationalgefühl bleibt verwundet, wir leben nicht im ganzen Deutschland. Aber wir leben in einer ganzen Verfassung, in einem ganzen Verfassungsstaat, und das ist selbst eine Art von Vaterland". (translator's translation: "National feelings remain injured, we do not live in the whole of Germany. But, we live under a whole Constitution, in a whole Constitutional State, and that in itself is a kind of fatherland."); cf. on this, with references to criticism of this view: *Korioth* (note 100), p.125

[109] Cf. on this *Joseph H. H. Weiler*, Federalism without Constitutionalism: Europe's Sonderweg, in: *Nicolaidis/Howse* (eds.), The Federal Vision, 2001, p. 54 (63).

[110] Cf. *Armin von Bogdandy*, Europäische und nationale Identität: Integration durch Verfassungsrecht?, VVDStRL 62 (2003), p. 156 (170 et seqq.).

[111] Cf. *Rudolf Streinz*, Die Verfassungsstaatliche Erwartung an den Sport, in: Landessportbund Nordrhein-Westfalen, „Was ist des Sportes Wert?", 1997, p. 10 (10 et seq.); cf. also *Streinz*, in: VVDStRL 62 (2003), p. 202 et seq.; cf. also *von Bogdandy* (note 110), p. 171.

d. In summary: Opportunities for and limits to the integrative identity building achieved by constitutional law

There is no doubt that the constitution also has an integrative function over and above its function as a set of rules.[112] This applies less to the actual text itself than to the content, which is not necessarily known in detail, but is sensed, and on which "constitutional patriotism" focuses.[113] Democracy, if it is not to simply remain a formal principle of responsibility, depends on the existence of certain pre-legal conditions.[114] The "basic understanding of state and law which holds national citizens together and affords the unity of the state", cannot be secured solely by a constitutional text, but finds its true roots in the constitutional preconditions. The state does not have a good constitution but is in good shape ("der Staat hat nicht eine gute Verfassung, sondern ist in guter Verfassung"). In its constitution, it documents the political reality developed by its people and institutions, to the extent that this is to be formalised as a legal achievement and continuously updated[115]. In this respect constitutional law enables integrative identity building. We must simply remain aware of its limits.

2. Application of the concept to groups of states, in particular supranational communities

a. Identity and integration as foundations of a community

Although we may doubt the need for there to be certain forms and a certain level of identity in order for a community to exist,[116] and we must be aware of the consequences of excessive "demands in terms of identity", which can jeopardise freedom,[117] there is no doubt that every community needs everyone to identify with and be integrated into it to a certain degree. For example, the Basic Law does not require every citizen to personally share the values of the constitution; all are free to question fundamental values of the constitution, provided they do not thereby put at risk the legally protected interests of others. However, the Basic Law is based on the expectation that citizens (as a whole) should accept and put into practice the general values of the constitution.[118] This represents the proper core of

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[112] Cf. on this *Korioth* (note 100), p. 126 et seqq. with further references, also to opposite views.

[113] Cf. *Sternberger*, Verfassungspatriotismus (1982), in: Schriften (note 108), p. 17 (24).

[114] BVerfGE 89, 155 (185).

[115] *Paul Kirchhof*, Die Steuerungsfunktion von Verfassungsrecht in Umbruchsituationen, in: *Joachim Jens Hesse/Gunnar Folke Schuppert/Katherina Harms* (eds.), Verfassungsrecht und Verfassungspolitik in Umbruchsituationen, 1999, p. 31 (36 et seq.).

[116] Cf. on this *von Bogdandy* (note 110), p. 172 et seqq.

[117] Cf. *ibid.*, p. 180 et seqq.

[118] Cf. BVerfG, NJW 2001, 2069 (2070). The wording was reversed here, as the issue for the Federal Constitional Court was to reject an obligation of loyalty to the Constitution on the part of the individual citizen.

the doctrine of constitutional preconditions and the related constitutional expectations.[119]

b. The concept "constitution" in international law

As far as experts in international law are concerned, use of the term "constitution" for the statutes establishing international organisations is not unusual. For example, we refer to the "constitution" of the United Nations.[120] However, already the classic text by *Alfred Verdross*[121] makes it clear that what is involved is not merely form, but also substance, namely the association and mutual engagement of states under a cooperative international law which, at least in idealistic terms, characterises the Charter of the United Nations. This is clearly a level of integration which is structurally and substantively different from that of a highly integrated community such as the European Union, let alone states.

c. Special features of the EC and the EU as a highly integrated "federation of states" and as a union of states and peoples (citizens)

The European Union, and especially its most important foundation (see Art. 1 (3) TEU), the European Community, are characterised by strong integration and not merely cooperation amongst the states combined within them. A particular feature is the direct effect of Community law and the associated direct entitlement, and in some cases obligation, carried by its citizens. Not only the commitments in the preambles, but also the substantive law, the rights for citizens provided for under Community law or even guaranteed directly, with primacy over contrary national law, the direct election of the European Parliament, the opportunity for direct actions before the ECJ and for actions based on breaches of Community law before national courts, the involvement of citizens in the safeguarding of Community law, all prove the EC / EU to be a union of states and citizens. This is also clear from the dual legitimacy of the Community legislation via the Council, which is made up of the representatives of Member States, whose members are controlled or at least should be controlled by the parliaments of Member States, and the European Parliament which is directly elected by European citizens.[122] It is precisely due to this double-stranded legitimacy that it is possible to raise objections against the democratic element of the decision-making procedure in the Council,

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[119] Cf. on this *Herbert Krüger*, Verfassungsvoraussetzungen und Verfassungserwartungen, in: Festschrift für Ulrich Scheuner, 1973, p. 285 (302 et seqq.); in depth *Ernst-Wolfgang Böckenförde*, Die Entwicklung des Staates als Vorgang der Säkularisation, 1967, p. 60.

[120] Cf. *Alfred Verdross/Bruno Simma*, Universelles Völkerrecht – Theorie und Praxis, 3rd edn. 1984, p. 69 et seqq.

[121] *Alfred Verdross*, Die Verfassung der Völkerrechtsgemeinschaft, 1926.

[122] On this, cf. BVerfGE 89, 155 (184 et seq.) which, however, underestimates the role of the Parliament.

which was introduced by the Convention.[123] Admittedly, this should more or less offset the lack of equality of voting to the European Parliament (one man one vote) which persists despite improvements, which may be criticised as inconsistent.[124]

d. European identity, integration and constitution in comparison with the nation state

If we compare the questions related to European identity and European integration and the potential respective contribution of a constitution, to the same topics in relation to the nation state, it immediately becomes clear that even the existing "constitution" of the Union contains explicit provisions that are associated with identity. Their significance is derived from the partial substitution of the concept of sovereignty by integration[125]. Art. 2 indent 2 TEU requires the Union to "assert its identity on the international scene". The Union should present itself as the group capable of acting which organises the Europeans amidst other groups organised on a sovereign basis, so that Union citizens conceive of themselves as a group and are able to assert what may be termed their "European way of life". Inwards, the concept of identity finds expression in the establishment and development of institutions which, like the European Parliament and the European parties, enable political participation at Union level. Citizenship of the Union establishes a status of equality amongst the legal systems of the Member States, which simplifies the process of reciprocal recognition of Union citizens and thereby of group formation processes, through the prohibition of discrimination on grounds of nationality.[126] The acknowledgement of "special rights" for Union citizens, which in the final analysis amounted to Union citizenship, is on the one hand a condition for the emergence of a "European identity". On the other hand the necessarily associated separation from "non-EU citizens" is criticised. Since the Union pays explicit attention to the "national identities of its Member States" (Art. 6 (3) TEU) and consequently also the national identities of their citizens, European and national identity and integration must not conflict. The citizenship of the Union referred to in Art. 17 (1) EC-Treaty expresses this link.

As in the national context, "confessions of allegiance" may not be demanded, but simply encouraged, except in the case of officials, where the EC is even stricter. To encourage allegiance certainly is a Community task, just as it is a task of the state in the national sphere.[127] A separate study would be needed in order to

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[123] See *Tsatsos* (note 14), p. 190 et seq.

[124] See *Tsatsos* (note 14) p. 191, who demands – wholly consistently – the realisation of the principle of equality of voting in the membership of the European Parliament.

[125] *Von Bogdandy* (note 110), p. 184 et seq.

[126] *Ibid.*, p. 185.

[127] Cf. on this e.g. *Eckart Klein*, Die Staatssymbole, in: *Isensee/Kirchhof* (note 106), § 17, para. 1 et seq.; *Klaus Stern*, Das Staatsrecht der Bundesrepublik Deutschland, Vol. I, 2nd Ed. 1984, p. 282 et seqq.; *Helmut Quaritsch* (ed.), Die Selbstdarstellung des Staates, 1977; *von Bogdandy* (note 110), p. 184.

determine the extent to which the Community symbols (flag, anthem) already play a role for the citizen's identification with and their integration into the EC / EU similarly to the national symbols of Member States or whether they cannot perform this function at all. In some areas, the identity building factors of the EU carry less weight than those of individual Member States. There are no "European" teams, other than in peripheral fields.[128] As regards the "Constitution", the "Europe clauses" of the constitutions of Member States and the "European Constitution" supplement one another.[129] However, both are only able to try to attract the citizens. Although the "proclamation" in a "Constitution" may make a contribution.[130] For a lasting effect and deep-rooted establishment, we clearly need more than a simple political proclamation,[131] and also more than a simple constitutional text. It must develop into a working constitution.

IV. Approaches adopted by the Convention and the TEC

If we examine the approaches adopted by the Convention, and the resultant TEC, notwithstanding the changes made, in the light of what has been said so far, we can see the following:

1. The idea of integration as a motive for the constitutional project

In accordance with the Laeken mission, the draft Constitution was motivated by the idea of integration. The intention was to "bring Europe closer to its citizens", to explain it or at least make it more accessible, in formal terms through a more readily comprehensible, uniform and linguistically improved version, and in substantive terms by picking up the themes which were considered to be deficient and consequently in need of regulation. In contrast to the draft constitution drawn up by the European Parliament in 1984, the document produced by the Convention has (meanwhile had?) the advantage that it may become reality, following (broad) acceptance by the Intergovernmental Conference and approval by the national Parliaments (which may only approve or reject, but may not make any amendments). As we know, the assumption that the Summit should and would simply "nod through" the Convention document, especially since that had been demanded by *Giscard d'Estaing*, more or less bluntly,[132] proved to be illusory, not only as a

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[128] Cf. on this *Streinz* (note 67), p. 202.

[129] Cf. *von Bogdandy* (note 110), p. 170 et seqq., 176.

[130] Cf. on proclamation *Christoph Möllers*, Verfassung – Verfassungsgebende Gewalt – Konstitutionalisierung, in: *Armin von Bogdandy* (ed.), Europäisches Verfassungsrecht, 2002, p. 1 (38 et seqq.).

[131] Cf. *von Bogdandy* (note 110), p.172 on the Charter of Fundamental Rights with particular reference to the expectation of identification linked to this.

[132] Cf. his speech at the European Parliament on 03/09/2003, EuGRZ 2003, p. 528.

result of the political controversies which arose, for example in relation to the voting rules in the Council and the composition of the Commission.

2. The Convention method as a suitable instrument

Whatever objections we may wish to rise regarding the individual points of the actual practice of the Convention procedure that has now been concluded, it proved to be a basically suitable instrument for preparation of a TEC. After all, the public were able to participate. The extent to which it will actually be used and its proposals will (can) be taken seriously, is a different matter. A clear gain is the participation of the members of the European Parliament and the parliaments of the Member States. The composition of the Convention and the consensus during resolution at least fundamentally applies pressure on the governments and the parliaments of Member States to accept the document. This does not mean that there was no further need for discussion and if necessary change in relation to individual questions and also on some questions of principle (e.g. Presidency of the Council). Subsequent developments have confirmed this. The Intergovernmental Conference had to overcome fundamental differences, which it initially failed to do, because the potential for conflict was underestimated, but was finally able to achieve, because joint interests in a TEC prevailed.

3. The Constitution drawn up "in the name of the citizens and States of Europe" and the resulting provisional text of the TEC

The final recital of the Preamble to the TEC expresses gratitude to "the members of the European Convention for having prepared this Constitution on behalf of the citizens and States of Europe". This is an expression of the unique character of the European Union as a union of states and peoples (citizens). The Convention model takes this into account by involving the representatives of the governments, the members of the national parliaments and the members of the European Parliament as representatives of the peoples of the States brought together in the Community (as the European Parliament is defined in Art. 189 (1) EC-Treaty), plus the representative of the Commission, which represents the "Community interest". It remains to be seen whether the result itself meets expectations. Initial assessments differed considerably. And the sceptic point of view now has been justified by political reality.

4. The prospects of the "Constitution" of the European Union

In this paper I have addressed the prospects of the "Constitution" of the European Union. First of all, I have considered whether and to what extent the draft TEC would be accepted by the Intergovernmental Conference. There was a dilemma in this respect, because the Intergovernmental Conference was unlikely to merely

exercise a simple confirmatory "notarial function". The parliaments of the Member States also had a final opportunity to alter something themselves in relation to the Treaty, although in political terms this would have been difficult to assert before the Treaty was signed on 29 October 2004. Thereafter there remained only the possibility of approval or rejection in toto. Secondly, if the carefully devised compromise package were to be untied to any degree, the entire "bundle" will risk falling apart, with the subsequent collapse of the TEC. During the history of integration, the self-imposed time pressure had frequently proved to be beneficial, although it was not able to prevent the collapse of the first attempt at the Brussels Summit in December 2003, no doubt firstly because the political differences were too great and secondly because the preparatory work by the Italian Council Presidency was, to put it politely, less than ideal. The Irish Presidency was more successful, and clearly also benefited from the change of government in Spain. Finally the Treaty was solemnly signed at Rome on 29 October 2004, but still needs ratification by all 25 Member States. Up to now in fourteen Member States the respective constitutional requirements have been fulfilled.[133] But France and the Netherlands cannot ratify the treaty after the "veto" of their peoples.[134] One of the manifold reasons for this may be that the mission of clarity not only in linguistic terms, but also in terms of content, has not been met. To achieve this would have been important, for a Constitution should adhere to the pacifying and if possible also the satisfying rules of the political process.

In the long term, the political process of integration, which is seriously challenged by the sizeable enlargement to include ten new Member States, to which others are soon likely to follow (possibly including Turkey), must demonstrate whether the TEC has truly tackled and solved the problems addressed in the Laeken mandate.

V. In summary: Possibilities and limits of European integration via constitutional law

Constitutional law, the (written) legal expression of the constitution of a community, is an important integrative factor. This holds particularly true in the case of the European Union, which considers itself to be a community based on the rule of

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[133] Austria, Belgium, Cyprys, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, Spain. This does not mean that the TEC has already been ratified (so wrongly the website of the EU Commission, http://europa.eu.int/constitution/ratification_en.htm). So for instance in Germany the President of the Federal Republic, who is competent for the ratification of the TEC (cf. Art. 59 (1) Basic Law), has postponed it till the Federal Constitutional Court has decided whether the Statute of Approval of the Bundestag (with consent of the Bundesrat) is constitutional or not.

[134] For the referendum in France of 29 May 2005 and the referendum in the Netherlands of 1 June 2005 see note 96.

law and in the final analysis, can only exist as such. However, the enduring political will of the Member States and their citizens to achieve integration is a key factor in its success, even if in individual instances, the loss of their own political freedom to arrange their own affairs is a painful experience. There are of course limits to this. Willingness to integrate should not be overstrained, in order to avoid jeopardising integration as a whole. Political institutions are in a position to stimulate, and in a sense to extend, the will to integrate. In this respect it may even make sense to have a European Foreign Minister, albeit only provided he is able to represent the content of a truly common foreign and security policy.

That this enduring political will is the decisive factor in European integration became dramatically evident when the French and the Dutch people refused to adopt the constitution. The reasons for doing so will be numerous. One reason was - surprisingly not only for some politicians - the term "Constitution" itself. The French and the Dutch feared to loose "their national constitutions" if they adopted a "European" one. Although this fear is not supported by the facts, it proves the limits of European integration as well as the necessity of the support of the peoples of all Member States for successful European integration. This task obviously has been missed. The Brussels summit of 18/19 June 2005 demonstrated not only disagreement on the future of the process of ratification of the TEC. In addition to the very critical United Kingdom also Portugal, Sweden, Denmark and Finland will put the ratification process on hold.[135] Therefore not only the 1st November 2006 as the planned date on which the TEC should enter into force (cf. Art. IV-447 (2) TEC) has been postponed at least for one year, it is doubtful whether the TEC will ever enter into force at all. Some politicians already declare it to be "dead". The Brussels Summit demonstrated also disagreement about the future of the European project in general. Of course the reasons for this are more fundamental, first of all the economic and financial problems of the Member States. But the rejection of the TEC by the French and the Dutch people and the dramatically falling support for the Constitution in the polls surely was an important factor. So the European Constitution provoked the opposite of integration. This possible effect of the Treaty establishing a Constitution for Europe had been suspected by *Manfred Zuleeg*, an enthusiastic supporter of European integration.[136]

[135] Cf. the website of the EU Commission (note 133).

[136] Cf. *Manfred Zuleeg*, Die Vorzüge der Europäischen Verfassung, in: *von Bogdandy* (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge, 2003, p. 955 et seq.

The ability of a European Constitution to forge a European identity

M. Rainer Lepsius

Identity is an ambiguous term, which cannot be readily associated with the establishment of a constitution within the European Union. Identity means the socio-psychological process of the formation of biographical continuity, taking into account changing life circumstances, role expectations and the consequent behavioural demands. The creation of an individual personal unit encompasses role conflicts and heterogenous alignments of value, which are homogenised to a greater or lesser degree. The self-descriptions and the descriptions given by others, which individuals, groups and social structures allow to apply to themselves, form the point of departure for the establishment of their identity. A whole range of categories can be applied. These include sex and age, skin colour and origin, language and religion, profession and social status, value convictions and moral postulates, transnational, national and local frameworks. Plural identities can be formed from this complex network of categories. The significance of the value of the reference criterion and the behavioural situation determines what distinguishes behaviour at any given time. Thus even sex, which is registered as a primary feature of identity, may become secondary and even irrelevant in specific behavioural situations. Furthermore, long-standing attributions of identity may suddenly fundamentally alter, as may be the case for example in the event of religious or political conversion experiences. The combination of self-selected and attributed socio-cultural criteria that arise during the establishment of identity is in many respects ambivalent and subject to change. Consequently, identities are firstly multifaceted, they are secondly selectively activated in different behavioural contexts and are thirdly non-uniformly relevant to behaviour, dependent on the value attributed to the individual reference criteria.

Collective groups, that is to say an indeterminate number of highly different individuals, conceptualise their own character by reference to imagined communities. Such imagined communities include in particular nations, cultural groups, language communities and political entities. In such socio-cultural constructions, an objective area is described, which is ascribed an independent value and towards which behaviour is oriented. Imagined communities therefore contain first of all a named objective, secondly a normative claim to validity and thirdly a power of orientation capable of directing behaviour. National consciousness develops where a nation is categorised by being distinguished from other nations, where it is adjudged a normative value and gears itself to these moral concepts and behavioural demands. Complex cognitive constructs and socio-cultural and behavioural orientations are formed. They are not "natural", even if they frequently purport to be "objective". In the case of Japan for example, the reference object is clearly dis-

tinct from other nations through its island situation, with a very high quality rating derived from its mythological past; Japan offers its population, which is homogenous in language and cultural terms, a relevant direction in behavioural terms. However, most nations are products of successfully operating ruling edits and associations that have been able to assert a collective notion of order. Using force, modern states have managed to create nations. Costly wars were fought to secure external borders, and the homogenisation of the peoples within these borders was asserted by means of force, majorities were suppressed, national values imposed and behaviour orientated towards the sovereignty structures. In this respect, modern nation states are the product of educational, military and fiscal compulsion. In order to create legitimacy, claims were made in relation to equality of origin, a specific "cultural mission", a historical community of fate.

The prevailing national consciousness in each case is the product of the degree of institutionalisation of cognitive notions of order of the prevailing sovereignty structure, and of the behaviour directed towards these. In this way, moral concepts are defined in concrete form and their validity for specific contexts of action is standardised. In the case of Germany, the national consciousness transformed, when the *Reich* was established in 1871, from membership of a "cultural nation" in a number of different state units, into a "political nation". The Germans within the *Habsburg Reich* left the German political nation, although they remained part of the German cultural nation. During the decades of the divided Germany, the prevailing balance of power compelled the creation of two independent German states, each with their own self-image. The military, political, economic and (following the construction of the Wall) social frontiers led to different descriptions by others and self-descriptions with behavioural orientations for specific contexts of action. The concept of the German nation state faded into a memory. The reunification increasingly appeared unrealistic, and some even considered it undesirable. However, when the world political situation suddenly altered, the concept of order of the German nation state was revived both in Germany and abroad, determined behavioural orientation and legitimised the unification of two different state, political, economic and social units as "natural". In the words of *Willy Brandt*: what belonged together should grow together. The German situation demonstrates the historicity of national identification and the acutely differing value relevances of the moulding of the content of national consciousness and its normative expressive force as regards human behavioural orientations. The order concept of the nation can be based on the assumpton of an ethnic homogeneity (which was radicalised towards racial identity under National Socialism), or on the assumpton of cultural equality, defined by language or religion. It may also be established on the basis of the concept of equality of citizens, without thereby presupposing equality claims of an ethnic or cultural nature. Accordingly emphasis is placed on different values and standardisations of behaviour.

These introductory remarks are intended to give structure to the deliberations below in relation to the ability of a European Constitution to forge identity. Constitutions define in concrete terms general notions of order and give them binding force. They achieve this by determining a sovereign association, by giving it an external frontier, by defining its value relevance and by circumscribing its sphere

of validity. Constitutional standardisations represent a high degree of institutionalisation of definitions of value and behavioural standardisation, towards which behaviour is orientated.

I. Europe as a political unit

In the European Union, we have an institutionalised sovereign association, which serves as a reference object during the forging of a European identity. For the first time, a political unit has arisen alongside the geographical, cultural and historical views of Europe. Individual nations have always allied themselves with European concepts of order. Both the Germans and the French, but also the Russians, are considered Europeans. The European cultural space covers a number of different cultures: the heritage of antique Greece, Eastern and Western Rome, the Roman Catholic, Greek Orthodox and Protestant Europe, its multilingual literature and philosophy. This space is divided into many nations, who describe themselves as European. Despite major differences and varied historical development processes, wars, suppression and liberation, there developed an awareness of belonging to Europe. Many criteria may be applied to the forging of European identity. The European Union has added a new dimension to the formation of identity. The new feature is a political unit with a central opinion-forming and decision-making structure, with binding coordination of political areas and a joint legal system, in sharp contrast to the history of the European nation states, with their endless wars, differences and claims for dominance. Individual states within Europe resisted all efforts at supremacy, and emphasised their autonomy and sovereignty. Europe's political order involved a relentlessly unstable "balance of powers" with no focus. The major powers saw themselves as "world powers", and during the colonial era they did in fact rule the world. World powers are able to form tactical alliances, but cannot conclude agreements on common interests. It was only the experiences of the Second World War, which highlighted the fact that even the major nation states were no longer "world powers", that they were no longer capable of independently asserting their interests and that enduring European peace was an existential prerequisite for all European states, that led to a change in the European political order, to the concept of the formation of a supranational community. This has now developed into the European Union with far-reaching competencies, binding regulations and legislation. The old notions of Europe have been superseded by a new political order. Their interest in belonging to this new Europe led to processes of alignment with this multinational unit and to orientation of behaviour towards the laws of the Union.

The Constitution gives concrete and legally binding shape to this new reference level for the establishment of identity.

II. The indeterminate frontiers of the Union

Every object of identification is distinguished from other units, and to this end, its frontiers must be determined. When it was first formed, the European Community did not envisage binding frontiers, but remained open to the accession of additional members. As a consequence, the original Community of six has gradually become a Union of nine, twelve and finally fifteen Member States. They were all situated to the West of the "Iron Curtain", and their eligibility for membership was determined on the basis of their democratic and market economic systems and the value they attributed to human rights. The "Iron Curtain" formed the clear Eastern frontier of the Community. After it was lifted and Soviet Imperialism was swept away, the Eastern frontier opened up. Eight Central and Eastern European States have already joined the Union. The desire of these countries to join, and their appeal to old geographical, cultural and historical patterns made the expansion towards the East something of a "matter of course". As a result, the character of the Union changed, it became more heterogenous, more complex. The social and economic differences between its members have increased significantly.

But even following the latest accessions, the frontiers of the Union have by no means closed. There are a further nine more states, whose belonging to Europe cannot be disputed. These are Rumania, Bulgaria, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, Kosovo, Macedonia and Albania. There are particular problems associated with the integration of the Balkan States, because some of them are far from being consolidated on a national level. Examples are Bosnia, Montenegro, Kosovo and Macedonia. The same applies to the new member Cyprus. The non-members Norway and Switzerland are special cases. As a result, the Union is not yet territorially complete, it has not yet achieved "closure". In the foreseeable future, the number of its members is likely to gradually increase, from its present level of 25, to around 35.

In addition, we are confronted by the keenly disputed planned accession of Turkey. By allowing Turkey to join, we would be including a country in the European Union which, according to the established perceptions, does not belong to Europe in either a geographical, cultural or historical sense, thus whose accession cannot be deemed to be a "matter of course". By allowing Turkey to join, the Union would be overstepping the traditional criteria of Europe. There would have to be a special reason for this, such as has not been required for the accessions to date. In Turkey's favour, it is said that as a result of its membership prospects, its democratisation process is being strengthened, that it would develop into a civil society, protecting human rights, that it could become a model for the compatibility of Islam and "Western" society. These are clearly desirable objectives. However, even if Turkey were to recognise human rights and become organised along democratic and market economic lines, would it then become part of Europe? Turkey's accession is desirable, not for reasons related to European consolidation, but with a view to configuring Europe's foreign relations with the Islamic countries. The westernisation of an Islamic society through its integration into the European Union is a goal of world politics, not specifically one of Euro-

pean politics. However, this would have far-reaching consequences. Turkey's integration would push the European frontier close to Syria, Iraq, Iran, Armenia, Azerbaijan and Georgia, its stabilisation would become more complex and problematic. However, the Ukraine is already on the list of possible accession candidates after Turkey. Russia has been part of Europe since *Peter the Great*, but it is simultaneously an Asian Empire. Is the European Union en route to becoming a Eurasian Union? What kind of identity could we then expect to be forging?

One thing is clear: although the European Union may be a defined object of self-reference, its frontier remains indeterminate. The accession criteria do not include any grounds for exclusion against a country which meets the criteria and wishes to join the Union. The frontiers are ever expanding, and new members in the form of adjacent countries give rise to new accession problems. Every unit wishing to cultivate an identity needs to be distinguished from other units, since otherwise its self-description will become unclear, and consequently the forging of identity will also remain vague. The Europe of 15 had acquired a self-description and a description by others, which also led to reciprocal identifications of the Member States. The same will apply to the Europe of 25. Established self-conceptualization and classifications by others support these processes, even as heterogeneity increases. In the case of Turkey, the historical and geographical willingness to accept breaks down. If Turkey were to be accepted as a member, European identity would have to be redefined, in a way by which increasingly more adjoining states, e.g. the countries around the Mediterranean, could be considered as possible members of the European Community.

III. The duality of the supranationality of the Union and the sovereignty of its members

The TEC determines the institutions, decision-making and competence of the European Union with precise accuracy, but duality remains a feature of the constitutional principles. Although the Member States administer important sovereignty rights jointly, their independence is safeguarded. Individually, they are members of the United Nations, but the European Union is not. Without their approval, the European institutions can make no decisions. Although unanimity is no longer necessary in an increasing number of circumstances, they remain the "Masters of the Treaties". Furthermore, the European Parliament has co-determination rights, which the Council of Ministers may not circumvent. The TEC combines elements of a confederation based on international treaties, with those of a federal state with outsourced competences for supranational legislation, and those of a parliamentary democracy. The Union has not yet established finality as a sovereign system. It remains a "project", moving towards a horizon which remains open.

The Member States determine the nature of the opinion-forming and legitimise the Union for its citizens. This is expressed for example through the fact that the European elections are determined by criteria related to individual national political situations, the parties within the European Parliament are nationally structured

and the assessment of the efficiency of the Union's decisions is based on national interests. The Member States are equally entitled partners, who are also represented in the European Commission, the Union's "Government", by their own Commissioner. On the other side, the Union has a centre, whose decisions permeate through to Member States and limit their autonomous creative force. National regulations may be repealed by the Union, and uniform rationality criteria are imposed on Member States. A composite system arises, which does not permit clear responsibility either to the Union or to individual Member States. In view of this unclear classification, despite its increasing importance, the European level has not made itself so autonomous as to have become a category for Europe's self-description which is independent of the Member States.

The institutions of the Union are entwined in complex negotiation structures, and individually they do not have adequate representational force, which could be used in a self-description of "Europe". The European Council is made up of the Heads of State and Heads of Government, i.e. the representatives of the Member States. The Council of Ministers consists of specific decision-making committees, which debate behind closed doors. The Commission, which is more or less the "Government" of the Union, only makes a full appearance on occasion, whilst the individual Commissioners have greater visibility within their individual spheres of responsibility. The President occupies an elevated position, but does not represent the Union as such on behalf of the populations of the Member States, as do their respective Premiers and Prime Ministers.

The position of the European Foreign Minister, who, as it were, wears "two hats", is new. First of all, he is the representative of the Council of Ministers for the common foreign and security policy and the permanent chairman of the Political and Security Committee of the Council of Ministers, to whom the Foreign Ministers of the Member States belong. Secondly, he is a member of the Commission and one of its Vice Presidents. This dual position will give him prominent weight, and in view of the importance and topicality of questions related to foreign and security policy, considerable personal visibility. He will represent the strongest symbol of the European Union during all conflicts of a foreign policy nature and during international negotiations. His dual role means that he will represent the Union more or less on behalf of its members. By creating the post of European Foreign Minister, the Member States are reacting to the Union's new duties in Bosnia, Macedonia and Kosovo, and also in the Near East (Palestine, Iraq, Iran). This involves institutional innovations. The Foreign Minister links the formerly partitioned relationship between the Council of Ministers and the Commission. He will also develop his own diplomatic service, which will consequently become a parallel authority to those of the Member States. This does nothing to promote the sought-after transparency of the Union's institutions.

Finally, the European Parliament remains an institution which represents the Union as a whole. It constitutes the most important platform for a European discourse, as the only body which meets publicly and discusses legislation. It is extremely important in fostering the growth of public opinion in Europe. However, the Union is not a parliamentary regime, the European Parliament has no budgetary rights, cannot levy taxes, remains as tied both to the subsidies of the Member

States as to the monopoly of the Commission in relation to the tabling of bills for resolution in the Council of Ministers and in the Parliament. As a result, the Parliament only plays a limited role in the Union's self-description. In addition, its delegates have little visibility within the national political discourses conducted in the individual national parliaments without the involvement of the European deputies. Despite their reduced decision-making powers in comparison with the European Parliament, national parliaments still have considerably more symbolic representative force.

The ambivalence of the Constitution between the principles of the "confederation" and the "federal state" also determines the perception of Europe and identification with it. No European nation exists as the true source of the sovereign rights. The European nation is made up of the nations of the Member States of the Union. The TEC does nothing to alter this. The huge step needed to overcome the dual nature of the Union has not been taken. The sovereignty of the Member States, and consequently their significance in forging an overall identity, is retained in the Union's multiple level regime.

The construction of identity is also in line with the constitutional model of the European Union. European identification cannot be clearly distinguished from individual nationally established identities. Diversity arises, within which national identifications dominate.

IV. Value relevances of the European Union

In order to develop an identification into an order, its value must be enhanced. The forging of identity is based on a commitment to moral concepts, which are to be represented and realised by this order. The stronger the value relevance, the stronger the identity which it is able to generate.

The Union relates to human rights and basic rights, with an explicit charter of human rights being incorporated into the Treaty. Peace, democracy, prosperity and validity of the law are to be achieved within Europe. These are also the criteria which apply to the constitutions of the Member States. The value relevances of the Union do not bring them any new value orientation, which could be binding in bringing a specific identification with the Union. As a result, its Constitution does not involve any fundamentally new value horizon, such as was the case with the American Constitution or even with the Constitution of the Federal Republic of Germany in 1948. In view of the very little specificity of identifications with a Europe of many languages and cultures, historical borders and differences, a higher value relevance, such as constitutions are able to provide, would be important. This applied to the immigrant society of the USA, and also applies to the new German Federal Republic, which had to constitute a new political order following the division of the country and the far-reaching corruption of national German values by National Socialism and German warfare. A "constitutional patriotism" developed on this basis. The German Constitution offered a value relevance as a means of identification with the new State and the moral orientation towards new

institutional order. In the form of the German Federal Constitutional Court, it was also given an institution for the ongoing interpretation and reinforcement of the value relevances of the Constitution.

The European Union is in a comparable position. It too needs a value relevance which bridges the nation states, with which they are able to make an emotive link. However, it is difficult to develop a separate assessment of the European constitutional values. Under the general value relevances, the European Union represents a "world model", which generates no specific European value, from which an identification can be established. The model of human rights, democratic sovereign constitution and market economy is also found in Japan, India, South America, Canada, Australia, New Zealand and in parts of Africa. What special features of the Union Constitution could give rise to separate assessment and related identification?

Three elements could be considered in this respect. The first is peace and freedom between its members that the Union guarantees. In view of Europe's history, the peace and freedom unquestionably represent the strongest value of the European Union. The history of the break-up of Yugoslavia is proof enough that wars between the successor countries, the persecution of minorities and ethnic cleansing could well have been avoided if the former Yugoslavia had been a member of the European Union. Although not all conflicts between minorities have been peacefully solved within the European Union, as witnessed by the lengthy conflicts in Northern Ireland and in the Basque Region, the guarantee of internal peace and freedom represents the core value relevance of the formation of the Union.

The second is the project forming communities out of societies constituted as independed states. This second project by the Union has a specific European character. This is linked to the development of a novel institutional structure, which coordinates a number of political areas through varying densities of unification and an informal coordination. Although the model of a European political system, which is new in comparison with the traditional central state, is not yet fully formed, its force of orientation has asserted itself, and European rationality criteria must be adhered to by the functional elite in the Member States.

The third project is the realisation of a European social model. Initial signs for this are appearing, but are being pushed into the background through the dominance of the problems associated with economic globalisation. The "Lisbon Strategy" aims to increase international competitiveness and to promote social cohesion within the Union, and is targeted at a specific European social order. Its contours are still unclear, since the Western European models of the welfare state have come under serious pressure to reform. In addition, the model of the Western welfare state hardly has pan-European validity, as a result of the expansion towards the East and in particular the prospective accession of Turkey and the Ukraine.

All three projects, namely European peace, the formation of a European "composite of nationalities" and of a European social space, are anchored in the Constitution. They also offer criteria for self-description and for supranational formations of identification based thereon. Constitutional provisions alone are not

enough, the moral concepts must be institutionalised in order to have the effect of directing behaviour. In this respect, the Union is still not a concluded project, the establishment of identification is determined by ongoing complex institutionnalisation processes. The Constitution reflects the current status of this process, it does not determine its finality. Accordingly, the value relevances towards which identification with the European Union is directed, are not yet clearly shaped.

V. Responsibilities and expectations

The nature and degree of identification with a political regime are determined by its responsibilities and competencies, and by the degree to which the expectations made of it are fulfilled. The Union acts within the framework of entitlements by its members, it has no general competence. It developed out of an economic community through the levels of the customs union, the creation of a large internal market, into an economic union and partial currency union. Its goals were freedom of cross-border traffic of persons, goods, services and capital. This was intended to save transaction costs, increase competition and finally to raise productivity. All Member States were to achieve an increase in the level of welfare through economic growth. Competences remain restricted to selected political areas. Accordingly, expectations were directed to a great extent towards instrumental goals. Cost-benefit calculations validated the Union. Based on such considerations, the Union acquired a high level of acceptance amongst its peoples and membership was considered to be beneficial. Added to this came the aid financed by the Union, from the Structural and Cohesion Funds, which were and remain important in macroeconomic terms, in particular for the underdeveloped accession countries of Greece, Portugal and Spain, but also for Ireland. It was not possible to develop an emotively tinged identification on this basis.

New spheres of activity were added with the TEU and the 1992 EC-Treaty, and competencies extended gradually. The Union was given responsibilities in the fields of environmental protection, health policy, consumer protection and research and technology policy. These were supplemented by the common foreign and security policy and cooperation in legal and internal policy and the formation of a European Central Bank. The density of regulations increased considerably, and Member States became increasingly dependent on the Union's Directives. The scope of responsibility of the old economic community was extended. The Union was to "organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples", "promote economic and social progress", introduce "citizenship of the Union" and "respect the national identities of its Member States" (Title I of the TEU). In 2000, the European Council adopted the "Lisbon Strategy", under which the Union was to become the most competitive and dynamic, knowledge-based economic area in the world by 2010. But growth rates fell back steadily, unemployment rose, as did debt in major Member States. It was not possible to fulfil the 2000 Agenda. In addition to economic stagnation, we have experienced demographic shrinkage, the overburdening

of the national social security systems, the globalisation of markets beyond the frontiers of the Union, and competition from low wage countries both within and outside the Union. The isolation of its economic policy from the other policy areas, which was characteristic of the European Economic Community, reached its limits. At the same time, the view of the achievements of the Union became less positive. This is also clear from the increasing ambivalence towards the new Union Constitution amongst the political elite in a number of Member States, and consequently also amongst their citizens. In view of the new problems, combating unemployment, rebuilding the social systems, demographic development and market globalisation, the significance of Union policy became reduced, whereas national reforming efforts became more important to citizens. In these circumstances, identification with the Union will not increase, but expectations will be directed instead at the national level, with its competencies for social reforms in the spheres of employment, social security and education. At the same time, the density of regulations that has been reached has brought a reduction in the capacity of Members to adapt, for example through the debt limits within the currency union, or the ban on subsidies for national industrial and structural policy.

The Union's integrative force is reducing, and national preferences are becoming more influential. This is clear for example from the conflicts in relation to the Union budget contributions. The net payers want to freeze the Union's financial funds, although its need for financing is increasing as a result of the new accession countries. The countries who were previously the recipients of aid from the Structural and Cohesion Funds are reluctant to see their allocations reduced, and even the former agricultural subsidy policy cannot any longer be continued in the same way. The expectations of the new accession countries cannot be met by restricting financial support. However, the TEC has brought no innovations in relation to the Union's financial constitution.

The restriction of the responsibilities of the economic community, coupled with the singular rise in welfare in Western Europe, has contributed hitherto to the acceptance of Union competence. Its expansion will impose ever greater expectations on the Union. This will generate more efforts to extend competence, which can be justified by the functional interdependence of the political areas. The widening of the Union's competence is combined with a reduction in the competences of the Member States. Inasmuch as the legitimacy and identity of the Union depends on the complementary capacity to act of Member States, the expansion of competence endangers the legitimacy of the Union. This problem was formerly displaced by the belief in the effect of market expansion and an increase in productivity brought about through competition. The division of competence between the Union and the Member States also remains unclear within the TEC. This affects both the efficiency of the Union and that of its Member States. It decides far more than the question of opinion-forming, decision-making and the exercise of the Union's authorities to act. It has a direct effect on the basis of the Union, its legitimacy and identity, based on the ability of Member States to structure the living conditions of their populations, to legitimise the inequalities in national pacts between interest groups and parties and to secure solidarities for unequal distributions.

VI. European identities

The European Union is a multinational political system. Its Constitution makes explicit reference to the safeguarding of the national identities of the Member States. Their governments shape the Union's configuration assignment and also determine its actual policy through the Council of Ministers. The Member States guarantee the legitimacy of the Union and the compliance of its peoples. They transpose the Directives into national law, they accept the judgments of the European Court of Justice, they have the administrative monopoly for implementation of European legislation. However, they also take responsibility for the consistent adaptation of national procedures and for action to European requirements. If decisions are taken via unanimous resolutions in the Council of Ministers, then the Member States are directly involved, in their own name, in action at Union level. The increasing number of issues which can be resolved via qualified majorities in the Council of Ministers, is slackening this direct involvement of the Member States. They can be outvoted, in which case they are no longer the guarantors of legimitacy and compliance in regard to their citizens. The governments of the Member States however represent the political and social basis of the Union.

The integration of Union policy at multiple levels produces restricted public involvement, which takes place indirectly through the governments of the Member States and the members of the European Parliament. The public are only directly mobilised to tackle European questions through occasional referenda. There was no pro-European outcome in the referenda in France and the Netherlands and in the past also in Great Britain, Ireland and Denmark. Generally speaking, people entrust the safeguarding of their national interests to their own governments. In view of the distance between the individual citizens and the European Union, their greater proximity to the Union is increasingly demanded. The introduction of Union citizenship also served this aim. However this is linked to the citizenship of a Member State, and does not give rise to any significant own rights. Symbolic projects, such as the annually alternating proclamation of European capitals of culture, city partnerships, information and study centres, are not capable of bridging the gap between the European Union and its citizens. The proposal of a referendum for a European President has failed because it is contrary to the principle of a parliamentary democracy, simulates a uniform European "national state", and personalises and consequently seemingly de-institutionalises structural problems associated with the Union construction and its social basis. This in particular is contrary to the TEC. It is a coordinating statute of extreme institutional complexity, and not a structuring of the exercise of sovereignty comparable to the national state of the 19th Century. All efforts at developing a European identity must remain free of analogies with the national state. The European Union cannot strive towards the internal homogenisation of its citizens, and thereby towards identification with a specific collective group. It pursues instrumental projects. Following the creation of a single internal market, it is now tackling the problems associated with the expansion towards the East. These are quite extraordinary, since the incorporation of the 10 new accession countries means an increase in the size of the

union by 33%, an increase in its population by 28% but an increase in its gross domestic product of only 9%. Moreover, the impending accessions increase these duties. What is needed is not a symbolic forging of identity, but an understanding of the rationality criteria of the competition and aid policy, the approximation of laws and a structural policy to reduce socio-economic imparities.

The increasing highlighting of rationality criteria for determining objectives and for the implementation of European policy are all inherent in the formation of the Union. They relate to a level on which the traditional rules of the Member States do not represent normative prescriptions, but simply variations. For example, a European water policy is based on criteria which apply to dry areas and areas with high precipitation levels, it is directed, in the form of management units, towards river basins which cross national borders, and establishes equal water quality criteria. A new spatial reference, which is subject to common criteria and replaces traditional national water management criteria, arises. Multinational experts develop such rationality criteria, towards which the functional elite strive. This applies to all the areas of Union policy, namely competition and aid policy, structural and regional policy, consumer and environmental policy. A political European consciousness is formed through the aggregation of such processes and the familiarisation of the national officials with the validity of these rationality criteria. The institutionalisation of regulations and procedures precedes the shaping of opinions. The Constitution plays an important part in this. It provides a binding framework for opinion-forming, decision-making and implementation of European rationality criteria. A European consciousness is gradually spreading. It arises initially amongst international experts and the national functional elite, and finally includes those who are directly affected by the European regulations. The greater the sphere of validity of European regulations, the more persons are covered by it, and the greater the likelihood that populations will in part describe their perception of reality as "European". A "post-traditional identity" develops from this (*Habermas*).

The European Union is a multiple level system, which covers supranational, national, regional and very many intermediate and civil interests and conflict solution processes. Identification processes arise at all levels, offering those involved references for their action based on individual situations. A post national identification with Europe develops within this composite, which moves away from traditional identifications from the nation, the culture, history and language, without thereby losing their force of orientation. Dependent on the actual situation in which action is required, and its meaning, one or other identification will direct action. We cannot expect an overriding dominance of identification with the still unfinished "Project Europe", as was formerly the case in relation to national consciousness. In any event, this would be excessive for the Union, and would only compromise its internal balance as a "state of nationalities". Flexibility of European identities would be appropriate in achieving the requisite flexibility of the "multiple level model" of the Union. To convey via this the universalistic values of the Union coupled with the particularistic perceptions of the institutions at national level, which each shape their own interests, would strengthen the Union.

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"Identity building" by means of a European Constitution? Some reflections from a Swiss point of view

Giovanni Biaggini

It is self-evident nowadays that constitutions contribute, to a certain extent, to the building of a national identity. It is, therefore, not unusual to speak of "identity building by constitution" in the context of the European Union and also of the ongoing constitutional process. However, there is something irritating in the use of the words "identity building" and "constitution" in this context, at least from the point of view of a non-citizen of the Union, as will be outlined in the following reflections (1.) on the concept of "European identity", (2.) on the tasks of a constitution, and (3.) on the Draft Treaty establishing a Constitution for Europe (Convention Draft).

I. "Identity building..."

What kind of identity? Obviously, not a national one, but *a* (?) or *the* (?) "European" identity. What, however, is the point of reference? Europe as a *continent*? [1] But then: What about those European peoples and states at the borders and in the centre of the continent, which are – so far (and perhaps in the future) – not willing or not able, for whatever reasons, to participate entirely in the integration process? *Pro memoria*: The external frontiers of the Union run only a few kilometres to the West of the venue of this conference, across Lake Lugano. As a Swiss scholar and citizen, I hope that "building a European identity" does not imply the exclusion of those European peoples and states which stand apart from the European Union. Again, what is the meaning of *European* identity?

Does the concept of "European identity" refer to *common basic principles*? To the "*Union's values*", as enumerated in Art. I-2 of the Convention Draft?[2] However, "human dignity, liberty, democracy, equality, the rule of law and respect for human rights" are not only the basic principles of the European Union, but also the fundamental values of the *Council of Europe* (although these values are not yet fully respected in all of the meanwhile 46 Member States).

Or, does "European identity" refer to common *cultural* roots - the "cultural ... inheritance of Europe", as the preamble says? However, Europe as a culture area ("Kulturraum") surpasses the frontiers of the Union, up to San Francisco in the

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[1] Cf. the expression introduced into the preamble of the Convention Draft, but not adopted in the final version of the Constitutional Treaty.

[2] Cf. Art. I-2 TEC.

West, far beyond Moscow in the East, and down to Wellington - at least for those who are broadminded. On the other hand, it is evident that national common background and the (mother-) tongue still play an important part in the creation of the "cultural identity".

Or, should we understand "European identity" rather in a historical-political perspective: as the identity of a community which is based on a *common destiny and will*? There are certain clues in the preamble of the Convention Draft as well as in the preamble of the Constitutional Treaty. This point of view is almost a Swiss one: Usually, Switzerland is characterized as a "nation of will". And the official name of the country – "Schweizerische Eidgenossenschaft" – alludes to a community ("Genossenschaft") of free citizens, fatefully united by an oath ("Eid"). Shall this idea be a model for the European Union: the Union as a community bound together by fate and by confederational oath ("Schicksals- und Eidgenossenschaft")? However, is such an idea compatible with the fact that the EC/EU, so far, has not had to face a confrontation with any truly existential question since the ratification of the Treaties of Rome? Is it compatible with the fact that both the European Union and Union citizenship have only been in use for ten years? Furthermore, with the fact that the territorial extension of the Union is continually changing (enlargement) and that the basic legal framework of the Union is in permanent transformation? Is it possible to identify oneself with a *process*, with something *"unfinished"*?

Or, should we understand the endeavours to form a "European identity" in a different way, as part of a strategy aiming at establishing better foundations for a strong and powerful, truly "common" foreign policy which would enable the EU to become an actor capable of political action (Habermas) and of pursuing its own aims in world politics? However, would a forced European "identity building policy", especially effected in respect of the common foreign policy, be an appropriate means? And would not such a strategy provoke the risk of divisions and ruptures inside the Union?

After all, what is the European Union's *proprium* whereupon the "building of a European identity" can be effectuated? Doesn't the Union still stand primarily for a single market, for a common currency, for an area of fundamental (economic) freedoms for the benefit of individuals as employees, consumers and entrepreneurs?

II. "...by constitution"?

From a theoretical point of view, we have to ask which tasks a constitution fulfils respectively should fulfil. Nowadays, "identity building" is certainly such a task, but not the most important one. The core business of a constitution is still and will remain the establishment and limitation of powers. Since the upcoming of written constitutions more than two hundred years ago, responsible government and democracy have been principal subjects of constitutions – subjects which should be considered more often within the present constitutional discussions.

There are times when nations are affected by a "constitutional fever", times when "Societies of the friends of the Constitution" (or *Sociétés des amis de la Constitution)* spring up all over a country. The following citation reflects such a spirit: "A constitution is the object of all yearning. Every citizen sacrifices his property, his personal affairs and his tranquillity in order to achieve [this aim] (...)". These are not thoughts of the 21st century, but of the beginning of the French Revolution.[3] At that epoch, as Thomas Paine reports, in some parts of North America a copy of the U.S. constitution could be found in almost every household, like the Bible; therefore, Paine characterized the constitution as a kind of "political bible".

Times have changed, however. On one hand, we have to ask in which way (if at all) a constitution as a legal document is able nowadays to rouse enthusiasm or build identity. Do we not strain the constitution when we impose on it the task of "identity building"? When we look at the national level, is it truly the constitution - as a legal text, formally concluded and officially published - which forms a national identity? Is this not rather the effect of (national) *institutions* – often based on constitutional provisions, of course, but filled with own life – and of other factors? With regard to the Swiss experience, one can mention the instruments of direct democracy (referendum, popular initiative), so important in political life, or the militia army ("Milizarmee"). The question arises why nowadays – and especially in the European context – the debate on "identity building" increasingly refers to the constitution. Is this the consequence of an embarrassment and deficit: because other – pre- or extralegal – strategies have failed? Again: Do we not strain the constitution when we assign to it the difficult task of "identity building" right at this moment?

On the other hand, we have to ask which might be the purpose/s that is/are behind the promotion of a European identity. Is it a question of appealing to the citizens: "Think more European!"? This thought leads us to the question: To which extent (if at all) can and may a constitution, which is founded on liberal values, *educate* the citizens in order to create "better Europeans" who accept decisions from "Brussels" and "Strasbourg" more easily.

III. "...by a European Constitution"?

Let us suppose that constitutions as legal documents have, in general, at least some effects on the "building" of a national or European identity (I think, almost everybody would agree, and so would I): Will the Treaty establishing a Constitution for Europe be able to substantially contribute to the building of a European identity? At this point, a lot of questions arise, for example: To which extent (if at all) is a *treaty* – usually being the result of a painful process of negotiation and an "oeuvre of compromise" – able to promote "European identity"? Are the new elements, worked out by the Convention, substantial and weighty enough to give a

[3] Cf. No 20 of the "Révolutions de Paris", 21 – 28 November 1789, p 3.

new push to the process of "identity building"? When we compare the Convention Draft with the actual *"acquis"* from the point of view of a European citizen, some doubts may arise. And is it not against "identity building" when the Constitutional Treaty, as proposed in Art. I-59 of the Convention Draft respectively Art. 60 of the Constitutional Treaty, explicitly mentions the possibility to withdraw from the Union which would enable (some) member states to play a "political game" of scare mongering? Is the suggested procedure: Convention – Intergovernmental Conference – national ratification (in some member states by national referendum) appropriate to the aim of "identity building"? Even if the citizens of the Union could express their will in a European-wide referendum on the Constitutional Treaty, which would mean that the legal foundation of the EU henceforth benefits from a previously unknown democratic legitimacy: Can a *single act*, i.e. the approval by referendum, sustainably build a European identity? Would it not be necessary to create additional instruments of democratic participation which substantially surpass what the Convention Draft proposes in Article I-46 (the present Art. I-47 of the Constitutional Treaty) confusingly entitled "The Principle of Participatory Democracy"?

Finally, I would like to point out that these rather critical and sceptical remarks are not aimed at degrading the work of the European Convention and the Intergovernmental Conference. A revision of the legal foundations of the Union is urgently necessary. I consider the work which was undertaken to be very important and valuable. The question is, however, if it is adequate to describe the initiated reform process with the notions "building a European identity" or "identity building by constitution" with the assistance of the corresponding constitutional vocabulary and rhetoric. At present, an unemotional vocabulary which does not rouse exaggerated expectations and hopes seems to be much more appropriate. Otherwise, there will be a serious risk of deep disappointment which could transform itself into a heavy burden for the future of the European integration process.

In twenty or thirty years, perhaps, we will be able to evaluate how and to which extent the reforms which are on the agenda now will have contributed to the building and consolidation of a European identity, coexisting with national identities.

Perspectives of the Project for a European Constitution

Daniel Thürer

> *"Europe will be what it was, and what it never has been."*[1]
>
> *"I am saying that poetry makes poets, whereas Bloom believes that poets make poetry."*[2]

On the basis of a mandate issued in Nice and Laeken, the "Convention on the Future of the Europe"[3] completed its work on the draft Treaty establishing a Constitution for the European Union on 10 July 2003 after 16 months consultation. According to the procedure for the amendment of Treaties specified in Article 48 of the EU Treaty, the TEC had to be accepted by the Conference of Heads of State and Government. The first attempt at this failed in December 2003 under the Italian Presidency. After the signature in October 2004, its entry into force will require all 25 EU Member States to ratify the draft Treaty in accordance with the procedure specified in their national legislation.

The Constitution received diverse responses from the European public. For example, in early July 2003, "Le Monde" acclaimed it as a "historical step"[4], while the "Economist" which originally had a positive opinion of the "constitutional reform", subsequently maintained in an article entitled "Charlemagne" that the present text should be chucked in the wastepaper bin; the final sentence of the "Economist's" article claimed that, instead of engaging in large-scale national constitutional conflicts, the citizens would react with "a deep yawn rather than a rush to arms".[5]

It is a sine qua non that the process of European integration is a first in the history of constitutionalism. It represents an institutionally unique, highly significant achievement in the political history of the 20th Century. The new draft European

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1 *Philip Allott*, The Health of Nations – Society and Law beyond the State, Cambridge 2002, p. 204.

2 Power, Politics, and Cultures. Interviews with *Edward W. Said*, edt. by *Gauri Viswanathan*, New York 2001, p. 12.

3 According to the conclusions of the European Constitutional Convention on the occasion of the adoption of the Draft Treaty: The Convention constituted a "useful forum of democratic dialogue between representatives of government, national Parliaments, the European Commission an Civil Society".

4 Le Monde, Dossiers et Documents, July 2003: "Cette future constitution va être une grande étape dans l'histoire de la construction européenne".

5 Economist, 5 July 2003, p. 34: "It should be chucked in the bin".

Constitution signifies an important and logical stage in the transition of the European Union from a functional economic concept into a constitutional political system.[6] This article is an attempt to illuminate the broader political and historical context of the current attempts at "constitution-making". In addition, despite taking a positive view overall, I will pinpoint a few critical remarks on in the draft version of the Constitution, albeit from an objective distance. I will first provide a brief overview of how the Constitution came into existence. I will then address the question as to whether the draft Constitution has brought about a change to the peculiar nature of the EU. This will be followed by a discussion of three crucial themes: foreign relations, the significance of democracy and federalism versus subsidiarity.[7] I will conclude with a few observations on the Constitution as a stage in the dynamic process of policymaking and on the role played by Switzerland in the matter.

I. Was it developed in the same way as a national constitution?

The debate concerning a formal European constitution has been going on for almost 20 years. The first attempts at developing a European constitution took place back in 1984 and 1994.[8] The process of the creation of the present text of Constitution was very rapid. Obviously, it did not take place overnight, but nevertheless it occurred over a very short period of less than two years. On the whole, it was a transparent process. Nevertheless, many EU citizens have been unaware of it up to now.[9] And, this is despite the fact that the new Treaty establishing a Constitution for Europe is intended to endow the EU with transparency, simplicity and clarity and to bring it closer to its citizens.

Of course, it is an irrefutable fact that some state constitutions were also developed in a very short time. To cite one example, in France, the Gaullist constitution for the Fifth Republic was drawn up in 1958 in a few months only under the direction of its principal author *Michel Debré*. Older constitutions, such as the 1787 Constitution founding the American Union, were, on the other hand, the products of longer, more intensive deliberation processes and constitutional battles. The

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6 Cf. *Joseph H. H. Weiler*, The Constitution of Europe, Cambridge 1999, p. 330 et. seqq.

7 The question of the method of decision-making and the weighting of votes in the Council which were at the centre of debate because of their great practical, though less fundamental, significance, remains intentionally excluded here.

8 1984: Draft Treaty founding the European Union, 14 February 1984 (Spinelli Report); Resolution on the Constitution of the European Union, 10 March 1994, OJC 61, 28 February 1994, p. 155.

9 It is interesting to note that during the June elections to the European Parliament there was no or only marginal mention of the draft Constitution; in all the Member States the European elections were dominated exclusively, or at least mostly, by national political considerations.

debate at the Constitutional Convention in Philadelphia was accompanied by the publication of the "Federalist Papers" in which the pre-eminent Founding Fathers *Hamilton*, *Madison* and *Jay* discussed the pros and cons of the federal structures to be introduced.[10] In Switzerland, although the constitutional convention (Tagsatzung) of 1848 introduced the new federal constitution after only a few weeks of negotiations - according to the words of the Swiss-American William Rappard, the country accepted the new text as uncritically as a weary patient accepts a life-saving medicine[11] - the establishment of the Federation 1848 had in fact been preceded for 50 years of sometimes acrimonious disputes between centralists and federalists, liberals and conservatives that took place on the occasions of shooting and gymnastic competitions, and numerous other patriotic events. Following the second world war, the Constitution of the Federal Republic of Germany became the focal point of the new national consciousness and a new understanding of a political identity for the people and the state, which, appropriately termed "constitutional patriotism", had a unique impact extending way beyond the borders of Germany.[12]

The Constitutional Convention on the Future of the Europe worked more quickly and calmly than the majority of national constitutional bodies. It was not besieged by a public hungry for knowledge and news. Leaving aside the publications of *Umberto Eco, Jürgen Habermas, Jacques Derrida, Adolf Muschg* and other intellectuals,[13] it did not produce any "Federalist Papers". There is probably

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[10] The dignity attributed to the assembly of the Founding Fathers becomes apparent in the story which is told that the streets and squares of Philadelphia around the Convention venue, "Liberty Hall" were covered in sawdust so that delegates would not have their deliberations disrupted by the rattling of passing carriages.
On the myth of the American Constitution, of e.g. *Louis Menand*, The Metaphysical Club – A Story of Ideas in America, New York, 2001.

[11] Cf. the reference in *Daniel Thürer*, Perspektive Schweiz – Übergreifendes Verfassungsdenken als Herausforderung, Zurich 1998, pp. 24/25.

[12] See further e.g. *Dieter Grimm*, Das Grundgesetz nach 50 Jahren – Versuch einer staatsrechtlichen Würdigung, in: Bundesministerium des Innern (ed.), Bewährung und Herausforderung – Die Verfassung vor der Zukunft, Opladen 1999, p. 44 et seqq.; *Peter Häberle*, Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik – Ausgewählte Studien zur vergleichenden Verfassungslehre in Europa, Baden-Baden 1996, p. 9 et seqq.; *Hans-Peter Schneider*, 50 Jahre Grundgesetz – Vom westdeutschen Provisorium zur gesamtdeutschen Verfassung, in: Neue Juristische Wochenschrift 1999, p. 1497 et seqq.; *Christian Starck*, Das Grundgesetz nach fünfzig Jahren: Bewährt und herausgefordert, in: Juristen Zeitung 1999, p. 473 et seqq.; *Klaus Stern*, Staatsrecht der Bundesrepublik Deutschland, Vol. V, Munich 2000, § 135; *Christian Tomuschat*, Wege zur deutschen Einheit, in: Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 49 (1990), p. 70 et seq.; For a view from outside: *Daniel Thürer*, Deutsche Einheit: Sicht eines Nachbarn, in: *Klaus Stern* (ed.), Deutsche Wiedervereinigung, Deutsche Einheit, Köln/Berlin/Bonn/München 2001, p. 81 et seqq.

[13] *Jürgen Habermas* and *Jaques Derrida*, Nach dem Krieg: Die Wiedergeburt Europas, Frankfurter Allgemeine Zeitung, 31 May 2003; *Adolf Muschg*, "Kerneuropa" – Gedanken zur europäischen Identität, in: Neue Zürcher Zeitung, 31 May 2003.

a variety of reasons for this. First of all, the purpose of the enterprise was not to produce a sort of symbolic monument with the powers to terminate and pacify fatal conflicts between citizens, as was the case with numerous national constitutions. Although it does contain some completely new elements, large parts of the Constitution are (admittedly only partially successful[14]) attempts to codify, systemise, simplify and streamline existing legislation – in Switzerland, we would call this "fine-tuning" the current legislation. Another reason for the speed, and also for the maintenance of a certain remoteness and introversion of the project, was the fact under the Presidency of *Valérie Giscard d'Estaing*, the Convention was run according to strict (not to say: authoritarian) guidelines and unlike in normal legislative procedures, the text was not accepted following intensive debates and then voting on the individual articles and sections and finally on the complete text, but in a consensus procedure. I think it is important to bear in mind the political environment and political circumstances that gave rise to the text in order correctly to understand its significance and function.

II. The legal force of the Treaty establishing a Constitution for Europe

Lawyers have been arguing for a long time as to whether the European Community/European Union is an international organisation or a federal state or a federal state "in the making". Reasoning of this kind is not profound enough for a federal/confederal dichotomy.[15] Since its origin, the supranational European Community has always been based on international treaties, but, as the European Court of Justice recognised back in the eighties, also has a functional, structural and institu-

[14] With 448 Articles and nine Protocols the Constitution has become too bulky. The length of the text may be explained by the fact that the Convention did not limit its work to a constitutional basic law, the general part of any Constitutional Treaty, but also wanted to carry out itself the required adaptions to the existing Treaties – in the various policy areas of the EU. The European Charter of Fundamental rights was included in its entirety in the text of the Treaty; cf. *Jürgen Schwarze*, Ein pragmatischer Verfassungsentwurf – Analyse und Bewertung des vom Europäischen Verfassungskonvent vorgelegten Entwurfs eines Vertrags über eine Verfassung für Europa, in: Europarecht 2003, p. 535, 536 et seqq.

[15] Cf. on this *Anne Peters*, Elemente einer Theorie der Verfassung Europas, Berlin 2001; *Armin von Bogdandy* (ed.), Europäisches Verfassungsrecht – Theoretische und dogmatische Grundzüge, Heidelberg 2003, with contributions by *Jürgen Bast, Armin von Bogdandy, Philipp Dann, Jürgen Drexl, Christoph Grabenwarter, Ulrich Haltern, Armin Hatje, Stefan Kadelbach, Thorsten Kingreen, Paul Kirchhof, Jürgen Kühling, Franz Christian Mayer, Christoph Möllers, Martin Nettesheim, Stefan Oeter, Alexander Schmitt Glaeser, Werner Schroeder, Robert Uerpmann, Antje Wiener, Jan Wouters, Manfred Zuleeg.*

tional base (basic constitutional charter).[16] Therefore, the "constituent power" is formed by the Member States; however, the architecture of the provisions relating to objectives and targets, the division of responsibility between the Union and the Member States, the structure and mechanics of the Union's institutions or the fundamental rights are similar to those in state constitutions.

The Constitution will not change any of this. As before, the EU and its Constitution do not fit within the traditional scheme of either the confederation or the federal state. They move according to their own rationale, always occupying the middle field. This is the third way: even under the Treaty establishing a Constitution, integration law remains in a state of suspension between (loose) international law and (firmly established) national law. Although the "para-national" features of the Union have been reinforced overall, this tends to be expressed in the abolition of the "three-column structure" and the conferral of legal personality to the Union.[17] On the other hand, however, the international basis of the EU has been retained in that the right of appeal remains with the States; in fact, it was actually intensified by the concession of a right of secession to the States. [18]

It is evident that in the form of the draft Treaty for a Constitution for Europe, the EU has outgrown the model of a confederation of states or even never actually fitted into this model. However, according to the present project, the Union also lacks the essential elements of federalism: it still only possesses a rudimentary power of enforcement. It is unable to protect the citizens with its own means and the citizens have no direct tax liability towards it. To employ the familiar expressions coined by *Alexander Hamilton*, it lacks the "power of the sword" and has no direct impact on the citizens in form of the "power of the purse". However, above all it lacks a European people. This not because of the multilingual nature of Europe. Rather, what I mean is the absence of any emotional, allegiance-inspiring identification on the part of the citizens. Not only do the inhabitants of Europe lack a political, policy-determining awareness of identity, Europe is also not considered by the outside world to be a constitutional identity with unity of action. These are important reasons why the general public still has little awareness of the Union's Constitutional process.

Should the EU be more than the sum of the Member States? A "civitas foederata", a federation of citizens, or should the people united by the Union form

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[16] Case 294/83 ECJ Les Verts – v – European Parliament [1986] ECR 1339, 1365; Cf. also opinion I/91 ECJ of 14.12.1991 [1991] ECR I-6079 para. 20 and 21 of the grounds.

[17] In spite of the conferral of legal personality to the Union the procedure of intergovernmental co-operation has been preserved in the Common Policy in Justice and Home Affairs as well as in the Common Foreign and Security Policy; cf. *Jürgen Schwarze*, Der Verfassungsentwurf des Europäischen Konvents – Struktur, Kernelemente und Verwirklichungschancen, in: *id.* (ed.), Der Verfassungsentwurf des Europäischen Konvents – Verfassungsrechtliche Grundstrukturen und wirtschaftsverfassungsrechtliches Konzept, Baden-Baden 2004, p. 489, 493.

[18] Art. IV-447 and Art. I-60 TEC.

the basis for the future of Europe?[19] In the midst of a on-going global change of attitudes, recent times have apparently witnessed the emergence of a "European public"; for example, there have been demonstrations against the war in Iraq in Berlin and Barcelona, in London and Rome, in Paris and Amsterdam.[20] At the same time, however, the war has also made Europeans extremely aware of the lack of teeth of the Common Foreign and Security Policy. It appears as if the common foreign policy is (temporarily) subject to the same doubts as the process of democratisation within the European Union. We should now ask ourselves whether a legally valid and enforced Constitution could also be capable of actually giving rise to a European citizenry, defining its characteristics and affording it protection.

III. Ambivalence with regard to external relations

This leads us to the controversial question of the Union's foreign policy profile. It is the opinion of the Convention that a President of the European Council should be elected to run the business of the Council for two and a half or five years and inter alia represent the Union at an international level.[21] A minister for foreign affairs who "ex officio" would also be one of the vice-presidents of the Commission will be responsible for the development of a common foreign and security policy.[22] This has met with two reactions. On the one hand, particularly as a result of the nomenclature used to describe them, institutions and offices such as those mentioned here are commonly associated with the concept of the concentration of power and experience has revealed that power tends to be used to serve the personal interests of the occupants of the positions of power and tempt them towards arrogance and the abuse of power. On the other hand, we should ask ourselves whether the unique quality of the institutions of European integration could possibly lie in the fact that they provide forums for the representation and interaction of diverse (political) cultures. We could argue that nowadays the responsible bodies of the Union should be allocated the special and genuine task of turning away from the old, nation-state concept of power and of embracing a modern concept of values and ideals in order to disseminate the achievements evolved and developed over the course of Europe's rich history from the times of antiquity, through the Renaissance and Enlightenment to the modern day.

For this reason, we take an *ambivalent* reaction to the proposed changes in the draft Constitution to the Union structures relevant to foreign policy. I will attempt

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19 Art. I-6 (3) TEU; cf. questions posed by *Hermann-Josef Blanke*, Essentialia des Entwurfes des Europäischen Verfassungsvertrages, in: Teoria del Diritto e dello Stato, 2003/1-2, p. 95, 105 et seqq.

20 Cf. e.g. *Daniel Thürer*, Irak-Krise: Anstoss zu einem Neuüberdenken der völkerrechtlichen Quellenlehre?, in: Archiv des Völkerrechts, issue 3/2003, p. 314 et seqq.

21 Art. I-23 TEC.

22 Art. I-28 TEC.

to define this tension by putting forward two points of view, a "power-sceptic" point of view and a "pro-peace" point of view, and use this as the basis for the development of my own assessment of the situation.

1. On reading the proposed provisions in the Constitution for the Union's foreign relations, even observers in favour of constitutional law, will first tend to favour the suspicious point of view– that of the *power sceptics*. Why a full-time president? Why a Minister for Foreign Affairs? – that's what they will ask themselves. Even though it is true that in this draft version of the Constitution the bodies responsible for an EU foreign policy have relatively little force, in the longer term, the following question will arise: should Europe in the end really have only *one* foreign policy with regard to important matters? "*One* vision of the World"? Should Europe really address the outside world with only *one* voice? Why? Is it not the case that the basic concept, tradition and identity of Europe incorporate pluralism and competition? Proponents of "para-national" foreign policy structures for the Union argue that a consolidation of forces is necessary to balance out the rapidly growing power of the USA. This may be countered by the argument that, apart from the serious errors of judgment and excesses of power of the current administration in Washington, in principle Europe and the United States still share common values and, to a large extent, interests so that questions of the balance of power will remain in the long term a matter of the relationship between the West and other parts of the world. Shouldn't the West attempt to establish a common international platform to promote the spread of democracy and human rights?

People sceptical of the Union's new foreign policy concept will continue to ask whether a common foreign policy (which some States are aiming to achieve in future) has the inherent risk that will always be steered by the smallest common denominator in each case. For example, a Member State wishing to distinguish itself by enforcing a progressive human rights policy, environmental policy or innovative peace policy, could find its initiatives thwarted by the EU's positions on foreign policy. There is also the question as to whether, considered from a "power-sceptic" viewpoint, subject to the chopping and changing of institutionalised power, an integrated foreign policy, will not *de facto* assign the greatest importance to the biggest powers and that the smaller members will cede to the "pressure" or even the "dictates" of the larger powers, as was all too frequently the case in balances of power in the past.[23]

The final point put forward by "power-sceptics" is that citizens all over the world, including those in Europe, are rapidly becoming tired of governmental meetings which not only advance incentives and inspirations for the promotion of high-level politics over their heads and the heads of their national representatives, but also present them with "faits accomplis". Was not the history of Europe in the

[23] Experience from the area of international and supranational organisations, but also federative constructs based on the law of national states show us, however, that precisely small units can exert an influence as "mediators" or "brokers" which far exceeds their actual powers.

hands of princes and other rulers for long enough – despots who deployed power and egotism like the pieces in a chess game to further their own interests? Sceptics query whether we really want the "team photos" of the European Council that appear from time to time in the media to depict a full-time President as overall boss with long-term special internal and external responsibilities, as opposed to the rotation system employed up to now?[24]

2. The arguments put forward by the "power sceptics" are countered by the faction that emphasises the attractiveness of the possibilities for the development of the EU's foreign policy profile offered by the Treaty Establishing a Constitution for Europe. This viewpoint is essentially "*pro-peace*". Despite all the aforementioned objections that may be raised against the institution of a President and Minister of Foreign Affairs (a Commissioner with a special post), proponents of this viewpoint believe that the proposals put forward by the Convention will preserve the distinctive features of Europeanness in our modern world of increasing globalisation. This is particularly evident when considered from a historical perspective. European countries have been making their stamp on other countries and the entire world in the fields of culture, science, politics and economy for three thousand years. From the Roman Empire to the colonial period, in numerous European countries and over numerous epochs, foreign policy has been characterised by an imperial nature.[25] In a similar way, the USA is now striving to acquire a hegemonic status. In view of the new image which Europe is attempting to develop, or at least identify, from its own history, as a conscious departure from its historical tradition of power politics and colonial politics and as an alternative hegemonic policies of the USA, it would now appear an attractive proposition for Europe to attempt to promote and influence a policy of human rights, democracy, the protection of minorities, environmental protection and above all the "Rule of Law"[26] in the other continents. With the current European power dynamics, the institutions proposed by the Convention would not be powerful enough to dominate or silence the numerous other voices. However, according to this viewpoint, representative

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[24] Cf. *Philip Allott*, op. cit. (note 1), p. 380 et seqq., coined the expression of "Hof-Mafia". He wrote: "There were no rules about who could participate in the international court of courts but, as at Versailles or Schönbrunn or Potsdam or St Petersburg, mere presence as part of what we may call the international Hofmafia did not confer any automatic degree of power or influence or even of prestige." (p. 384) and: "The Congress of Vienna was the last great party of the old order dancing on its own grave" (p. 382).

[25] Cf. *Simone Weil*, Letter to a Priest (Paris 1951), London/New York 2002, p. 55: "Rome, like every colonizing country, had morally and spiritually uprooted than conquered countries. Such is always the effect of a colonial conquest. It was not a question of giving them back their roots. It was necessary they should still be a little further uprooted." Cf. also p. 17 on the link between colonialism and mission: „Missionary zeal has not christianized Africa, Asia and Oceania, but has brought these territories under the cold, cruel and destructive domination of the white race, which has trodden down everything."

[26] Cf. *Peter Singer*, One World – The ethics of globalization, New Haven/London 2002, particularly p. 106 et seqq.

institutions of a European foreign policy would nevertheless be desirable in order to provide a genuine counterbalance to the USA's current obsession with its (military) security policy[27]. At the same, it would be perfectly feasible, instead of a President, to appoint a "Council", that is a board, which, in true European tradition, would in turn reflect and embody the diversity of the political cultures of the continent. The important factor would be the symbolic value of the institution. If we accept the Schuman declaration of 1950 as the moment in which the historical concept of the traditional nation state was abandoned[28], then it appears that, with the concept of a constructive, active EU foreign policy, this moment has now arrived, since Europe, having abolished conflict on its own territory, will disseminate its modern vision of peace as a institutionalised dialog between states, nations and people to the outside world. This does not require a powerful "President of the European Republic". However, in view of the special history and potential for the development of Europe, an institutionally transparent pan-European authority provided with persuasive powers[29] and with the flexible tools of a peace policy[30] could still bring about an advancement in global politics.

3. Which direction or viewpoint should be given preference? Power-sceptic or pro-peace? Or, is there a middle way, a synthesis? The power-sceptic reflex, which is part of the basic ethos of the constitutional experts, is counterbalanced by the understanding that the main power centres in Europe remain within the individual States and that the image of the Union will continue to be characterised by the diversity of identities and cultures shared by the European States, people and countries; a closer examination of the actual policies of the European Union reveals the horror stories concerning the power excesses of the new foreign policy bodies to be created to be exaggerations. However, on the other hand idealistic hopes for peace lack substance and feasibility. Consequently, in synthesis, we come to the conclusion that it is entirely inappropriate to think in terms of "out" and "in", i.e. to differentiate between the "European world" and the "world out there". This means we are not going to witness the formation of a new monolithic "European Union" that speaks and acts uniformly, in the form of a direct copy and extrapolation of the old cliché of the nation state. Instead, the Union will rather correspond to the spirit and tradition of the broadest definition of Europe in that it will retain the concept of inward and outward flexibility and encompass variable pluralistic embodiments. Open networks of communication and cooperation may in the long run be much more productive and, paradoxically, much more effective than large-scale national or para-national structures, which the EU has pledged to

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27 Cf. the critical view of *Joseph Nye, Jr.*, Soft Power – The Means to Success in World Politics, New York 2004.

28 Cf. *Armin von Bogdandy*, Europäische Verfassung und europäische Identität, in: Juristen Zeitung, 2004, p. 1, 2.

29 A better example would be – albeit in an attenuated form – the German Federal President rather than the French President.

30 From this perspective it is also to be regretted that Europe's Commitment in the area of active peace policy, in particular in peacekeeping, has diminished.

overcome. The idea that successful peace-keeping policies as used in the European interior will now be employed externally appears to me to be an extremely rewarding ideal and objective for the Union.

In my opinion, it is desirable that a European foreign policy should, therefore, include above all advocate human rights, international humanitarian law, democracy, the protection of minorities and environmental protection. These objectives could be pursued by the EU, the Council of Europe, the OSCE and also the Member States on their own or together. The text of a Treaty establishing a European Constitution should make express reference to these objectives, in particular to the protection of national minorities, and to European networks with other organisations such as the Council of Europe, OSCE or even NATO – and this is not the case in the current draft.

IV. The importance and dilemma of democracy

Somewhat grandly, the preamble to the Constitution drafted by the Convention quoted the Greek author *Thycydides* "Our constitution is named democracy because the power is in the hands not of a few but of the many."[31] Although the intergovernmental conference decided to cut this motto, the concept of democracy in the signed Constitutional Treaty (Art. I-46 et seqq.) seems to be framed in the spirit of the ancient Greek "Polis". "Poleis" was the birthplace of science and democratic politic culture in Europe, and embodied an ideal of democracy and integration which is completely incompatible with that of the European Union. In his seminal work on "Greek Cultural History", *Jacob Burckhardt* mentions with reference to the Greek people a "form which takes on a febrile vital instinct by creating the Polis" and describes the role of the citizen as follows:

"Anyone participating in ruling and being ruled is a citizen. Only a citizen will realise his abilities and virtue in and on the state, the whole Greek spirit and its culture is in a closer relationship with the Polis."[32]

The intensity of the inward-looking democracy in the political system in Ancient Greece amounted to an autarchy, that is,isolation from the exterior. The Greek city states, which extended from Attica as far as the western coast of Asia Minor, were small independent states. Attempts to form larger groups by alliances, would, according to *Burckhardt* "only achieve success and power, for short peri-

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[31] *Thycydides*, History of the Peloponesian War – war speech by *Pericles* (431 BC), Book 1, part 5 (the pre-history) E/3. On this cf. e.g. *Joachim Schwind*, The Preamble of the Treaty Establishing a Constitution for Europe – A Comment on the Work of the European Convention, in: German Yearbook of International Law, Vol. 46, Berlin 2004, p. 353.

[32] *Jacob Burckhardt*, Griechische Kulturgeschichte (1898), Frankfurt a.M. 2003, p. 111; On the whole, also cf. *Moses I. Finley*, Antike und moderne Demokratie, Stuttgart 1980.

ods, in wars, and never for long".[33] "Polis (stood) against Polis in a contest of existence and political power". And: "The one thing that was impossible was the surrender of autonomy to another city, to a large collective state or to a prince."[34] The constitutional ideal of the Greek city states was, therefore, autonomy of the people within and autarchy in relation to the outside world, and, when necessary, this autonomy and independence were defended against enemies with a cruel, and "terrible martial law".[35]

Why, we feel obliged to ask, was this reference made to the Ancient Greek form of "direct democracy"?[36] Would the world of the Ancient Greek Polis really fit into the landscape of the new European Constitution? Is democracy as a system of rule in the end only possible *within* states, but not *between* states? Since its very beginning, the structure of the European Community has represented a unique amalgam of diplomatic-governmental and democratic-political elements. A not implausible view of historical development identifies quite generally the relocation of centres of power in the sense that, sometimes at the expense of the legislative, an administrative class of "controllers" developed gradually in the interiors of states to form a kind of "state within a state "and considers that this elite group of functionaries has now expanded and consolidated its position "trans-nationally" within the framework of European (and international) integration.[37]

The dilemma of supranationality and democracy will probably never be resolved in a manner satisfying all political tendencies. The text of the Treaty establishing a Constitution for Europe does at least contain a passage that moves the balance from supranationality in the direction of democracy and provides pause

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[33] *Burckhardt*, op. cit. (note 32), p. 95.

[34] *Burckhardt*, op. cit. (note 32), p. 96.

[35] Cf. on this *Hannah Arendt*, Über die Revolution, Munich/Zurich, 4th edn. 2000, p. 11: "Da aber für die Griechen das Politische, nämlich die Polis, schon dem Wortsinn nach sich unter keinen Umständen über die Grenzen der Stadtmauern erstrecken konnte, bedurfte die Gewalt in dem Bereich, den wir heute Aussenpolitik oder internationale Beziehungen nennen, auch gar keiner Rechtfertigung. Obwohl griechische Außenpolitik (abgesehen von den Perserkriegen, in denen ganz Hellas vereint war) sich nur zwischen griechischen Stadtstaaten abspielte, galt sie nicht als eigentlich politisch. Ausserhalb der Stadtmauern, nämlich ausserhalb des Bereichs des Politischen im griechischen Sinne, galt das Wort des *Thucydides*: 'Die Mächtigen tun, was sie können, und die Schwachen leiden, was sie müssen.'. "
("For the Greeks 'the Political', that is the Polis, could under no circumstances, as the literal sense implies, stretch across the boundaries of the city wall. Therefore the power in the area we nowadays call foreign policy or international relations required no justification. Although Greek foreign policy (except for the Persian Wars when the whole of Hellas was united) was only conducted between Greek city states, it was not considered to be political at all. Outside the city walls, that is to say beyond 'the Political' in the Greek sense, the word of Thucydides applied: 'The powerful do what they can and the weak suffer what they must.'")

[36] Cf. *Anne Peters*, Democracy after the 2003 Convention, in: Common Market Law Review 2004, p. 37 et seqq.

[37] Cf. *Allott*, op. cit. (note 1), p. 216.

for thought. At the last moment, a regulation relating to the "*citizens' initiative*" was inserted in the concept of European civil rights; this is worded as follows:

"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 on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come."[38]

Should the institution of the citizens' initiative be taken seriously as a prelude to the "future dreams" of further possible forms of democratisation of the constitutional law of the European Union? Maybe it will form a promising starting point in the future for a directly democratic line of development in European constitutional law. However, I have always been of the opinion that the (multinational) peoples' initiative would be one of the most effective tools for initiating the (cross-frontier) democratic mobilisation of the citizens from the bottom to the top and guiding the European constitutional process towards an ideal system which is actually in the hands of the citizens of the continent: "a daily plebiscite" as defined by the French historian *Ernest Renan*. Does the provision cited offer an auspicious starting point, a small step towards approaching the ideal spoken of by Pericles as recorded by *Thycydides*?

Finally, another item of significance for the concept of democracy anchored in the Constitution for Europe is the fact that Article 1 (1) stresses that the Constitution is at the service of the citizens and the Member States (in this order). Therefore, it places the *citizens* at the top and reinforces the (innovative) concept and the key role of the citizens of the Union as already laid down in the Maastricht Treaty.[39] In addition, the Charter of Fundamental Rights has been included verbatim as Part 2 of the text of the draft Constitution. This means that the Charter of Fundamental Rights may be viewed as being equivalent to important constitutional, regional and international pacts regarding human rights and basic liberties.

V. Federalism and subsidiarity – the broad and the narrow

The federative element has played a central role since the very beginning of European integration. For example, *Winston Churchill* stated in his Zurich speech:

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[38] Art. I-47 (4).

[39] See further *Jürgen Schwarze*, Der Verfassungsentwurf des Europäischen Konvents – Struktur, Kernelemente und Verwirklichungschancen, in: *id.*, Der Verfassungsentwurf des Europäischen Konvents. Verfassungsrechtliche Grundstrukturen und wirtschaftsverfassungsrechtliches Konzept, Baden-Baden 2004, p. 492 et seqq.; *Daniel Thürer*, „Citizenship" und Demokratieprinzip: „Föderative" Ausgestaltungen im innerstaatlichen, europäischen und globalen Rechtskreis, in: Globalisierung und Demokratie, Frankfurt a.M. 2000 (Suhrkamp Taschenbuch Wissenschaft), p. 177 et seqq.

"Under and within that world concept (of the United Nations), we must recreate the European Family in a regional structure called, it may be, the United States of Europe."[40] *Walter Hallstein*, the first President of the Commission of the European Economic Community, and intellectuals such as *Altiero Spinelli* then even proposed the creation of a federal European state.[41] The idea of the "United States of Europe" has meanwhile changed over the course of time into a looser concept of a "multi-level Europe".[42] The Constitution for Europe represents a large-scale experiment relating to federalism in Europe.

The American political scientist *Martin Diamond* paraphrased the basic concept of federalist systems as follows:

"Hence any given federal structure is always the institutional expression of the contradiction or tension between the particular reasons the member units have for remaining small and autonomous but not wholly, and large and consolidated, but not quite."[43]

However, the principle of subsidiarity must be allocated a central role in the European Constitution.[44] *Thomas Oppermann* considered that the "key to the success of the work on the European Constitution" lay "in the consistent observation and application of the principle of subsidiarity".[45] However, we now have to address the difficult problems pertaining to interpretation and legal policy, of the precise delimitation of which cases, to what degree and in which form the principle of subsidiarity should be applied. The draft Treaty envisages a three-way division of competences into exclusive, shared and complementary competences, which are extremely reminiscent of the demarcation of competences in a federal state. According to Article 11 (1) TEC, as the measure for the exercise of the competences of the Union, the observance of the principles of subsidiarity and proportionality should be checked for all proposed legislation. More important than the specification of standard competences are the procedures for their safeguarding. The Convention's proposal is aimed at a combination of a "political early warning system" with subsequent rights to appeal to the European Court of Justice. Overall, it is true that the primary aim of the draft Treaty is to achieve a political solution and only secondly a judicial solution for safeguarding the principle of subsidiarity. Even in traditional federal states, the courts do not usually have

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40 Speech of *Winston Churchill* to academic youth, Aula of Zurich University, 19 September 1946. http://www.tages-anzeiger.ch/europe/1996/d/d-rede.htm. On the whole, cf. *Daniel Thürer/Colin Jennings* (eds.), Churchill Commemoration 1996, Europe,Fifty Years on: Constitutional, Economic and Political Aspects, Zurich 1997.

41 *Walter Hallstein*, Europäische Reden, edt. by *Thomas Oppermann*, Stuttgart 1979.

42 Cf. *Blanke*, op. cit. (note 19), p. 106 et seqq.

43 Quoted in: *Martha Derthick*, Keeping the Compound Republic – Essays on American Federalism, Washington D.C. 2001, p. 10.

44 On this *Heinz Kleger, Irenensz Pawel Karolewski* and *Matthias Munke*, Europäische Verfassung – Zum Stand der europäischen Demokratie im Zuge der Osterweiterung, Münster 2004, p. 415 et seqq. (3rd edn.).

45 *Thomas Oppermann*, Vom Nizza-Vertrag 2001 zum Europäischen Verfassungskonvent 2002/2003, Deutsches Verwaltungsblatt 1/2003, p. 10.

anything more than a marginal influence on the organisation of a federal allocation of competences. Nevertheless, I consider this approach to be too feeble and too technocratic. The "early warning" authority placed in the hands of the national parliaments (at six weeks) has far too little time and very difficult to manage in practice. It would also be desirable if, in addition to the national parliaments, other political bodies such as regions or federal states were to be given a right to be consulted. Finally, it would also be feasible to establish actual subsidiarity committees in the Commission and Council. These could provide support for the European Court of Justice which in the last instance has to decide regarding an infringement of the regulation of competences as laid down in the EU Constitution. The members of these committees could also include national MPs who could input experiences from their native countries.[46] And, why shouldn't subsidiarity questions before the Court of Justice be entrusted to a special mixed chamber of European nationals?

VI. EU Constitution as a stage in a dynamic process

The concept of a constitution is related to permanence, stability and even rigidity. When *Solon* left Athens for a few years after completing his constitution, he made the citizens of Athens swear to leave the Constitution unchanged until his return. The children were made to learn Constitution by heart in the form of a song in order in this way to anchor it firmly in the people's consciousness as a untouchable set of rules.

Things are quite different regarding European integration law. This was designed to change from the very beginning. Many years ago, *Hans Peter Ipsen* even described the European Constitution as a "changing Constitution".[47] According to the logic behind this point of view, the draft Constitution does not represent a fixed final point, but remains an expression of incompleteness and a reflection of the current status of constitutional law within the framework of a more extensive process of European integration. According to the plans for its future development, further reforms to the Constitution may be introduced as early as 2009.

However, at the time of writing, it is still uncertain whether the draft version of the Treaty establishing a Constitution for Europe will enter into force in the version as agreed in Laeken or in an amended form or even whether the whole constitutional project will be shelved for the present. This risk of failure is not small because, for it to be accepted in a legal binding way, it requires the approval of all 25 Member States and some of them have already made the Constitution the sub-

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[46] On the division of competences between the Union and the Member States, cf. e.g. *Daniel Thürer*, Kompetenzverteilung zwischen Union und Mitgliedstaaten aus Schweizer Sicht, in: *Nicolas Michel* (ed.) Une Constitution pour l'Europe – Eine Verfassung für Europa, Freiburg 2003, pp. 9-27.

[47] On the whole e.g. *Hans Peter Ipsen*, Europäisches Gemeinschaftsrecht in Einzelstudien, Baden-Baden 1984, p. 11 et seqq.

ject of a referendum – France and the Netherlands with a negative turn out – or intend to do so. In the long term, it is perhaps not so important whether the text succeeds as assembled by the Convention as more "a mix and match" than a completely new self-contained, conceptual and systematic unit - I think that in principle there are two things that are more important: firstly that whatever its wording, the text of a treaty establishing a constitution should essentially represent the expression or formulation of a constitutional status such as that already exists, i.e. that it does not re-constitute the laws of the Union, but primarily enshrines legal developments that have already been enforced. The second, longer-term aspect is that this project should basically only reflect a further stage in the development of the constitutional phenomenon per se: a historically new form of organising the co-existence of states and peoples that has evolved in Europe. For, is it not the case that even though the idea and force behind constitutionalism are the spiritual and political products of the new era that were borne in the American and French Revolutions, re-ignited in 1848 and widely propagated in the period after the Second World War, in modern times and in the numerous mechanisms and embodiments of the European integration process, they have now acquired, and will continue to acquire, a new form and quality? Will not the constitutional teaching of the future perhaps recognise at last that constitutionalism in Europe, and possibly soon also beyond the boundaries of Europe, has entered a new, paradigmatic development stage? And when we discuss Maastricht or Laeken or later on subsequent projects, we basically only mean stages and forms of this new-type of trans- and supranational constitutional movement.

Overall, however, it is unrealistic to speculate on possible developments in Europe's constitutional structures, if we fail to include in our considerations the historical process of the expansion of the membership from 15 to 25 States today that has been running in parallel with the constitutional project.[48] It is virtually inconceivable that the boundaries with Eastern Europe and the Mediterranean area will expand significantly without this encompassing a further shift in their structures, probably the increasing acceptance of confederative elements. Historical evidence and the opinions of important statesmen indicate that this will be the case. *Vaclav Havel* recently wrote the following noteworthy statement:

"All earlier expansions brought about a shift in the EU, but the current one will have a far more fundamental impact, both on the way the Union works and on its policy priorities. Expansion eastwards amounts to a final break with the founding fathers' vision of a homogeneous 'United States of Europe'."[49]

In addition, Polish Prime Minister *Tadeusz Mazowiecki* commenced a speech that he gave on 30 January 1990 on the occasion of the incorporation of Poland in the Council of Europe as follows:

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[48] On the whole, cf. *Wolfgang Graf Vitzthum*, Penser l'Europe de demain, in: *Klaus Beckmann, Jürgen Dieringer* and *Ulrich Hufeld* (eds.), Eine Verfassung für Europa, Tübingen 2004, p. 37 et seqq.

[49] *Vaclav Havel*, A new impetus for the old Europe, in: The World in 2004, published by the "Economist", 2003, p. 44.

"Europe is going through extraordinary times. The half of continent that was deprived of its roots almost half a century ago is now set to return... Perhaps the terms 'return and Europe' are also too feeble to describe the process we are currently undergoing. It would more appropriate to refer to the revival of Europe, a Europe that basically ceased to exist following the decisions taken at Yalta."[50]

It is important that we do not only discuss the current draft, but that we also consider strategies for its further development. Whatever the case, it is a fact that the draft Constitution – regardless of whether it is finally enforced in its current form or an amended form – will provide a focus for debate, and this represents a significant advance. The "plasticity" of European constitution law also offers a special opportunity. Instead of imitating the old nation state and its institution, which it is the stated aim of the European Union to overcome, it should utilise the special potential offered by the political and cultural variety of the continent and preserve its diversity inwards and outwards.

VII. ...and Switzerland...?

Switzerland, which is itself a model of successful, political, economic and cultural integration, has trouble with the intrinsically fascinating concept of multilateral, multi-state, European integration.[51] It does not (yet) wish to join the Union, but is unable to remain completely on the outside. As a small country in the centre of Europe, it is on the verge of negotiating bilateral solutions to common problems with the European Union. It approaches this with persistence. However, here at the same time it is running a certain risk of "internalising" the bilateral concept of international law with its accumulation of specialist dossiers, entrenched constellations of interest, negotiated concessions and counter-concessions and of narrowing the performance of this insofar as the sense for the acquisition of the system and the dynamics of comprehensive social processes threatens to atrophy.[52] After all, multilateral contracts of this kind are not "zero-sum games" in which one person wins and the other loses, here everyone can benefit from the joint project in

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[50] Quoted in: *Peter Oliver Loew* (ed.), Polen denkt Europa – Politische Texte aus zwei Jahrhunderten, Baden-Baden 2004, p. 302.

[51] Cf. *Daniel Thürer*, Föderalistische Verfassungsstrukturen für Europa, in: Integration 2000, p. 89, 99 et seqq.; *id.*, Werte in Europa – Werte in der Schweiz, in: *Peter Forstmoser/Hans Caspar von der Crone/Rolf H. Weber/Dieter Zobl* (eds.), Festschrift für Roger Zäch, Zurich 1999, p. 139 et seqq.

[52] *Kleger, Karolewski* and *Munke* leave open the question whether the EU is becoming more „like Switzerland" or not, whether in the round it is building a Europe „from the bottom up" or whether it is developing into a centralising State (op. cit. note 44 p. 16). In the view of the (historical) development of powers there are no reasons to assume that the model of a European superstate could be realised in the foreseeable future.

the long-term.[53] The proponents of a narrow bilateral approach call themselves (strangely) "realists" and authorities deliberately omit to point out the possible horizons beyond bilateralism due to the fear that this will endanger acceptance of the negotiated agreements or the next bilateral stage. This reminds me of *Erich Fromm* who described realists as follows:

"A person may be able to recognise things as they are, or as his culture maintains them to be, but he is unable to enliven his perception from within. Such a person is the perfect 'realist' who sees all there is to be seen on the surface features of phenomena but who is quite incapable of penetrating below the surface to the essential and of visualising what is not yet apparent. He sees the details, but not the whole, the trees but not the forest. Reality is for him only the sum total of what has already materialised. This person is not lacking in imagination, but his is a calculating imagination, combining factors all of which are known and in existence."[54]

Therefore, what is probably lacking in many circles in Switzerland is any sensitivity for the fact that new structures are developing in Europe (and way beyond this continent). The inclusion of ten new countries from central Europe, in conjunction with the Constitutional project, is an expression of the degree to which the political changes in Europe can only be understood as a (productive) process. This indicates how greatly developments in future may deviate from the direction taken in western Europe over the last fifty years, that Europe can be enriched and enlivened by the expansion and its culture and politics intensified and how much more pluralistic und broader it will be possible for a European Constitution to be in future than the models provided by the Maastricht and Laeken Treaties. Overall, in the end the European project is essentially concerned with the maintenance and advancement of a common culture.

Switzerland therefore represents the original Europe, without many of its citizens feeling any affinity towards the European Union. It is possible that the (apparent) lack of interest of the Swiss and their island mentality could be attributable to an (unconscious) feeling that old (basic) democratic values and processes are underrepresented in their institutions? The attitude of many Swiss towards the European integration process is based on utilitarian motives. Others try to think in terms of broader relationships between national and multinational values and interests. Here, it is fully understandable that many Swiss are unable to recognise any trace of their history and their identity in the European Union, particularly because of the greatly criticised democratic deficit which is to some extent inher-

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[53] The process of European integration shows a parallel with the creation of a global system of State co-operation. An interesting paradigm may be seen in the, albeit unsuccessful, efforts by President *Woodrow Wilson* to create a new system of peace („pactum pacis") in the shape of the League of nations which was to replace the bargaining based on egotistical interests by individual parties in the conclusion of peace treaties. Cf. on this *Stefan Zweig*, Wilson versagt, in: *id.*, Menschen und Schicksale, 3rd edn., Frankfurt a.M. 1998, p. 366 et seqq.

[54] *Erich Fromm*, Den Menschen verstehen – Psychoanalyse und Ethik (1947), 6th edn., Munich 2004, p. 76.

ent within the system. However, it should be borne in mind that the political and cultural concept of Europe is much broader than the European Union and that the potential and spirit of the EU are not the same as the current situation and the status of the regulations currently in force. Despite the justified scepticism, in my opinion it is better to go with the flow of development and work with others than remain stranded as an isolated observer on the banks.

The Issue of the Legal Nature of the Constitutional Treaty and the System of Sources

Vincenzo Cerulli Irelli

I. On the Treaty-Constitution

There is no doubt that the instrument drawn up by the Convention which the governments are currently examining is a Treaty, and not a Constitution: indeed, it is the latest in a series of Treaties that have been concluded across the years to amend and supplement the original Treaty of Rome, all designed to gradually, though constantly, strengthen the European institutions.

But, quoting the text itself, this is a Treaty "establishing a Constitution". In other words, it is opening up a new process specifically intended to lead to the institution of a fully-fledged Constitution, following the prescribed procedures and timing. This is tantamount to establishing a fully-fledged federal State.

The Treaty is being approved and ratified along the lines of the previous model: firstly, with the unanimous adoption of the instrument by the Intergovernmental Conference, that is to say, by the governments of the Member States, followed by its ratification by the parliaments of the Member States. The Convention had rejected the proposal tabled by several authoritative members to provide for a number of different procedures for the adoption of the Treaty, making it possible to proceed considering the TEC as already effective after ratification by a given number of Member States, and consider the Treaty to be already in force; this would have given the other Member States the option to withdraw from the Union, or to bring a political issue to the attention of the European Council for a final decision.

Unfortunately this solution was set aside, even though it would have been an important move in the direction of a federal State.

The Treaty was therefore adopted and ratified in the usual manner. But there was one very significant novelty in Part IV of the text, regarding amendments to the Treaty at some future date. Whereas the original text of the Treaty is to be approved and ratified in the customary manner, a special procedure has been introduced for later amendments. If, two years after the signature of the treaty amending the TEC, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. This would open a phase of political negotiations which could have different outcomes.

For example, one might even envisage the establishment of a new Union, made up of the States that have ratified the new Treaty, a strengthened Union in a sense,

which would be flanked by the States that have not yet ratified the new Treaty. However, at this point would open up a political process with an uncertain outcome. This would be a major change to the present system which, at least as far as the Treaty is concerned, is based on the model of international relations between States. We would have preferred more than this, but even in this way one might say that a constituent process has been inaugurated.

This Treaty is being proposed to governments following a wholly new procedure. Through the European Convention, it was not only the governments and not only the parliaments and national political forces that played a major part, but also lobbies and pressure groups, and professional and cultural associations. In other words (one might say) European society as a whole.

There was very broad participation, and it was the first time that the problem of amending the Treaties in a politically transparent manner had ever been addressed. Citizens, interests groups and political parties were kept briefed through a widely publicised debate in the media making it widely accessible to public opinion, on the procedures used to reach decisions as the text was hammered out, and the possible alternatives that had been discussed.

However, we have seen that since the Thessalonica Intergovernmental Conference an attitude, if not a political stance, has been emerging on the part of governments, that seems to be reversing the progress made by the Convention. It is evident that governments (and in particular the diplomatic authorities of the Foreign Ministries) are obviously determined to take back the "issue" of the European Constitution, in some cases reasoning as though nothing had happened and as if the experience of the Convention could be relegated to the purely cultural sphere, instead of being viewed as the outcome of a delicate and painstaking political process. For all Europe's political forces from both the European Parliament and the national parliaments were present at the Convention, and the decisions adopted on the individual points in the Treaty were the result of agreements and clashes between these political forces before being the result of cultural inputs, however significant. But this important procedural innovation is now tending to be sidelined by what governments are now doing as they try to retake control of the reform of the Treaties, using the standard procedures.

And there was a real danger that at the Intergovernmental Conference some of the innovative decisions set out in the TEC (some say that there are few innovations, and that more were needed, but there are certainly some and they are highly significant) could have all been challenged and debated all over again. A particularly controversial issue was the new relationship between the European Parliament and the national parliaments, or the new role of the European Parliament in the Community law-making process, or the new rules governing majority voting on the Council on major issues, or the new configuration of the European Council which differs from the Council of national governments, and is chaired by someone who is not a member of a national government, and remains permanently in office. Then there was the provision for a special Legislative Affairs Council as an organ responsible for legislation (Art. 32 of the Draft TEC), made up of permanent ministers (somewhat like a second Chamber, representing governments along the lines of the German *Bundesrat*, while the European Parliament would be a

kind of first Chamber). It was precisely this latter institution, which we believe to be of enormous significance, that has fallen victim of national governments (or rather, in my opinion, of the diplomatic apparatus of the Foreign Ministries, which still believe they are the main players in the European integration process).

On this point we should remember that the present system of sectorial Councils of Ministers exercising full law-making powers is giving rise, and has already given rise, to huge constitutional distortions in relations between national governments and national parliaments. In many cases, an individual national minister in one area who has not manage to obtain a legislative measure from the national parliament following a public and transparent procedure, manages to get the same measure pushed through by the sectorial European Council of Ministers without any transparency, and wholly ignoring the will of the national parliament. The national representative institution would therefore find itself, when the European procedure is completed, faced with a European law which is superimposed to its own powers and jurisdiction!

I believe that it is very important to follow very carefully in literature the closer integration which European Member States face everyday more, as much as being sensitive to the need for European integration. This request was satisfied enough by the work of the Convention, brought out to the full in public debates as far as the innovative parts were concerned. And at least some of the achievements, despite the fact that there were so many others that might have been successful but were not taken up, has been safeguarded whatever the cost.

II. On the system of sources

There is no doubt that the Convention set out to rationalise the system of European sources that had been built up somewhat chaotically over the decades, with negative repercussions on the protection of the principle of certainty of law.

But it can be considered only partially successful.

First of all, the text of the Treaty incorporates the concept of European law, divided into two categories: European laws and European framework laws. It makes an attempt to give both of these acts a specific function, such that the European laws would govern matters that fall within the exclusive competence of the Union, while European framework laws would govern matters that are attributed to shared competence. Furthermore, a distinction has been drawn between the law-making level and the regulation-making level, creating a hierarchical relationship between these two sources according to a model that exists in the constitutional systems of the Member States. Regulations are lawful insofar as they are in accordance with the law; and in relation to this question of the legality of a regulation, the Court of Justice may be asked to rule by any interested party, provided that the party taking action is the direct recipient of that regulation. Some would have preferred the text to include the right to challenge laws directly, but this can only be done by the Member States and by the Community institutions. That would certainly have strengthened the justiciability of the Community system.

It should, however, be emphasised that, as already indicated, European law is characterised by a law-making procedure involving what we might call the two sovereign institutions of the European order, namely, the Parliament and the Council. In this respect, European laws are designed along the lines of state laws, which are voted through by the parliaments. But they are not subject to a control of their legality except by referring them to a Constitutional Court which, as we know, is totally different from referrals to the administrative courts which are competent to rule on the legality of regulations.

Another rather obscure area is the relationship between European laws and domestic laws, which the Convention basically evades altogether. For the overall paramountcy of European laws over national laws, as laid down hitherto in an absolutely indiscriminate manner by the courts, even to the point of stating that any Act of the Union prevails over the primary sources of national law, is something that I believe has to be thought through all over again, in terms of the new European order as it is emerging from the Treaty.

For the Treaty clearly lists all the areas which fall to the competence of the Union or to the competence of the Member States, and the areas that are attributed to the competence of each source of Community law, according to the well-known model of our own national systems of sources of law, in which the principle of hierarchy and competence coexist. The Treaty text is, however, clear about the competences conferred on the Member States as opposed to the competences of the European Union. Everything that is not specifically conferred on the Union falls within the competence of the States. In my opinion, this means that the supremacy of European law over the national legal systems could certainly continue to be affirmed, but only to the extent that European law is the result of the exercise of competences that are legitimately conferred on the European institutions under the Treaty. And every European source can prevail over national law wherever provision is made for national law to be competent, and not some other source of European law.

In the new text of the TEC the principle is quite clear that "the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution" (Art. I-11(2) TEC). Furthermore, "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." (Art. I-6). In other words, Community law has supremacy, but only if it is adopted by the Union exercising its competences, and not law adopted by the Union outside its areas of competence.

It is only in matters where the Union has exclusive competence that it is the only authority empowered to legislate and adopt mandatory legal acts; the Member States can only legislate if they are authorised to. Whereas in the matter of shared competence both the Union and States may legislate and adopt legally binding acts, Member States can only do so where the Union has not exercised its own competence or has decided to cease exercising it (Art. I-12(2) TEC). But even in these areas, the exercise of law-making powers by the Union is governed by the principles of subsidiarity and proportionality (Art. I-11(1) TEC), in other

words, only where it is necessary, and within the limits laid down by the law, and by the additional protocol, and under the control of the national parliaments.

It is on the basis of these fundamental principles, whose developments in terms of case law and practice need to be very carefully monitored, that I believe the currently used principle of the general and indiscriminate supremacy of European law over national laws must be reviewed and revised. Whenever a national court is faced with a European law that has to be enforced, but which is in contradiction with the principles of the system of competences, it must suspend the judgement and refer the case to the ECJ, which will decide on the legality of that Community act. On the other hand, when there is a national law that is in contrast with the rules of European law, if it is an area over which the Union has exclusive competence, the Court must certainly apply European law and not-apply national law. Conversely, when it is a question for shared competence, the Court must decide whether the European provision with which the domestic provision is at odds is itself lawful, in that it is being exercised in accordance with the principles and the limitations that govern the exercise of joint competence. If the Court decides for its legality, it must raise the question, of constitutional nature, of the national law on the grounds that it is in contrast with European law. But if the Court rules that it is not, it can enforce the national law or refer the matter of the legitimacy of the ECJ.

As this shows, an articulate system of relations exists between the European system of sources and the national systems of sources and a more complex one might emerge, which will be more consistent with a federal-type constitutional system approach.

This clearly opens up new horizons for further reflection and debate, and we may well see new principles being very carefully framed in this area by the Court of Justice and by the national Constitutional Courts.

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Economic and market direction in the European Constitution*

Miguel Ángel García Herrera and Gonzalo Maestro Buelga

I. Introduction: Lisbon - between change and continuity

Economic regulation substantially incorporates former normatives and instruments of intervention. The difficult evolution from early economic integration, the construction of the single market and the subsequent creation of the European Economic Community all emerge in the new text which is essentially more an attempt at ordering than the incorporation of new rules. This means relative independence for the economic regulation of the constitutional structure and its survival even if the constitutional process fails.

Drafting of the text was carried out in an apparently novel context. In the Treaties there had been an insistence on the building of a market based on general principles such would determine the framework in which to establish certain limitations which are to be respected by the States. It is fitting, here, to remember the distinction between positive and negative integration[1] which accurately reflects the rather fragile foundations of European construction. Nevertheless, it appeared that the direction was changing and new winds of inspiration were blowing. In the 1990's objectives had been formulated which aimed to cure the European paralysis by emphasising the problems of unemployment and job training. However, any attempt to design a new scenario was to come about only at the start of the new millennium.

The March, 2000 Council of Lisbon attempted to adapt, symbolically, to the start of the new millennium and to introduce a change of course in line with the problems of the 21st century. It seemed that the Community tradition of setting limits had been overcome, to be replaced by a more active attitude which would favour intervention. A scenario and specific objectives were established from and for Europe which would channel the available energies towards its implementation. There would be a defined strategy sustained by Community institutions to be completed by a series of coherent programmes and implemented by means of specific action.

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1 *F. Scharpf*, "Governing in Europe", Madrid, Alianza, 2000, p. 59 et seqq.

However, the Conclusions of the Presidency did not validate this reading of the situation. It is true that a strategic target was defined but the practical implementtation consisted of planned programmes in which the regulatory aspect dominated and the call to the States to be more active was reduced to a request for studies or reports on certain problems. With regard to the information society, the Global European Action Plan was proposed, as well as legislative innovation on matters such as e-commerce and e-money, copyright, liberalised markets, regulation of telecommunications, Internet teaching and access in schools, high speed networks, etc., were announced and the distribution of traditional roles was maintained between Community regulation and State action. Specific measures were linked to topics, like telecommunications, on which many previous European Councils had focussed.

Despite attempts to underline the break with the past, the Council of Lisbon itself explained in the Presidency Conclusions the background situation: "No new process is needed. The existing broad Economic Policy Guidelines and the Luxembourg, Cardiff and Cologne processes offer the necessary instruments...". Thus, only simplification and co-ordination were deemed necessary.

Although there was no turning point, the Lisbon Council constituted a pragmatic statement which transcended mere market arrangement. Goals were announced demanding State direction, regulation and intervention, which in the Community context constituted a definition of the types of co-ordination. It meant a tension between change and continuity, the affirmation of a will to manage and the rejection of an automatic response to the external conditions of globalisation.

The question now is how to illustrate this tension and verify its transformation in the new context of European integration.

II. Principles and values of the Economic Constitution

A specific definition of the values is made in Article I-2 TEC which declares that they are common to all States. For those with a set of values in their constitution, as is the case with the Spanish Constitution, the extensive enumeration of Art. I-2 TEC is surprising, in particular the distinct nature of the constitutionalized values. To consider as a "value" the rule of law, respect for rights or democracy is alien to our understanding of values, as is the attribution of pluralism and justice exclusively to society.[2] We can share the desired aim of guaranteeing the basis and contents contained in the said concepts together with the object of ensuring their continued existence in the new heterogeneous political unity and still dissent from

[2] *F. Sorrentino,* "Brevi riflessioni sui valori e sui fini dell'Unione nel progetto di Costituzione europea", in Diritto Pubblico, 2003, n. 2, p. 809 et seqq.; *A. Cantaro/ C. Magnani,* "L'ambiguo Preámbulo: atto formalmente internazionalistico, dichiarazione sostanzialmente costituzionale", in *A. Lucarelli/A. Patroni Griffi* (eds.), Studi sulla Costituzione europea. Percorsi e ipotesi, Nápoles: Edizioni Scientifiche Italiane, 2003, p. 51 et seqq.

their literal regulation, tabulation and distribution. While this disorder is regrettable, the most interesting aspect is the parallelism between the social and the legal-political contents encompassing a conception of power.

We consider that this distinction is also retained in Article I-3 TEC, in which a distinction is made between legal and economic areas. Whilst the first concept alludes to freedom, justice and security, which will be defined in the Bill of Fundamental Rights, the second is redirected towards a free and truly competitive market. It is not a question of building two independent spheres with an independent logic, ruled by legal norms and natural laws, respectively. We accept that this type of market requires legal regulation and that legal precepts, and not spontaneous rules, govern their working.[3] However, this difference is pertinent since in one of them the market is identified as a framework of reproduction defining the principles of the interchange between autonomous subjects carried out in a system of which the fundamental rules are identified.

However, what is most conspicuous about this declaration is the praise for the market within the framework of the fundamental principles of the European Union. The set of basic pronouncements referring to the pillars of co-existence is founded on a material base which is circumscribed to a historical type of the organisation of the interchange. Acknowledgement of the values in no way reduces the relevance of the market.

Any idea of spontaneity or naturalness is ultimately discarded in favour of the establishment of a series of general objectives which must be achieved by the working of the market. Thus, sustained development, balanced growth, full employment and social progress, environment protection and the rejection of both general and certain collective social rights are taken for granted. The so-called social welfare of the nations in Article I-3.1 TEC is restricted to the vaporous formulas of Article I-3.3 TEC and is achieved within a market which is structured as a "highly competitive social market economy". Consequently, a tension can be perceived between the material and the ultimate aim, between reality and aspiration, and between that which exists and that which is achievable. However, contrary to the contradiction inherent in the constitutions of the social state, it is easy to reach the conclusion that the market is confirmed as an unquestionable structure which becomes the primary instrument for the execution of the objectives stated. The economic essence of European construction is reaffirmed and its primacy over the rest of the Treaty is asserted. In the text, social development is based on the market, which is the premise by which the rest is measured and the other objecttives will be compatible only so long as they conform to economic logic. Obviously, it is not a question of affirming that only economic imperatives exist, but rather of drawing attention to the contradictions in Article I-3 TEC and providing a logical interpretation of the conflicting elements: the social market economy – ordo-liberal by definition – will be the insurmountable context in which to execute those objectives and whose content will adapt to the demands of the market. The claim that the market is the fundamental principle is both the starting and arrival

[3] *N. Irti,* "L'ordine giuridico del mercato", Rome-Bari. Laterza, 1998; *id,* "Il dibattito sull'ordine giuridico del mercato", Rome-Bari, Laterza, 1999.

point, since it defines the framework for carrying out the Union's objectives. Characterisation of the market involves the incorporation of a weakened social link given that, as the Constitutional Treaty invariably reminds us in other precepts inherited from the original Treaties, there will be various working guidelines which will impede the survival of the communal links of the social states.

III. Model definition

1. Social market economy and the European social model

It is not a question now of reconstructing the complex unfinished debate about the European economic Constitution, but rather looking closely at the implications derived from the innovations which have appeared in the European "constituent" debate and determine their final effect.

One cannot overlook the constitutionalization in Article I-3 of the Constitutional Treaty of a concept which defines the model and the basic elements of the economic system. We refer to the "social market economy", an expression which, due to the multipurpose nature of the concept, the new Treaty defines succinctly by means of a significant expression: "highly competitive".

The term "social market economy" takes on a different scope and meaning depending on who uses it. In the initial draft, which lacked the expression "highly competitive", it seemed to be construed as a level of commitment which would enable the integration of social elements in the model.

To determine the meaning of the formula contained in the Constitutional Treaty, a dual exercise would be necessary. The first, involves a systematic interpretation of the draft text and finding a meaning coherent with the new Treaty. The second, entails setting the contents of the "social market economy" formula within the historical context.

The incorporation of the "social market economy" in Article I-3 TEC, regarding the Union's objectives, originates from the Working Group's proposals concerning "Social Europe" (XI) and less importantly, from those of the "Economic Governance" group. Although in both groups the desire to incorporate this formula in the Constitutional Treaty Bill[4] is present, the "Economic Governance" group does not propose the incorporation of this concept in the same terms, nor with the same meaning given by the "Social Europe" group because the latter, in their conclusions, suggested that the economic and social objectives be included in the Constitutional Treaty and based on the content of the current Articles 2, 3 and 4 EC-Treaty. It understands that the "social market economy" as a model is expressed in the content of these principles.

The "Social Europe" group expresses its proposal in other terms. In section II of their report (inclusion of social objectives in the Constitutional Treaty Bill), the

[4] See the final reports of these working groups: "Social Europe", CONV 516/1/03, 04/02/2003; "Economic Governance", CONV 357/02 of 21/10/2002.

"social market economy" appears as the nexus between economic and social development and demands equality, not subordination, between economic and social objectives. Going even further, they state that the "social market economy" formula is opposed to that included in Article 4.1 of the EC-Treaty: "the open market economy and free competition".

As we have mentioned, the final expression is different and implies an involution with regard to group XI's report. Certainly, the expression "highly competitive" added to that of the "social market economy" aims to weaken the commitment which this, according to the proponents, incorporated between the social and the economic dimensions. The new term, in order to demonstrate its corrective effect, must come into contact with the precepts of part III, particularly with those regarding economic and monetary policy. These dispositions substantially reproduce the present configurations of these parts of the EC-Treaty and Article 4.1 of the same, reinforcing the reorientation of the model to the formula: the "open market economy with free competition".

It would seem, then, that after the debate on the principles which decide the nucleus of the European Economic Constitution, it has not overcome the formulation of the current Articles 2, 3 and 4 of the EC-Treaty.

Not only is the innovation of Article I-3 TEC denaturalized through allusion to high competitiveness, but its normative materialisation also seems redirected towards pure market economics.

The Constitutional Treaty resolves the tension in the debate regarding the balance between economic and social dimensions in favour of the market which resists any normative conditioning.

On the other hand, the pretension that the "social market economy" as a model for market-public power relations implies a committed formula linked to the social state is more than doubtful.[5] From the beginning of the European integration process, the influence of the postulates of the Friburg School has been present in the design of the model.[6] The norms regarding the concurrence and design of the common market clearly make reference to this.[7] Inevitably, this leads us to make some observations regarding the proposals which this school incorporated in the debate on the political-economic relationship.[8]

The fundamental innovation which ordo-liberalism incorporates was a new relationship between market and public power which breaks with the liberal paradigm. However, this new relationship has not been imposed by the introduction of the social link as a market conditioner which legitimises state intervention, but

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5 *G. Maestro Buelga,* "Constitución económica e Integración europea", in Revista de Derecho Político, 2002, n. 54, p. 33-111.

6 *S. Cassese,* "La costituzione economica europea" in Rivista italiana di diritto pubblico comunitario, 2001, p. 907-921.

7 *L. Dinella,* "La scuola di Friburgo, o dell'ordoliberalismo", in Dir. ed. econ., 1999.

8 On the Friburg School contribution, see *R. Miccu,* "Economia e costituzione. Una lettura della giuspubblicistica tedesca" in Quaderni del pluralismo, 1996, n°1 p. 243-288.

rather is explained as the sole possibility of guaranteeing the market as the determining institution in the economic system.

The fundamental problem of the Friburg School is the guarantee of competition for which end public power becomes a key mechanism.

If the legitimacy of state intervention is summarised as the guarantee of competition (which is the guarantee of the working of the free market) it is not surprising that part of the doctrine links ordo-liberalism with liberal currents, more than with its break.[9] Furthermore, for ordo-liberals the interventionist proposal finds its limits in guaranteeing the working of the free market, which brings it into conflict with the social state project. In short, the "social market economy" proposal incorporates the social element as clearly subordinate and incapable of conditioning the market.

The constitutionalisation of a "highly competitive social market economy", far from being configured as a constitutional model which evokes post-war social constitutionalism and capable of expressing a balance between social and economic dimensions, recovers the original proposal of the Friburg School.

On the other hand, the debate about the "social market economy" formula has been linked to the "European social model". This aims to be a formula-summary which brings together both the historical tradition linked to European construction of the post-war social state as well as the return to the balance between the economic and social dimensions in the future Europe, which should be transferred to the legal constitution.

However, few formulas are as ambiguous as this. What is the content of the "European social model"? During the Convention debates reference was made to this by appealing to this rebalancing commitment. However, for exact content details previous European Council declarations have been cited and in such politically vague terms that it loses its capacity to express anything.

Even so, some Convention members hoped for a kind of constitutionalisation of the term which could contribute to delimiting the scope of the "social market economy". What is significant in this proposal is the content of the group's final report on the "Social Europe", to which we have already alluded.

In this report, the express desire of members is clearly manifested: "... The definition of the objectives of the Union should contain a reference to the 'European social model'". Attempts to clarify the content of this ambiguous expression have not gone beyond a referral to previous Union declarations. We can establish as a definition of this concept, in accordance with the report of XI group, that given in the conclusions of the Presidency of the European Council in Barcelona (2002), which in spite of its generality provides grounds for common agreement as regards its content: "The 'European social model' is based on good economic performance, competitiveness, a high level of social protection and education and social dialogue." The Council of Barcelona did not prove very satisfactory, which is why some prefer to see in the Lisbon Council (2000) a more balanced proposal, particularly regarding the attention given to employment. The balance between the

[9] *N. Reich,* "Mercado y derecho", Barcelona, Ariel, 1985, p. 43-46 and 75-79.

economy, the social dimension and environmental protection, should have expressed the commitment present in the "European social model" formula.
We are aware that Article I-3 TEC, the new "home" of the Union's objectives, has not satisfied the wish for a balance which the "European social model" seems to invoke, although it is, despite its precarious legal interpretation, what remains of the formula. To the robust and important definition represented by the "highly competitive social market economy", is juxtaposed a confused allusion to full employment and social progress, to high levels of protection and improvement of the quality of the environment, not to mention the encouragement of scientific and technical progress.

In view of the normative translation of the "European social model", it is evident that the appeal to the latter has the essential aim of legitimising it, especially with regard to the capacity to evoke the extinct tradition linked to the construction of the social state.

The "European social model" should have manifested itself normatively by giving a leading role to social rights in the Constitutional Treaty. The normative design, with respect to social rights, is confusing and does not resolve the subordination of these rights to the economic principles for the successful working of the Community. The Bill of Rights must be harmonised with the social rights referred to in Part Three.

Article III-209 TEC (previously Article 136 EC-Treaty) literally contains the same references included previously in the Treaty of Amsterdam and which compromised their effectiveness. Likewise, the development of certain social rights contained in the Bill (part II) imply a regression with regard to the level of recognition and protection consolidated in the State constitutionalism of the Union Members. Reference in Art. III-209 TEC to the European Social Charter of 1961 or the Community Charter of Fundamental Social Rights of Workers of 1989, has only one interpretative value conditioned by economic imperatives. On the other hand, the social rights in part II of the Constitutional Treaty acquire their materialisation in the specific dispositions of the text located in the policies of part III, Article II 112.2 TEC, which normatively devalues these rights. The relativisation of the latter, subordinating them to the economic link (Preamble to the Bill, Article III-209, Article III-203 TEC, etc.) weakens their status, which implies an involution in relation to the already debilitated situation extant in State constitutionalism. As for the rest, the formulation of some of the most signifycative rights cannot be considered even the basic minimum of the level of State protection.

Reference to social rights in the Constitutional Treaty should essentially be read in the light of two considerations: on the one hand, as an expression of the inability of the constitutional draft text to redress the balance between economic rights and the market; and on the other hand, as a normative deterioration of these rights which devaluates their presence in the fundamental text.

Social rights are recognised with formulas of normative conferral which emphasise their character as programmable norms[10] within the Community ambit, debilitated by the principle of subsidiarity and reference to national legislations.

The innovation of introducing the Bill of Rights has not proved effective in reinforcing the social dimension of the European Union. The unresolvable tension imposed by the model of integration and the single market configuration[11] confines redistribution to the periphery of the system.

2. Competition and regulation

Nobody argues that competition regulations, together with the basic freedoms of movement, constitute the fundamental nucleus of the Community's economic constitution. Two questions linked to competition in the Constitutional Treaty demand our attention. First, how to approach the competition-intervention relationship, incorporated into the Constitutional Treaty text; and second, the connection between competition rules and the regulatory model essential to the proposal of the "social market economy". As we can see, two questions linked to the economic Constitution model and which are contained in the new Treaty.

The centrality of competition in the Community constitution can be deduced from its connection with the market, from its demand for the configuration of first the common market and later the single market.[12]

Thus, competition rules were linked to the process of economic integration because they were essentially in confrontation with the barriers which the States could impose to prevent the construction of a unified market.

Basic liberties and customs regulations, etc. notwithstanding, the rules regarding competition tend to guarantee that the area of exchange may work. Although this set of regulations is aimed at both companies and Member States, the emphasis has been on those precepts aimed at the States. Article 86 EC-Treaty and the precepts referring to State aid (Articles 87 et seqq. EC-Treaty) have had considerable importance. Therefore, competition regulations, since the EEC constitution was directly connected to the process of integration,[13] were from this perspective its fundamental instrument.

However, as pointed out by conventional doctrine, the advance in the process of Community integration has led to a connection between competition and other functions linked more to the homogenisation of an economic model in which Community bodies have played a fundamental role. The 1980s initiated a period

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[10] *G. Ferrara*, "Lo 'stato pluriclasse' un protagonista del secolo breve", in Dallo stato monoclasse alla globalizzazione, Milan, Giuffré, 2000, p. 73-100.

[11] *M. Poiares Maduro*, "L'équilibre insaissible entre la liberté économique et les droits sociaux dans l'Union Européenne", in L'Union Européenne et les droits de l'homme, Brussels, Bruylant, 2001, p. 465-89.

[12] *S. Cassese*, "La Costituzione economica europea" (note 6).

[13] *J. Baquero Cruz*, "Between competition and free movement: the economic constitutional law of the European Community", Oxford, Hart, 2002, p. 172-178.

where the functionality of these norms acquired a new worth. These precepts were a key tool in the process of liberalising the economic sectors, until then largely state-owned in the Member States' economies: a process which contributed to the mutation of their economic constitutions.[14]
Competition and its norms act as erosive elements with a decisive influence[15] in the redimensioning of the public instruments of State intervention at a time when there is a notable loss of neutrality in the Community constitution.

Once the liberalisation process had been consolidated, the importance of competition regulations might be re-established in the European Constitution. Those voices which demand a new function for competition, linked more to achieving market efficiency than to extending an economic model in conflict with social constitutionalism, are ever more audible.[16]

Relocating competition at the heart of the original Community law implied the recovery of the public-private relationship at its centre, a problem transferred to those economic services of general interest.

The formal expression of the attempt to redress the public-private balance, by limiting the centrality of competition regulations, was the introduction of Article 16 EC-Treaty by the Treaty of Amsterdam. As to the consequences of including this precept, opinions have been divided, although after excessive optimism[17] the doctrine has tended to restrict its effects.[18] The collection of regulations in Article 16 EC-Treaty in relation to Articles 73, 86 and 87 EC-Treaty, to which the precept itself appeals, the case law of the ECJ together with the interpretative criteria of this norm added to the Treaty of Amsterdam, soon limited its scope.

The Constitutional Treaty adds nothing to the picture. Article III-122 reproduces the aforementioned Article 16 EC-Treaty with minor literary distinctions and maintains the same system of connections with the competition regulations.

On the other hand, in an attempt to strengthen the proposal contained in Article 16 EC-Treaty, the Nice Charter of Rights introduces an Article 36 (Art. II-96 TEC) which includes access to services of general interest for Union citizens, although with references to the TEU contents (promotion of the social and territorial cohesion of the Union), which makes it difficult to observe any progress in this direction.

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[14] *P. Bilancia,* "Libertà economica e situazioni giuridiche soggetive", in La costituzione materiale. Percorse culturali e attualità di un'idea, Milan, Giuffré, 2001, p. 311-339; *F. Bilancia,* "Brevi note sulla costituzione materiale, legalità ed Unione Europea", ibid., p. 425-443.

[15] *S. Cassese,* "La nuova costituzione economica – lezioni", 4. ed., Rome, Laterza 1997, p. 119, *A. Papa,* "Impresse pubbliche tra costituzione e ordinamento comunitario", in La Costituzione materiale (note 14), p. 503-524.

[16] See the note regarding this debate in *J. Baquero Cruz,* "Between competition and free movement: the economic constitutional law of the European Community" (note 13).

[17] *M. Ross,* "Article 16 EC, and service of general interest: from derogation to obligation?", in European Law Review, 2000, p. 22-38.

[18] *M. Clarich,* "Servizi pubblici e diritto europeo della concorrenza: L'esperienza italiana e tedesca a confronto", in Rivista Trimestrale di Diritto Pubblico, 2003, n. 1, p. 91-125.

After the liberalization process in the public sectors of the Member States, competition regulations reaffirm their centrality in the new economic scenario and are congruent with the contents of the model which is sanctioned in Article I-3 of the draft bill. The process is strengthened if we take into consideration the acquired rights which occurred during the liberalisation process. This process, which introduces State-market relation mechanisms typical of a regulatory State,[19] consolidates a type of external guarantor intervention,[20] substantially in harmony with the "highly competitive social market economy" formula.

IV. Private subjects: enterprise and property

With regard to private subjects and their interests, we shall only refer to free enterprise and property rights as regulated in Articles II-76 and II-77 of the Charter.

Although free enterprise was not acknowledged in the Treaty or the ECHR, and its constitutional regulation is minimal in the Member States, the Charter acknowledges free enterprise in Article II-76. It formalizes what was already included in the Treaty in the competition and enterprise regulations (Art. 81 and 82 EC-Treaty) and what jurisprudence had reasoned from Article 1 of Protocol num. 1 on protecting the freedom to exercise economic or commercial activity.

The Charter opts for a concise formulation which is limited to mere statement. This limited declaration leaves aside any explanation as to its content or limits. It merely gives a general conferral to Union law and to national legislation and practices. A heterogeneous material is constitutionalized and is more emphasised with the allusion to national practices.

If many years ago jurisprudence inferred the freedom to exercise economic activity from ownership right, with the recognition of free enterprise it now has at its disposal a concept which includes ideas such as freedom of initiative, contractual freedom, managerial power, etc., in a competition and market context. Thus, there is a strong inter-relationship between freedom and legal regulations which disciplines the social reproduction process: the market requires competition which demands free enterprise which is based on ownership. And these legal-economic components, in turn, must bear in mind the group of social contents and objectives which qualify the Community constitution. Thus, the recognition that was given to commercial freedom and economic activity was carried out within social function limits, which excluded the protection of any initiative and that the limitation might infringe the essential content.

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[19] *A. La Spina y G. Majone,* "Lo stato regolatore", Bologna, Il Mulino, 2000.

[20] *G. Majone,* "The rise of the regulatory state in Europe" in West European Politics, 1994, vol. 17, nº3, p. 77-111 also, "The European Community as a Regulatory State" in Collected Courses of the Academy of European Law, 1994, vol. I, p. 321-419.

Yet the difficulty regarding free enterprise is not merely limited to the delimitation of its content. Inclusion in the normative system imposes the taking into consideration of other related matters.[21]

Although there is no reference to the usual clause of general social or economic utility, it is undeniable that other Charter references to certain groups imply an inevitable conditioning. If we refer to the most obvious (given its scope), i.e. the allusion to consumers (Art. II-98 TEC), who are omnipresent in entrepreneurial activity, it must also act as a limit even at the beginning of the exercise of the right, in exactly the same way as the objectives of the Union which refer to environmental quality or sustainable growth (Art. I-3 and II-97 TEC); or references in Title IV to the right to information and consultation, and the right of collective bargaining (Arts. II- 87 and 88 TEC).[22]

Free enterprise is conditioned by specific limits which, however, do not impose the functionalisation of the free enterprise, given that this contains an individual matrix which demands respect for freedom of option and the obtainment of the economic result.

Likewise, the exercise of free enterprise is subject to permanent supervision. After years of Community experience, legal techniques and regulatory bodies have been maintained which ensure understanding of what exactly is free and fair competition (Art. 4.1 and 2, 82 et seqq. TEU). For this reason, the independent authorities work alongside[23] the judicial system, as a formula – supposedly – for the depoliticization of the definition of the working conditions of certain economic sectors and the application of, supposedly, technical and neutral criteria adjusted to the established principles for the working of the market. Once the markets have been liberalised and State companies privatised, public intervention censured, and the management and control of the economy vilified, the formula is resorted to which avoids both State presence as well as entrepreneurial self-regulation. Experience has demonstrated the tendency towards the deterioration of competitive conditions, towards economic concentration and the abuse of dominant positions.

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[21] *A. Lucarelli,* "Art. 16. Libertà d'impresa", in *R. Bifulco et al.*, L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea, Bologna, Il Mulino, p. 130 et seqq.

[22] According to *S. Rodotà,* "La Carta come atto político e documento giuridico" in *A. Manzella et. al.*, Riscrivere i diritti in Europa, Bologna, Il Mulino, p. 75, an optimistic reading must be made of the rights included in the Charter. An elementary systematic reading would imply considering a person's dignity, sustainable development or responsibility towards future generations as limits on free enterprise: "Why amputate these essential Charter contents which have enabled national constitutional Courts to exercise incisive interventions in protecting fundamental rights?".

[23] Among the extensive literature we highlight, *F. Merussi,* Democracia e autorítà indipendenti, Bologna, Il Mulino, 2000; *G. Amato,* Il potere e l'antitrust, Bologna, Il Mulino, 1998; in Spanish doctrine we highlight *A. Rallo Lombarte,* La constitucionalidad de las Administraciones independientes, Madrid, Tecnos, 2002; *M. Salvador Martinez;* Autoridades Independientes, Barcelona, Ariel, 2002; *E. Vírgala Foruria,* La Constitución y las comisiones reguladoras de los servicios de red, Madrid, Centro de Estudios Políticos y Constitucionales, 2004.

Therefore, the exercise of entrepreneurial freedom remains conditioned by whoever acts as a guarantor of competition. With the withdrawal of State intervention, there is a reluctance to let the law arbitrate disputes. Due to the preference for general statements and the insertion of the contract in the legal system, dispute settlement will be carried out by the judge who will decide on the conflict between the parties and conformity with the guiding ideas of the constitution. Thus, a better co-existence of the legal systems is achieved as well as adapting to changing circumstances.[24]

Article I-77 TEC regulates the right to enjoy the ownership of legally acquired goods, to use them, to dispose of them and to bequeath them: a right which was not included in the Treaties, although it was recognised in case law.[25] The future intention of the Union to adhere to the ECHR, included in Art. I-9.2 TEC, and the reference of Art. II-112.3 TEC that those Charter rights which are already guaranteed in the European Convention will have the same meaning and scope, a statement which is corroborated by the Explanations drafted by Group II and endorsed by the Presidium (CONV 828/03),[26] recommend that Article II-77 TEC be read in the light of Article 1 of Protocol num. 1. The reading of both texts shows their profound parallelism: the property which refers to goods, the pro causa privation of public utility and the limitations of the use of goods for reasons of general interest. The innovation of Article II-77 TEC consists of the protection given to intellectual property.

The systematics established by the Charter of Rights mean a clear break with the situation consolidated in the Constitutions of the social state. Although property was historically included in the block of rights of freedom, the subsequent evolution and implementation of new values meant the separation of property rights from the set of rights which referred directly to the nucleus of inalienable human rights. However, the incorporation of property right within Title II: Freedoms, alongside rights like freedom of thought, expression, etc., implies the recuperation of the property-freedom binomial which was considered irreversibly laid to rest.

It is not coincidental that in this axiological context, mention of the social function of property-disappears. This omission is not due to oversight, since an amendment was expressly rejected which proposed its inclusion in the text. As we

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[24] *G. Vettori,* "Carta Europea e diritti dei privati (diritti e doveri nel nuovo sistema delle fonti)", in Rivista di Diritto Civile, 2002, p. 669 et seqq.

[25] *C. Defilippi et al.*, "Il diritto di proprietà ed alla vita privata e familiare nella giurisprudenza della Corte Europea", Turín, G. Giappichelli, 2003 p. 26 et seqq.; *L. Ferrari Bravo et al.*, "Carta dei diritti fondamentali dell'Unione Europea", Milan, Giuffrè, 2001, p. 59 et seq.; *L. Daniele,* "La tutela del diritto di proprietà e del diritto al libero esercizio delle attività economiche nell'ordinamento comunitario in el sistema della Convenzione europea dei diritti dell'uomo", in Il Diritto dell'Unione Europea, 1998, n. 1, p. 53 et seqq.

[26] "The wording has been updated but, in accordance with Article 52(3) [now Art. II-112 TEC], the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there."

know, the importance of this proposal lies in the acknowledged distinction between the external limits, i.e. the public utility or general interest, and the internal limits, identified with the social function. In the latter case, the legislator is deemed capable of defining the content of property to ensure the fulfilment of its social function. Whereas in the former case, the content of the right is maintained intact which is constricted to satisfy the demands which are outside the right itself.

Community integration was based on the political will to favour the circulation of property without border obstacles. The meaning and sense of the property was entrusted to national law which settled the integration of interests within the framework of the social state. For its part, Community law ignored the nature of property (Art. 295 EC-Treaty) in order to concentrate on the regulation of competition conditions. The negative integration which was carried out prevented the circulation from being affected and competition falsified.[27]

The situation is not different in the European Convention. We will not dwell on the concept of goods, which is interpreted in its widest sense to cover a complex casuistry, since we are more interested in the substratum on which the understanding of the right of property is constructed. The conferrals to national texts indicate that the ultimate aim is to act as a type of guardian who parries untouchable matters. The Convention presupposes a preliminary regulation which corresponds to the establishment of national State powers whose reasonableness will be judged in order to check whether a balance and proportionality is achieved between the general interest and the safeguarding of individual rights. The European Convention contains no functionalization of the right since its aim is not to act but rather, as a last resort, to preserve its essential nucleus. Consequently, the constitutional regulation of the European Convention is very different from that of the social state because the latter aims to transform social reality and its content covers interest composition criteria.

There is no objection to this protection which is based on different objectives, whether it is a matter of social transformation or the ultimate guarantee addressed to verifying the justification and proportionality of the limitation of property. The consequences which are derived from the European Convention's concept of property are softened by the character of its protection and because the definition of property refers to the State which is external to the system itself.[28]

The transformation occurs when the Convention text is "constitutionalized" in the European Union and it must be defined from the point of view of the Community constitution. It becomes separate from the national reference and independently tackles the concept of property. Yet, on entering the orbit of European Con-

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[27] *M. Comba,* "I diritti civili. Verso una nuova funzione della proprietà privata", in *G. Zagreblesky* (ed.), Diritti e Costituzione nell'Unione Europea, Rome, Bari, Laterza, p. 153 et seqq.

[28] *F. Bilancia,* "I diritti fondamentali come conquiste sovrastatali di civiltà. Il diritto di proprietà nella CEDU", Turín, *G. Giappichelli,* 2002, p. 93 et seqq.; *M. L. Padelletti,* "Art. 1 Protezione della proprietà", in *Sergio Bartole et. al.*, Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali, Padua, Cedam, 2001, p 801 et seqq.

vention thinking, it lacks constitutional precision and becomes an unsatisfactory regulation: in the Charter text, there is an open contradiction between general and private interest without specific constitutional references to the social function. There only remains the interpretation within the entire Constitution, with the references to objectives and purposes of the Union which add little to the definition of property. The understandable shortcomings of the Convention become absolute when its regulation is transferred to the European Constitution.

When it moves up to the constitutional level, the legal weight accumulated in property is not recuperated as a result of the conflict of interests which its substantially limited conception favoured. It becomes linked with the tradition of property which is a support for the circulation of goods without the legal-political options of the social state. In this transposition, the Charter incorporates an idea of property in which the availability of goods as well as the weakness of the social links is highlighted.

Property remains inscribed in a constitution which has as its material base the market with which it has a strong relationship: if the market is the basis of exchange and social reproduction, ownership is the basis of the market. Compatibility between general and private interest will have, in terms of the text, to take into account not only other constitutional values but also their incidence in the general reference framework: the market and competition. Moreover, it will be the setting of this scenario which enables a more homogenous regulation and comprehension, based on the social market economy and separate from the idea of the social function of property.

Property regulation contains an imbalance in the struggle between individual and general interests and a break with respect to the traditions established in the constitutional texts. The legal clauses within which the regulation and exercise of the right are framed show the slide towards a legal concept with an individualistic and primacy matrix with respect to the general interest.

V. Economic policy co-ordination

European Union economic policy is ensconced in the old division of work between the Community and State bodies. Initially concentrated in regulatory intervention and subsequently extended to monetary matters, Community competence establishes a general relationship with economic matters. However, the normative is influenced by the demands of integration.

Integration is only conceived in terms of stability and balanced development. However, maintaining these conditions requires a deployment in the related areas. Therefore, currency policy cannot be understood without the development model, employment or the economy, which are the essential supports.

The references of Articles I-13 and 14 TEC to Union competences of an indisputable economic nature, precede the general reference to the co-ordination of the Member States' economic policies. While, in some particular sectors such as energy, agriculture, fishing and transport, a regime of shared competences is

established, on the other hand, for the general understanding of the economy, the weak formula of co-ordination established in Article I-15 TEC is assigned, which contains the specific reference to General Economic Policy Guidelines (GEPG), regulated in Section I of Chapter II of Title III of Part III.

Although Article III-177 TEC alludes to the Union's general economic policy, this is limited to a co-ordination of the States' economic policies and the definition of common objectives whose actions will be based, as is the case of monetary policy, on respect for free competition and open market economic principles and on respect for the guiding principles of price stability and sound public finance.

The Constitutional Treaty maintains the GEPG in force which express the attempt to find co-existence between opposing elements such as Community direction and State action, the establishment of criteria and the obtainment of results, minimal intervention and maximum effectiveness. The GEPG are a particular concretion which enables us to confirm the conflict of competences and interventions and the definition of the borderline between the elements involved: what are the areas of intervention, who participates and what are the legal techniques used.

The first step consists of the recommendations of the Commission to the Council of Ministers which, in turn, drafts a GEPG Bill on the basis of which the European Council debates the conclusions in accordance with which the Council of Ministers agrees on a recommendation establishing the GEPG. It then reports to the European Parliament regarding these guidelines.

The direction phase is followed by the control stage, in which the role of the Commission is essential. The latter draws up reports which enable the Council of Ministers to know the evolution and coherence of State policies by means of the so-called unilateral supervision. This control becomes more necessary when contradictions are detected or risks are observed for the working of the policies. The two possibilities foreseen are: a warning by the Commission and a recommendation by the Council of Ministers, which may be made public.

The high level of intergovernmentalism is noticeable, above all. When the Commission is limited to technical tasks, the leading role is played by the State representatives who define the criteria, verify their compliance and formulate the corrections. Also noteworthy is the minimal role of Parliament which is a mere receiver of reports and the headquarters of a possible appearance of the Commission. The technical instrument which is used (the recommendation) also lacks any binding legal capacity.

On the other hand, the control carried out is coherent with the procedure. It also moves in the orbit of factual conditions, of the capacity for influence which is exercised by analysis and the evaluations shared by State representatives. Multilateral supervision has, as its parameter, a recommendation. In the event of default or dangerous digression, new recommendations are issued based on the authority of the Council of Ministers. The moment for sanctions only comes into force in the budgetary field. Only when economic imbalances have an impact on budgetary figures is the moment that the Union's power to sanction is triggered off (Art. III-184.10 TEC). We will come back to this later.

Also worthy of mention, as additional provision, is the response plan to specific situations such as serious supply difficulties of certain products, natural catastro-

phes or exceptional events. These can be tackled by the approval of decisions which contain appropriate measures for the economic situation or financial aid for the exceptional circumstances. In both instances the proposal is issued by the Commission and the Council of Ministers adopts the decision. Furthermore, we must also remember the exemption from liability both regarding the Union and the State in relation to commitments undertaken by the different public subjects stated in Article III-183 TEC whose aim is to avoid the transfer of liabilities in the Union headquarters. Each State assumes and confronts its commitments on its own. This constitutes an attempt to prevent risk taking or asking for excessive aid in relation to their possibilities. These warnings and prohibitions cover a wide range of subjects from State and public authorities to public bodies and companies.

Although one Section of the Constitutional Treaty is dedicated to regulating and formalizing the legal instruments of intervention, there exist other provisions which also affect the economic field. Some decisions are adopted via non-formalized means. Although an inviolate decision-making area is reserved for the States, the European Council is also entrusted with the task of promotion and direction which are transformed into the adoption of fundamental decisions (e.g. the adoption of the Euro).

If the legal method used, i.e. the recommendation, lacks efficacy, the content of the GEPG accentuates its "weak" character even more. A reading of the document which contains the GEPG highlights their shortcomings in both content and method. If the supposed aim is to orientate (understood as leading to a specific goal) then it is hardly likely to be achieved when the objective is stated so generically and precise indications are omitted for achieving this.

The identification of the objectives is carried out with the indefiniteness which the Community texts adopt in economic matters. The GEPG for the period 2003-2005 have championed the strategy defined in Lisbon: knowledge, sustainability and full employment, which Ecofin in the forward to the presentation of the GEPG specifies as the priority of encouraging growth, increasing the flexibility of the labour markets and achieving public finance sustainability.

The co-ordinating indications are reduced to statements which are also characterised by their indetermination. Rather than being contents capable of predetermining or conditioning an activity, they are more a list of wishes which they hope to see fulfilled without specifying the achievable levels of materialization.

Furthermore, the Council's recommendation contains both an analysis as well as various suggestions which tiresomely give warnings and proposals, seen time after time in other Community documents. They are the untiring reiteration of someone who hopes that the future will be the appropriate moment for the realisation of the model, while the present is still the moment for admonitions, with the implicit conviction that they will be largely ignored. The relative reproach is incorporated in the inventory of Community censures which define a nebulous area of action rather than a prescription for action. The multiple recommendations reproduce the ideology of the social market economy and manifested in the combination between market principles and corrective interventions which embrace competition as a fundamental idea, and the labour market, salaries, social protection, public aid, energy, public finances, etc., with the by no means contemptible

nuance that they are aimed at a still quite heterogeneous economic area. Finally, we come across the Community feature: the strength of the document resides not in itself but rather in the external coactive apparatus represented by the Stability Pact, backbone of Community co-ordination.

So long as economic policy remains reduced to a co-ordination of State policy and fails to acquire more autonomy and consistency, European integration will be insufficient because public logic, which functions irregularly and discontinuously, will pervade.

To illustrate the extent of the regulation of the Constitutional Treaty we should recall failed attempts from the past. This comparison can be carried out using the Werner Plan[29] which observed that the absence of sufficient co-ordination made the creation of an economic and monetary union advisable. As can be read in its conclusions, the main economic policy decisions will be adopted within the Community field and the necessary powers will be transferred to the Community. With this in mind, two Community bodies will be created as well as a central banking system and a decision centre for economic policy be politically responsible to Parliament.[30] Furthermore, to ensure overall coherence of the general economic policy, responsibility will be extended to "other economic and social policy fields" which will have been transferred to the Community authorities.[31] To

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[29] It is true that the said Plan was drafted under specific conditions (economic and monetary disorders) in a different scenario (existence of public intervention models). However, a Community work proposal was made constituting a milestone and essential reference point. Its starting point was the contradiction between the weakening of the States and the weakness of the Community. The failure of medium term programmes demonstrates that the Community lacks the power to carry out economic policies which the States have lost.

[30] As planned instruments we can mention the establishment of medium term objectives (growth, employment, prices, foreign balance), provisional policy (supply and demand action, regulatory and compatible economic budgets), Community budget increase, pluriannual programming and sufficient level of fiscal harmony.

[31] Rapport au Conseil et à la Commission concernant la realisation par étapes de l'Union Économique et Monétaire dans la Communauté, "Rapport Werner", Luxemburg 8 October 1970: "*Le centre de décision pour la politique économique* exercera de façon indépendante, en fonction de l'interêt communautaire, une influence décisive sur la politique économique générale de la Communauté. Étant donné que le rôle du budget communautaire comme instrument conjoncturel sera insuffisant, le centre communaitaire de décision devrá être en mesure d'influencer les budgets nationaux, notamment en ce qui concerne le niveau et le sens des soldes ainsi que le méthodes de financement des déficits ou d'utilisation des excédents. En outre, les modifications de parité de la monnaie unique ou de l'ensemble des monnaies nationales seront du ressort de ce centre. En fin, pour assurer le lien necéssaire avec la politique économique générale, sa responsabilité s'étendra aux autres domaines de la politique économique et sociale qui auront été transferés au niveau communaitaire. Il est essentiel que le centre de dcécision pour la politique économique soit en mesure de prendre des décisions rapides et eficaces selon des modalités à preciser, notamment quant à la façon dont les États membres y participeront.

this end there is a strict procedure in place which foresees three annual inspections to enable common defined orientations to be concluded.

This brief selection of some of the important aspects of the Werner Plan, serves as a sample for comparing what was proposed at the time and the terms consecrated in the Constitutional Treaty, i.e. it enables us to see what still remains to be done. While the monetary instruments concentrate on their task of control, economic policy (the mechanism for integrating State economies in the European project) incorporates types of economic direction, with the definition of the objectives of the system and behavioural guidelines. However, the problem of economic policy, both in the EC-Treaties as well as in the text of the Constitutional Treaty, which introduces no substantially new ideas, except a relatively greater role for the Commission, resides in the distribution of economic competences. Economic policy remains in the hands of the States, while the Union establishes types of macroeconomic subjection with weak instruments in relation to the Member States. This system of weak governance betrays the limitations of its overall management in difficult situations such as at the present.

While Member States are obliged to execute their economic policies with submission to the general model (Article I-3 and III-178 TEC) and to general guidelines established by the Council (Article III-179 TEC), what is created is a duplicated area of economic management, i.e. the State and the European one, with contact mechanisms where the prevalence of the European bodies is not definitively provided with instruments for guaranteeing overall management.

To adapt the States' policy to the Union's objectives,[32] disciplinary measures (monetary policy, deficit control and balance of payments) are resorted to more than overall management. The GEPG only have limited efficiency mechanisms such as the multilateral watchdogs and the recommendations, as well as publicity in cases of deviation from guidelines, which in any case would have to be counterbalanced with the legitimate needs of the State's policy decision.

The shortage of interventionist instruments, which is not a technical deficiency but rather a lack of model, shapes the weak European economic governance, which is respectful of the limits within which the original law constrains it.

This idea (prevalent in the Constitutional Treaty) should be examined even more thoroughly. If the concept of a composite Constitution can be productive, particularly in the economic field, the interrelation of areas in the context of overall governance could allow the performance of policy management in the State field. In this case, the problem lies in the fact that the European economic model has ended up weakening the intervention instruments created in the social constitutionalism of the Member States, whose function was to lay down policy direction and condition the market. The question of compatibility between the Euro-

Le transfert à l'échelon communautaire des pouvoirs exercés jusqu'ici par les instances nationales ira de pair avec le transfert d'une responsabilité parlemantaire correspondante du plan national à celui de la Communauté. Le centre de décisión de la politique économique sera politiquement responsable devant un Parlement européen." (p. 13).

32 *S. Cassese*, "La costituzione economica europea" in Rivista Italiana di Diritto Pubblico Comunitario, 2001, pp. 207-221.

pean Economic Constitution and that of the Member States is an expression of this constantly reformulated contradiction.[33]

The problem of European economic governance ("gouvernement économique"), however, has been posed as a technical question, particularly by the Commission, in the debate on the Convention. The Commission's demand, since the commencement of the work of the Convention, has been to strengthen its powers of overall economic management, with the aim of avoiding its elusion via a system of majorities and complicated decision processes. It implicitly fomented a tension between the Commission - a body which genuinely expresses the European interest - and the Council, which is more interested in an integration of intergovernmental interests, and demanded that it be strengthened, something even more necessary given the imminent enlargement of the Union.[34]

From technical spheres the Commission's proposal has been backed as an attempt to rationalize the competences based on the experience of Community practice.[35] This approach has led to criticism of the design of European economic governance. The Treaties and the text of the Constitutional Treaty, from the technical point of view, do not allow "economic governance" to be spoken about. Furthermore, this term is, in the context of European regulation, confusing and of little

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[33] From another conceptual perspective, but tackling the same question, see *M. Luciani*, "Brevi cenni sulla cosidetta 'costituzione economica' europea e sul suo rapporto con la Costituzione italiana", in Le riforme istituzionali e la partecipazione dell'Italia all'Unione europea, Milan, Giuffré, 2002, p. 47-55.

[34] "Under the Treaty, coordination of economic policies is part of the common policies. As for other common policies, it is essential to have at the heart of the system a body responsible for stating the general interest, to ensure consistency in the provisions adopted by the Member States, with the means to impose an overall vision and to bolster the credibility and the cohesiveness of the system in the face of threats to the whole euro zone. This role falls naturally to the Commission, whose role must be strengthened.

The instruments of economic policy coordination, particularly the broad economic policy guidelines and the opinions on stability and convergence programmes should be drafted on the basis of proposals from the Commission rather than mere recommendations from which the Council may depart by qualified majority. The means available to the Commission should not be limited to a recommendation to be submitted to the Council when the economic policies pursued by a specific Member State deviate from the broad guidelines approved or jeopardise the smooth running of economic and monetary union. When this happens, the Commission must be in a position to act effectively within the framework set out by the Treaty: through warnings, which it would address directly to the Member State concerned, and by means of proposals from which the Council could depart only by unanimity." (Commission Communiqué: "A Project for the European Union", COM (2002) 247 of 22/05/2002).

This approach is shared by group VI (Economic governance), which also proposes varying the status of the competence regarding macroeconomic policy (the final report of the group on "Economic Governance", note 4).

[35] *B. Angel*, "Faut-il réformer le cadre institutionel de l'Union Économique e Monetaire"?, in Revue du Marchè Commun et de l'Union Européenne, 2002, n°468, p. 321-325.

use.[36] In any event, the normative bases are insufficient for efficient management which is of necessity centralised. The proposal which some people consider inevitable consists of an institutional reorganization, which affects the Commission, and a change of economic competences, transferring the job of overall governance to European bodies[37][38].

VI. Social and employment policy

The problem of the social deficit in the Community legal system was approached in two ways in the work of the Convention. The first is that of the status of the social objectives in relation to the economic ones. This was an attempt to recover a balance between both dimensions to correct the dominant nature of the economic link present in the Treaties and the subordination of the social objectives to the economic ones.

The Community references to social rights were framed within references to the economic principles headed by the formula: "open market economy with free competition" and by monetary and economic ties which conditioned the Community's actions. Overcoming this subordination meant establishing a new normative link formally equivalent to the economic one.[39]

The re-balancing of the relationship between the economic and social dimensions demanded both references to the model which attenuated the conceptual connection with the "market economy" and its central position, as well as a reorganisation of the principles of economic policy capable of admitting a composition of diverse principles and interests.

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[36] *H.-B. Friedrich*, "Grundzüge einer Europäischen Wirtschafts- und Finanzverfassung", in: http://www.eu-reform.de, 2002/05, Convention spotlight.

[37] *Friedrich* (note 36).

[38] What is left in the Convention text of the Commission's proposals? Not much. The General Guidelines draft includes a weak Commission intervention, consisting of the recommendation to the Council, and precisely the formula criticized by the Commission in its communiqué of 22nd May 2002. The supervisory role remains as now. The sole novelty which strengthens the Commission's role is the possibility of notifying warnings to Member States in the event of their economic policies contradicting the general European guidelines. With regard to more incisive corrective actions, they do not vary regarding the Treaty texts. Thus, the Commission's proposal is not accepted and the system of adopting decisions of the Council which it incorporated (Article III-179 TEC).

[39] As included in group IX's final report and in the resolution of the European Social and Economic Committee on 19/09/2002. The proposal to transfer the social objectives to Article 1-3 TEC aims to redress normatively its status. More directly, the proposal to suppress the subordination of the social objectives with respect to the economic ones is made in numerous contributions by Convention members. Among the most significant for their conjunction with the consequences of this proposal, see the contribution of *C. Einem/M. Berger* (Conv. 232/02); *P. Berés* of 19/12/2002; *A. van Lancker* (Conv. 86/02) and *J. Borrell/C. Carnero/D. López Garrido* (Conv. 394/02).

Likewise, this new relationship should be reflected in the economic governance by means of the introduction of new contents and a symmetry of intervention techniques. To this effect, these proposals propose the creation of a socio-economic governance which sanctions the inter-relation of both elements and their link to social objectives.

The second perspective of the debate affects European economic intervention and is the instrumental conversion of the redesign of the relationship between economic and social matters.

To overcome the subordination of social objectives would mean transferring the new balance to the field of Community policy. It is proposed that economic policy should become social-economic policy, and that their instrument, the GEPG, should likewise acquire the same normative quality. Strong macroeconomic direction, the path to achieving the balance demanded, would express the integration of social matters in the Community legal system.[40]

The contributions which postulated a new "socio-economic governance" arose from the shared diagnosis of the submission of the Union's social objectives to the introduction of a single market and to the economic and monetary Union and that, within a highly centralized monetary policy, socio-economic intervention is necessary to prevent social *dumping* as a form of inter-state competition and to make progress in employment and protection matters.

Coherently, the proposal in the GEPG for the unification of economic, employment and social policies, would require the reformulation of the objectives of the ECB in order to impede any monetary policy conditioning.[41]

Now let's see the materialisation of this in the constitutional text.

Article I-3 TEC establishes a general framework in which social objectives are introducing. Its second section considers (together with freedom, security and cross-border justice) the single market, in which competition is free and undistorted, as a Union objective. Likewise, section three asymmetrically incorporates the relationship between the economic link and the social dimension. To the "highly competitive social market economy" is added the comment of "tending towards full employment and social progress". The highly competitive social market economy is the framework in which these tendencies toward full employment and social protection should be implemented. Into a model averse to market conditioning, re-balancing elements are introduced. One need only recall how the doctrine has recognised the expansive and disciplinary effects of the single market and competition which, except for the appropriate instruments, impose their logic by subordinating the social objectives.[42]

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40 Group XI's report demanded the same status for social policy as for that of economic and employment policy and the co-ordination between them. Although the group's opinion was not unanimous, it was understood that compatibility between these policies, which might put an end to subordination of the social policies, was better guaranteed by their merger. (See section V of Group XI's final report).

41 See contributions of *A. van Lancker*, *C. Einem*, *M. Berger* and *P. Berés* (note 39).

42 *M. Poiares Maduro*, "L'equilibre insaissible entre la liberté economique et les droits sociaux dans l'Union Européenne", in L'Union Europèenne et les droits de l'homme, Brussels, Bruylant, 2001, pp 465-489.

To the way in which social objectives are included in Article I-3 TEC, one must add that policy regulation maintains the subordination of the social objectives. A systematic interpretation would recognise that the Treaty has failed to achieve a social and economic rebalance due to the fact that it maintains, normatively, the economic link in the European legal system.

The differential treatment as regards Union intervention in the socio-economic field is maintained. Economic policy and the status of the GEPG are integrated in the system of principles on which the economic link of the European Constitution is founded (Articles III-177, previously Article 4, virtually unamended, III-178 and 179 TEC). Also conserved, in the same terms, is the monetary policy and the objectives of the ECB (Article III-185 TEC).

Economic policy operates as a legal mechanism of subordination of the social policy. The compatibility of employment policy, defined functionally in relation to economic competitiveness (Article III-204 TEC), with the GEPG adopted pursuant to Article III-179 TEC, sanctions the economic link and its prevalence.

Employment policy, in contrast to the usual social state formulas, has considerably weaker types of intervention than those of the GEPG. The instruments of intervention are the encouragement of co-operation and the complementary action of the Member States. The Council's guidelines are outlined in their annual report and may include recommendations to the States. Thus, the original Treaty criteria are maintained, since employment policy is outside economy policy, is subordinate and the intervention techniques are weak.

Social policy suffers from the same effects. The Convention text establishes a subordinate relationship between protection and competition which perpetuates the asymmetry of the social dimension (Article III-209, 2nd paragraph TEC) and entrusts the Union's social homogenisation to market dynamics. This relationship between competition and protection is the basis of the new paradigm which has led to the reformulation of the European systems of protection.[43]

Social policy, as a result of its absence in the GEPG, remains confined to its residual position. In the field of intervention established in Article III-210 TEC, the Union's action is materialised in the promotion of co-operation (Article III-210.2 lit.a) and in the adoption of minimum dispositions on the basis of the normatives present in the States (Article III-210.2 lit.b).

The absence of social and employment policy innovations confirms the failure of the attempts at re-balancing which were suggested during the Convention debate. The formal independence of the social and economic policies and their prevalence is the path to maintaining the primacy of the economic link in the Treaty.

The wording of Article I-15 TEC, which seemed to incorporate the economic and social policies in a common instrument, is denied by the regulation of these policies.

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[43] *G. Maestro Buelga/M.A. García Herrera*, "Marginación, Estado social y prestaciones autonómicas", Barcelona, Cedecs, 1999, p. 59-62.

VII. Monetary policy

Articles I-13 and 30 and III-177 TEC confirm the experience, long present, of the separation between State and currency,[44] and establish the complex structure of the monetary authorities.[45] Monetary policy is the exclusive competence of the European Union. The European Central Banking System (ECBS) has the basic functions of defining and implementing monetary policy, carrying out currency operations, holding and managing the official currency reserves of the Member States and promoting the smooth working of the payment system.

This system is composed of the European Central Bank (ECB) and the Central Banks. This arrangement raises the problem of their relationship, a question already debated in the doctrine and which remains unmodified in the new text. The ECBS is the institutional reference to which functions are assigned and to whose principle objective is to maintain price stability. However, it is the Central Bank which is endowed with legal personality (I-30.3 TEC) and which adopts the regulations and decisions, as well as the recommendations and opinions (Art. III-190.1 TEC). On the other hand, the Central Banks, as integral members of the ECBS, are subject to the ECB guidelines and instructions and whose compliance the Council guarantees (Art. 14.3 of the ECBS and ECB Statute), although the text of Article I-30 TEC appears to establish a parity when it declares that the ECB and the Central Banks of the Member States which have adopted the Euro "shall conduct the monetary policy of the Union".

Once the superiority of the ECB over national banks was established and monetary competence assumed, the absorption is confirmed of an area of sovereignty which has formed part of the nucleus of the State's identity (Art. 149.1.19 SpC), and which is now exercised in a concentrated form, overcoming the dispersion of competences of previous periods during the process which led to monetary union.

From this complex structure emerges the unitary essence which characterises monetary competence. This matter is no longer a competence transferred by the States (Art. I-1 TEC), and is now regulated as an established competence of the Community, as a result of a process of concentration, which will have concretions – added slowly and laboriously - in other matters. The monetary field is one of the clearest examples of a Community decision which is imposed inexorably on the States.[46]

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[44] *G. Cama/G. Giraudi*, "Le politiche macroeconomiche", in *S. Fabbrini/F. Morata* (eds.), L'Unione Europea. Le politiche pubbliche, Rome-Bari, Laterza, 2002, p. 29 et seqq.

[45] *F. Dehousse*, "Article 105", in *V. Constantinesco/R. Kovar/D. Simon* (eds.), Traité sur l'Union Européenne, París, Economica, 1995, p. 252.

[46] *S. Cafaro*, "Unione monetaria e coordinamento delle politiche economiche", Milan, Giuffrè, 2001, p. 184. For other readings on this problem, *J.-V. Louis*, "Union Économique et Monetaire", in *J.-V. Louis et al.*, Union Économique et Monetaire, Cohesión Économique et Sociale, Politique industrielle et Technologie Européenne. Commentaire Megret, Vol. VI, 2ª, Brussels, Éditions de l'Université de Bruxelles, 1995, p. 57 et seqq.; cf. *A. Predieri*, "Euro, poliarchie democratiche e mercati mone-

The inclusion of Article I-30 TEC which regulates the ECB in Chapter II of Title IV of the First Part ("The other Union institutions and advisory bodies") although not included in Article I-19 TEC,[47] not only eliminates any arbitrariness on the part of the monetary authorities,[48] but also makes the Community nature of monetary direction explicit. This aspect is confirmed by its composition and method of working. With regard to its composition, the Executive Council is separate from the governments, and Central Bank governors must be independent[49] (Art. III-188 TEC) With regard to their workings, except in the cases of Articles 28, 29, 30, 32, 32 and 51 TEC, in which the votes are weighted, the agreements are adopted by a majority of those present and each member has one vote (Art. 10.2 of the Statute). Independence[50] is insisted upon in the exercise of their functions (Art. I-30. 3 TEC). This declaration is complemented by the Article III-188 TEC: "When exercising the powers and carrying out the tasks and duties conferred upon them by the Constitution and the Statute of the European System Central Banks and of the European Central Bank, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body." It is also completed by the Statute of the ECBS and the guarantee that a dismissal may only

tary", Turín, G. Giappichelli, 1998 p. 341, on the implementation of a federal subsystem in a non-federal system.

47 The following authors criticise this exclusion: *L. Carbone/L. Gianniti/C. Pinelli*: "Le istituzioni europee", in *F. Bassanini/G. Tiberi*, Una Costituzione per l'Europa, Bologna, Il Mulino, 2003, p. 131. The ECB in its opinion of 19/09/2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe was set up (CON/2003/20), published in O.J. C 229/04 of 25/09/2003, accepted that it was not included regarding Article I-18 (now I-19) TEC, but proposed change of the heading of Title IV ("The Union's Institutions") to "The Institutional Framework of the Union". In this way the ECB would be part of the constitutional framework without being a Union institution (sect. 11).

48 ECJ case 11/00, Commission –v- European Central Bank, [2003] ECR I-7147 et seqq., considers that the ECB should not be considered separate from the institution, body or organization terms of regulation 1073/1999 and, therefore, not subject to Community regulations, without being able to allege by way of exception the holding of economic resources other than those contained in the Community budgets (para. 63 et seqq.)

49 As the Court proclaimed in the judgment mentioned in note 48, the purpose of independence is to maintain the ECB separate from any political pressure, so it may efficiently pursue the objectives assigned to its functions. However, this independence does not completely separate the ECB from the European Community, nor exempt it from any legal Community regulation. (para. 134 and 135)

50 The ECB opinion of 19/09/2003 (O.J. C 229/7 of 25/09/2003 – sect, 13) esteems that it is a terminological difference endowing the ECB with independence while both the Commission (Art. I-26.7 TEC) and the Court of Auditors acknowledges its "complete independence" (Art. I-31.3 TEC).

be decided by the Court of Justice at the request of the Governing Council or the Executive Committee (Art. 11.4 of the Statute).[51]

A highly debated question regarding the regulation of the ECB is its function. To state that the principal objective of the ECBS is price stability means maintaining a reductive conception of an important instrument of economic governance. The reasons which justified the establishment of this criterion had a historical basis and clearly it is impossible to continue with this thesis. Moreover, the matter is even more delicate if we recall that economic policy is orientated by monetary policy guidelines. In this way, an orientation is imposed which does without any other possible contents take into account the complexity of the economy.

The ECB must attend to all the objectives mentioned in Article I-3 TEC.[52] But the Constitutional Treaty itself is charged with the responsibility for identifying the co-ordinates in which economic and monetary policy must operate. As laid down by Article III-177 TEC, the basic references allude to some of the contents of Article I-3 TEC but are silent about others. Thus, repeated reference is made to the structural elements of the market economy, to free competition and to the guiding principles of price stability, public finance and the balance of payments.

Nor is the responsibility of the ECB increased, since it merely issues an annual report which is debated in Parliament. Its decisions, recommendations and opinions can be made public and the technical profile of its members emphasised.[53] Therefore, if we add up the structural and functional aspects, we could ask ourselves whether an independent monetary policy ruled by economic logic isolated from other social considerations is not sanctioned. A hierarchy of contents is consolidated when we consider price stability as the "principal objective" (Art. I-30.2 and III-185.1 TEC) and monetary policy is more a way of disciplining than a mechanism of economic governance.[54][55]

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[51] Complementary elements are the specific dispositions for members of the euro zone (Section 4 of Chapter II of Title III). In the Euro Group Protocol it states that to develop ever-closer co-ordination there will be informal meetings foreseen in Article III-185 TEC. On the other hand, one must mention the ECB General Council (Art. III-199 TEC and 45 of the Statute), that its function will be transitory as the third decisive body so long as there are States invoking an exception (Art. III-197 TEC) and in which all the central banks are integrated in order to strengthen monetary policy co-ordination and supervise the working of the exchange rate mechanism.

[52] *C. Dordi/A. Malatesta*, "La política economica e monetaria nel Progetto di Costituzione europea", in Diritto Pubblico Comparato ed Europeo, 2003, n. 4, p. 1084.

[53] *F. Martucci*, "Le rôle du Parlement Européen dans la quête de légitimité démocratique de la Banque Centrale Européenne", in Cahiers de droit européen, 2003, n. 5-6, p. 549 et seqq.

[54] *C. Maestro Buelga*, "Constitución económica e integración europea", in Revista de Derecho Político, 2002, n°54, p. 35-111.

[55] During the Convention debate attempts were made to make the topics mentioned compatible with the social and economic dimensions. The debate positions regarding economic and social policies revised the model globally. Monetary policy proposals affected the definition of their principles (previously Art. 4.2 EC-Treaty) and the link of the ECB to the new principles in which the social bond acquires a greater role. The

VIII. The Community budget

The Constitutional Treaty had to answer two central questions: the identification and origin of the resources and the conception of the financial instrument. With regard to this question, the definition already incorporated in Art. 199 of the EC-Treaty of Maastricht (Art. 268 EC-Treaty Amsterdam) is maintained, which demanded a balance between income and expenditure, and reiterated in Art. I-53.2 TEC. Community powers have no anti-cyclical weapons and they are coherent with the primacy of the market as the focus of exchange, distribution and the creation of wealth, while the guiding principle of Community action is stable and sound public financing (Art. III-177.3 TEC) and the conviction that improvements derive from the working of the market (Art. III-209 TEC).

The other essential aspect is resolved in accordance with that described in Art. I-1 TEC. If the European Union has at its disposal an area of competences conferred on it by the States, then its resources also depend on its members.

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most articulate proposal was contributed by *Caspar Einem and Maria Berger*, "Towards a social Union", Conv. 232/02, Brussels 04/09/2002, which in fact contained a type of economic governance anchored in the tradition of the social state.

The former Article 4 EC-Treaty (III-177 TEC) was reformulated and the economic principles defined with an explicit mention of full employment (now Art. III-178 and I-3.3 TEC) - the central objective of macroeconomic policy. The reference to the open market economy with free competition was complemented by the incorporation of *"social welfare"* as a defining criterion. The proposal also affected monetary policy because, in addition to price stability, growth and full employment, were fixed as primary objectives.

It also had an impact on the containment mechanism of the State budgetary deficit, which went from being a disciplinary instrument to integration in a socially linked macroeconomic policy. The proposed, but never realized amendment of Article 104.2 EC-Treaty (now III-184 TEC) was justified as a way to subordinate monetary policy to the social objective of employment and the loss of its technical independence: "... the ECB would be made responsible for employment, growth and price stability and finance policy would be responsible for ensuring a stable employment market (automatic stabilising factors) and creating an infrastructure that promotes growth" (contribution of *C. Einem* and *M. Berger*, ibid., sect. 9).

The relativisation and flexibility of State budgetary discipline, perhaps one of the most criticised and compromising elements in the current economic situation, was completed in this suggested text (sect. 10) with inclusion of the "golden rule", which excluded from this precept the investment in infrastructure financed by the public debt: "Public investments in infrastructure financed by loans shall not be taken into account for the examination."

Likewise, as a logical consequence, the nature of the ECB was modified, whose "independent authority" profile became blurred as it changed into an instrument for monetary management subordinate to the economy policy objective of full employment. According to the proposed amendment of Art. 125, 127 and 105.1 EC-Treaty, the creation of a European employment strategy should be sustained by both macroeconomic policy and the ECB. The loss of independence and the technification of the decision meant the recovery of the policy which conditioned the decision insofar as a constitutional principle must operate: that of the social link of the economic activity.

According to Art. I-54.2 TEC the Union budget will be financed out of its own resources, as stated in Art. 269 EC-Treaty. In spite of the reference to their own resources, the same precept stipulates the scope and defines the dependence of the States. The limits of the resources and their categories is established in a Community Law approved by the Council of Ministers. The Council, after prior consultation with Parliament, pronounces itself unanimously in favour, it must subsequently be approved by the Member States. The Union's independence is reduced to establishing the category of the resources, for which prior parliamentary approval is required. What we have here is the future implantation of the European budget legality, given that previously the system of individual State resources was defined in the Council Decision of 29.9.2000, whose adoption was recommended to the Member States, whilst now a specific legal procedure is necessary.

However, budgetary legalisation does not imply a significant advance in parliamentary participation. Although the new legal formula can be used, the epicentre of the elaboration continues to be located in inter-governmental relationships. If we make a distinction between the definition of the general budgetary framework and the drawing up and implementation of the budget, we discover the different leading role of Parliament. In the first hypothesis, the substance of the budget is defined by means of the identification of the limits and the categories of the resources and mere parliamentary consultation is sufficient. In the second hypothesis, parliamentary approval is now required and, moreover, the capacity of Parliament to maintain its amendments or to request the presentation of a new budget is preserved (Art. III-404.8 TEC). Therefore, the basic co-ordinates of the previous situation are inherited. Continuity with respect to the previous situation is also verified in the statement on budgetary principles.[56] Art. I-53 TEC mentions the principles of unity, annuality, universality, balance and good legal administration. It also demands that public spending be preceded by the adoption of a legally binding act.[57]

Another significant component is the budgetary control exercised over the States. On the one hand, the legal basis of Community financing is defined. On the other, it aims to guarantee members' discipline and the smooth working of the system, with the end result that the availability of resources is assured. These resources will be provided by all the States which will have to adjust their budgets in accordance with strict financial criteria. Art. III-184.1 TEC imposes on Member States the obligation to avoid "excessive government deficits". Obviously the

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[56] *E. Gabolde/C. Perron*, "Art. 268 à 280", in *Ph. Léger* (ed.) Commentaire article par article des Traités UE et CE, Paris: Dalloz, 2000, p. 1799 et seqq.; *M. Carabba*, "Il bilancio dell'Unione", in *F. Bassanini/G. Tiberi* (ed.), Una Costituzione per l'Europa (note 47), p. 159 et seqq.

[57] These principles were previously included in Art. 268 EC-Treaty and later ones of the Treaty and Financial Regulations n° 1605/2002, whose articles regulate the principles of unity and budget veracity, annuality, balance, accounting unity, universality, speciality, good financial management and transparency. Even the preliminary demand for legal procedure was also contemplated in the Institutional Agreement of 06/05/1999 on budgetary discipline and the improvement of the budgetary procedure.

keystone is the loaded expression "excessive", redolent of discretionary and political interpretations given that the text does not precisely define it.

Although the Stability and Growth Pact is not formally constitutionalized, its spirit is present, because the reference values must be understood in the light of the Protocol concerning the procedure applicable in the event of excessive deficit which is quantified by the previous Art. 104.2 EC-Treaty (now Art. III-184.2 TEC). Consequently, one of the most controversial elements in the Community framework is maintained, producing considerable tension due to the difficulties of certain Union countries to stay within the parameters of the Stability Pact.[58]

To the normative constriction of the Community budget can be added the limitations imposed on the State budgets, with the consequent transformation of the budgetary function. The incorporation of certain budgetary limitations of this nature implies the revision of some of the essential instruments of the social state and of the relationship between politics and economics.[59][60]

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[58] Cf. case 27/04, Commission -v- Council [2004], http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en

[59] *G. Carbone*, "La finanza pubblica tra i vincoli comunitari e tutela degli interessi nazionali", in Rivista Italiana di Diritto Pubblico Comunitario, 1998, n. 1, p. 85 et seqq.; *G. Maestro Buelga*, "El vínculo presupuestario de los derechos sociales", in Revista Vasca de Administración Pública, 2002, n. 64, p. 193 et seqq.

[60] The legislative technique used accentuates budgetary manipulation. On applying the Stability Pact Regulations 1466/97 and 1467/97 were enacted in 1997 establishing information flows, supervision, and the adoption of stability plans to achieve budgetary balance or surplus. It proceeds not to an application of the Treaty but to its integration since it incorporates unforeseen obligations: from the negative link of avoiding excessive deficits it passes to the positive link of balance or surplus. This transformation has earned severe criticism. From a technical perspective the arbitrary form of the limits are criticised. Irrationality consists of establishing as a model some values which reflect the macroeconomic figures of the European countries during the second half of the nineties. The problem arises when we acknowledge that the European economy can only function in the future pursuant to parameters of a certain time period. Likewise, it does not make clear whether valuation of the balance is made in relation to the effective structural budgetary balance, or whether investment costs should be included in the deficit (as now provided in Art. 5.1 subparagraphs 3 and 4 of Council Regulation (EC) No. 1055/2005 of 27 June 2005 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies). From a political perspective limitation of the Parliament's decision capacity is rejected, and the alteration of the integration of the interests pertaining to the social states.

This question will be the touchstone of the European Union's next evolution. It is a specific reflection of the conception which inspires the economic regulation, because one thing is not to permit budgetary imbalances which correspond to party or client criteria and another to establish a rigidity lacking foundation. See *M. Degni*, "Il bilancio dell'Europa", in Democrazia e Diritto, 2003, n. 2, p. 166 et seqq.; *H.J. Hahn*, "The stability pact for European monetary union: compliance with deficit limit as a constant legal duty", in Common Market Law Review, 1998, n. 35, p. 77 et seqq.; *M.J. Herdegen*, "Price stability and budgetary restraints in the economic and monetary union: the law as guardian of economic wisdom", in Common Market Law Review, 1998, n. 35,

Palpable, once again, in the background is the tension between the public and the private, between market and government intervention and, once the rule is accepted, the policy is excluded and trust is placed in the regeneration of the market. With this in mind, it is hoped to avoid public responsibility in the promotion and rationalisation of economic development. However, the need for political impetus is ever more evident.[61]

The Constitutional Treaty - as already Art. 104.14 EC-Treaty - itself includes the provision for a European law from the Council of Ministers which would replace the aforementioned Protocol, and which would be unanimously adopted after prior consultation with the European Parliament and the European Central Bank (Art. III-184.13 TEC).

In short, it is a complex and controversial regulation which will continue to provoke disagreement.

IX. Conclusions

A constant feature of the modifications of the Treaties has been to acknowledge progress in integration while recognising the shortcomings. This contradictory balance means leaving the problems to the future, and hoping that reflection and reality will create the conditions for new modifications.[62] Moreover, the peculiarities of the final text raise questions concerning the future and very nature of the Constitution.[63]

This paper has tried to draw attention to the scarce provision of normative measures to carry out the tasks which correspond to a political union and which will be even more necessary with the enlargement of the Community. The qualitative leap, which creation of the European constitutional organization should have brought about, would have to be accompanied by an increase in powers which goes beyond the mere reiteration of previously incorporated formulas, at least in the economic field.

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p. 9 et seqq.; *J.-V. Louis*, "A legal and institutional approach for building a monetary union", in Common Market Law Review, 198, n. 35, p. 33 et seqq.

61 Thus, the Commission has drafted a document which translates the effort to improve about "Strenghtening the co-ordination of budgetary policies" (COM [2002] 668) in which it proposes the connection between budgetary objectives and economic cycle, to guarantee that public finances contribute to the objectives of the Lisbon strategy, to avoid pro-cyclical budgetary policies in favourable situations, transit flexibility with countries with structural deficit via annual adjustments, and the desire to achieve sustainability of the public finances in the future in order to attain budgetary surpluses.

62 *J.-V. Louis*, "L'échec de la conférence intergouvernamentale et les avatars du pacte de stabilité et de croissance", in Cahiers de droit euroeen, 2003, n. 5-6, p. 543 et seqq.

63 The lucid reflection of *A. Cantaro*, "Europa sovrana. La costituzione dell'Unione tra guerra e diritti", Bari: Dedalo, 2003, which considers the European Constitution as a Constitution without a nation, a people or a State and advocates the elimination of these shortcomings as the title of his book firmly reflects.

The drafting of a Constitution is more than a mere distribution of powers. To concentrate simply on institutional problems is somewhat disappointing. The relative clarification of relations between the Union and Member States, and between citizens and Community powers is worthy of little praise.

We must reiterate our point of view that progress is incomplete. The chronic tensions between the Union and the States, between Community institutions, between economic Europe and the survival of the social model, between the legal construction and democratic legitimacy, are to a great extent still unresolved because the transition is still incomplete.

This thesis is verified if we look merely at economic regulation. The heritage of the past, based on market hegemony and the subordination of the social model in the Community area, is accepted. The European Union remains partially disqualified both from the internal point of view, from ordering the process of reproduction, as well as the external point of view, from playing a strong role in the process of globalisation.

European integration was carried out without reneging ideologically on a tradition of social and economic rationalisation consolidated over decades in the social state. The European social model reconciled economic requirements and social needs. Preservation of the social advances was carried out thanks to the division of labour which entrusted social matters to the States and reserved market management to the European Community, based on competition and free trade. However, as integration progressed, the implantation of neo-liberal ideals in the social field has grown together with its resulting subordination. The rationalisation produced in the social state due to public direction of the economy has retreated in the face of the primacy of the Community monetary policy based on price stability and State finances. The social link has been replaced by the economic link. If the drafting of the Constitution was the ideal moment for constructing a rational political model based on social and economic democracy as a counterbalance to globalisation based on market spontaneity, then this occasion has been largely wasted.

Another disturbing factor can be added to all this. If, until now, internal heterogeneity has hindered the adoption of common measures, with the enlargement of the Union, this internal inequality will increase considerably. How then to govern a Union with such distinct social and economic parameters? Given the difficulty of harmonisation, competition and openness will tend to be guaranteed with the ensuing social cost for the new members.

A first evaluation of the European Constitution

Andrew Duff, MEP

The draft Constitution for Europe enhances the capacity of the European Union to act effectively at home and abroad. It rationalises the legal and policy instruments used by the EU and streamlines decision making. It codifies and entrenches what is valuable in the existing EU treaties, reflecting the latest case law of the European Court of Justice.

The Constitutional Treaty lays down clearly the political objectives of the Union and the values and principles which inform them. It sets out in fairly simple terms the competences of the Union and the powers of the institutions. It strengthens parliamentary democracy and the rule of law.

Once ratified, the Constitution will bring the Union greater stability and legitimacy than it has had before. A stronger and more democratic European Union that stands on its own two feet in world affairs is in everybody's interest.

However, the Constitution establishes that any member state that wants to leave the Union may do so in a negotiated way. This may be useful for the UK if the referendum is lost. The Council will act by qualified majority voting (QMV) and Parliament will be required to give its consent (I-60[1]).

The European Convention which drafted the Constitutional Treaty transformed the constitutional development of Europe.[2] Transparent and pluralistic, it reached a fresh and large consensus about how the enlarging Union should be run. The process of the Convention was very much more successful than that of the Intergovernmental Conference (IGC). The Treaty establishing the Constitution for Europe, which was signed in Rome on 29 October 2004, is largely the work of the European Convention.[3]

I. Main features of the Constitution

The Constitution greatly reinforces both the legislative and budgetary roles of the European Parliament. Furthermore it strengthens the rights of the Parliament concerning the appointment of the Commission. The European Parliament will be able to accept or reject the candidate the European Council puts forward (by QMV) for President of the Commission. Heads of government will have to take into account the result of the European elections and hold 'appropriate consul-

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1 Articles which are not designed are referred to the Treaty establishing a Constitution for Europe.

2 It is worth recalling that in the aftermath of the Treaty of Nice the UK government rigorously contested the need for a constitutional Convention.

3 CIG 86/04 and Addenda I and II of 25 June 2004.

tations' with the Parliament before making their nomination (I-27). The Treaty reforms the Council of Ministers by making it pass laws in public and by prescribing majority voting in place of unanimity over a much wider area. Despite understandable nervousness on the part of some governments, the IGC has accepted that insistence on Council unanimity in a Union of twenty-five and more member states will threaten paralysis.

1. Extension of the normal legislature procedure

The Constitution enlarges the number of matters subject to the normal legislative procedure - that is, co-decision between the European Parliament and the Council of Ministers, acting by qualified majority, on a proposal from the Commission (as laid down in Article III-396). There are few exceptions to this norm, although in some special cases use of the legislative procedure is subject to an emergency brake where a member state government might find itself critically embarrassed.

Widening the scope of QMV plus co-decision is a sign of genuine commitment to reaching common solutions to shared problems in a democratic way.

a) Single market, tax and social security

The single market would never have been created without QMV. Now, to consolidate it, the Constitution installs the same procedures for energy policy (III-256.2), and parts of commercial policy (III-315.2,3 and 4.1). The Parliament is also given the power of consent over any international agreement that has as its base policy areas covered by the legislative procedure (III-315.3.1, 325). The Convention applied the legislative procedure to the multiannual framework programmes in research and technological development (III-251, 252). Despite being challenged at the IGC, this reform found its way into the final text.

The EU has no competence in the field of income tax or national insurance. The harmonisation of policy in the field of indirect taxation remains governed essentially by unanimity. However, the Convention proposed that, with respect to company taxation, turnover taxes and excise duties, and only if necessary for the functioning of the internal market and to avoid distortion of competition, the Council could decide by unanimity to take measures relating to administrative cooperation or to combat tax fraud or evasion according to the normal legislative procedure (III-62.2 and III-63 of the Convention draft). The UK contested these proposals stubbornly - and successfully - at the IGC. The provisions were suppressed.

Even in the area of eco-taxation, the Convention proposed that decisions should be taken by unanimity in the Council (III-234(2)). Any change to this decision-making procedure has to be taken by unanimity.

The Constitution also introduces the legislative procedure for the provision of social security for mobile workers (III-136). It does not provide for harmonisation of social security systems. Nevertheless, the UK contested this - successfully - at the IGC by demanding an emergency brake clause whereby any member state may claim that its social security system will be fundamentally affected by the draft

measure and thereby suspend unilaterally the legislative procedure. In such circumstances, the European Council will have four months in which to refer the matter back to the Council of Ministers or to ask the Commission to submit a new draft (III-136.2).

b) Justice and Home Affairs

The Constitution provides for reinforced integration in the field of justice and home affairs. The normal legislative procedure is extended to frontier controls (III-265), asylum (III-266), immigration (III-267), judicial cooperation in criminal matters (III-270), minimum rules for the definition of and penalties in areas of serious crime (III-271), incentive measures for crime prevention (III-272), Eurojust (III-273), police cooperation (III-275.2), Europol (III-276), and civil protection (III-284). Unanimity in the Council is retained for the establishment of the European Public Prosecutor (III-274.1) and operational policing (III-275.3).

At the IGC the UK challenged such a wide extension of QMV in this area, suggesting a prevalent threat to the English common law system. It wanted, and got, an emergency brake whereby the normal co-decision procedure will be terminated on the appeal of any one member state that considers that 'fundamental aspects' of its criminal justice system would be affected (III-270.3). The European Council will then have four months in which to refer the matter back to the Council of Ministers or to ask the authors of the proposal (either the Commission or a group of member states) to submit a new draft.

However, the IGC modified this emergency brake by coupling it with an accelerator towards enhanced cooperation (III-270.4). If the European Council or the Council makes no progress towards the adoption of the framework law within one year, the requisite number of member states will receive automatic authorisation to form a core group.

Exactly the same procedures were applied, for the same reasons, to framework laws establishing minimum rules defining criminal offences and penalties for serious, cross-border crime (Article III-271).

The Convention draft permits the Council, acting unanimously, to establish the Public Prosecutor to act in areas of serious cross border crimes as well as the protection of the financial interests of the Union (III-274). The Italian presidency proposed to limit the Prosecutor to the EU's financial interest, but installed a *passerelle* to widen his scope in future (by unanimous decision of the European Council and consent of the Parliament). However, this *passerelle* was linked to national ratification by all member states, thereby rather negating its purpose. The Irish presidency negotiated successfully at the IGC to remove the unfortunate and unnecessary stipulation about national ratification.

c) Other matters

The Convention made provisions for the normal legislative procedure in the fields of cultural policy (III-280), education, youth and sport (III-282), and vocational training policies (III-283) - although in all such cases the harmonisation of na-

tional laws is excluded. The same exclusion applies to laws concerning cooperation in public administration (III-285).

2. Subsidiarity

The principle of subsidiarity means that the Union should act, in areas that do not fall within its exclusive competence, only when the objectives of the intended action cannot be sufficiently achieved nationally, regionally or locally. National parliaments, which are in any case represented by their own government's ministers in the Council, gain the right to challenge any draft law on the grounds of subsidiarity. The new Protocol on National Parliaments (Article 4) and the Protocol on the application of subsidiarity (Article 6) lay down the procedure whereby one third of national parliaments have six weeks to produce a reasoned opinion which will cause the Commission to reconsider any draft law.[4]

National parliaments also gain the right to have recourse to the Court of Justice in defence of their prerogatives.

3. Good governance

The Convention wrote into the Constitution a number of articles spelling out the nature of the Union's representative and participatory democracy, as well as codes of transparency and good governance. The importance of consultation with the social partners and non-governmental organisations is affirmed. The role of the Ombudsman is recognised. One million citizens are entitled to petition the Commission to initiate legislation (I-Title VI).

4. Rationalisation

The Constitution has reduced and rationalised the number of instruments at the disposal of the Union (I-33). Acts of a legislative nature are European laws or framework law. Acts of an executive nature are European regulations, decisions and recommendations. Acts passed under the legislative procedure are the norm. There are, however, some abnormal acts - mainly Council laws - where the Parliament still plays a subsidiary role.

Progress has been made towards making a greater distinction between the legislative and executive powers of the Union, although most of the Convention wanted an even clearer separation. The Council retains an autonomous law-

[4] At first, the UK government attempted to install a third legislative chamber composed of national and European parliamentarians that would assess each law on the basis of subsidiarity. Despite a rebuff in the Convention, the UK persisted in its efforts to convert the 'yellow card' into a 'red card' system, whereby one third of national parliaments could 'veto' any Commission proposal on the grounds of subsidiarity. Fortunately, wiser judgments prevailed.

making power in some limited, but sensitive areas, as well as a certain autonomous executive discretion, for example, over prices in the field of Common Agricultural Policy.

The Constitution establishes a new form of secondary legislation - the delegated European regulation (I-36). This enables the legislature (Parliament and Council) to delegate to the Commission elements of legislation that are not essential, whilst enabling either branch of the legislature to scrutinise the work of the Commission and, if necessary, to call back delegated law. This means that MEPs and ministers should be able to concentrate on the essential political choices behind law making, delegating more technical aspects to the Commission. The objectives, content, scope and duration of the delegation of power, however, have to be explicitly defined in European laws and framework laws (I-36.1.2)

'Comitology' - the mechanism for managing the implementation by member states of EU law - will be set out in a law, jointly agreed by the Council and Parliament (I-37.2-4).

5. Rule of law

Much to the chagrin of the British government, the Constitution unambiguously affirms the primacy of EU law (I-6). The European Court of Justice will have enhanced supervision over all aspects of justice and home affairs, and over common foreign and security policy with respect to sanctions (III-365.1). Individuals will now be able to seek redress in the Court against certain regulations of direct adverse concern (III-365.4). The Commission has stronger powers, via the Court, to enforce compliance. And the Court gains competence over the former third pillar, of justice and home affairs.

Member states agree to be loyal to the Union (I-5.2) on which, in order to attain specified common objectives, they have conferred certain competences (I-1.1, I-11.1,2).

6. Competences

The competences allocated to the Union have been much more clearly defined than in the present Treaties into three categories of exclusive, shared, and supporting, coordinating or complementary measures (I-Title III).

The Convention draft spelt out clearly the Union's acquired role in coordinating the economic and employment policies of member states (I-15). The IGC, under UK pressure, came to a more mealy-mouthed formulation. The Constitution lays down the Union's competence to define and implement a common foreign, security and defence policy (I-16). It also lays down the mutual obligation on the EU institutions and on member states to respect each other's respective competences, domestic constitutions and national identities (I-5.1), as well as to conserve regional, cultural and linguistic diversity (I-3.3).

A flexibility instrument (I-18) enables the Council of Ministers, acting unanimously and with the consent of the Parliament, to 'take appropriate measures' to attain one of the objectives set by the Constitution. This provision replaces existing Article 308 EC-Treaty, which only requires the consultation of Parliament.

II. Financial system and budgetary process

There are three elements to the EU's financial system and budgetary process. First, a ceiling is put on the total amount of revenue the Union needs to raise (currently 1.27 per cent of GNI); second, a medium-term strategy puts in place the financial perspectives for the main categories of expenditure (1.12 per cent of GNI in 2004, falling to 1.09 per cent in 2006); and, third, the annual budget is agreed (in 2004, € 111 billion, 0.98 per cent of GNI).

1. Own resources

Under the Constitution, the ceiling of own resources and the categories of revenue source remains decided by member states acting unanimously, after consultation with the European Parliament. The agreement then has to be ratified in all member states according to their own constitutional requirements (usually, by a vote of the national parliament). The Convention proposed that the modalities of the own resources decision would be enacted by QMV and with the consent of the Parliament. In defence of its rebate, the UK successfully contested that QMV element at the IGC.[5] The IGC establishes that the essential political choices over the own resources system (including the UK rebate) should be made by unanimity, with the Parliament consulted, but that a law of the Council, enacted by QMV and with the consent of the Parliament, should introduce the implementing measures (I-54.3 and 4).

2. Financial perspectives

The Convention suggested that the multi-annual financial framework (I-55) should be agreed by QMV in the Council and with the consent of the European Parliament, although QMV would not apply until the second round of negotiations following the entry into force of the Constitution. In its quest for a general corrective mechanism, however, the Netherlands successfully contested that QMV element at the IGC. The Constitution (I-55.2 and 4) retains unanimity for the financial perspectives, but permits the European Council, acting unanimously, to switch to QMV at a future date (once the Dutch have been satisfied).

[5] Article I-53.4 has been modified to link adoption of new categories of own resources to the implementing measures foreseen in this paragraph, thereby preventing the adoption within the implementing decisions of measures likely to affect the rebate.

3. Budget

As far as the budget is concerned, an important but arcane distinction between 'compulsory' and 'non-compulsory' expenditure has been removed and the Parliament will have full co-decision powers over the whole annual budget, including the Common Agricultural Policy (III-404.4). The Convention proposed that the Parliament should continue to have the last word on the budget. Faced with the hostility of certain finance ministers to the Convention's budgetary proposals, the Italian presidency tabled a compromise which would deprive the Parliament of the effective last word on the budget but would leave nevertheless the co-decisional nature of the system intact. This was further modified at the IGC under the Irish presidency, on the basis of a proposal from France, but Parliament's prerogatives are successfully preserved (III-404.7).

4. Stability Pact

Associated with these institutional matters is the sensitive issue of how to deal with the Stability and Growth Pact which is losing credibility as a result of its infringement by some large member states. The IGC did not accept an Italian presidency proposal to enable the Court of Justice to review infringements of the excessive deficit procedure (III-184.12). However, at Dutch insistence, the IGC adopted a Declaration reaffirming its commitment to the Stability and Growth Pact. Meanwhile, the justiciability of the Maastricht criteria on convergence is underminded by the decision of the Heads of State or Government of the member states on 22nd of March 2005 to reform this Pact. Although the Maastricht criteria formally have not been modified, the Pact has been further weakened by the fact that each member state can state its case for the "temporary" excess of government deficits.

The Constitution reinforced the autonomy of the eurozone. For example, the Council decision to allow a new currency to join the euro must be preceded by a positive recommendation from a qualified majority of current eurozone members (III-198.2). The eurozone will represent itself singly in international monetary system (new Articles III-194, 195 and 196).

III. The Charter of Fundamental Rights

Part Two of the Constitution contains the Charter of Fundamental Rights which was drawn up by the previous Convention in 1999-2000. The Charter is a modern catalogue of the classical fundamental rights as well as the principles which have guided the development of EU law and policy over the years. Its purpose is to protect the citizen from any abuse by the EU of the power it exercises.

The Constitution makes the Charter binding on EU institutions and agencies and justiciable in the Courts. Respect for the provisions of the Charter will be

mandatory for member state governments, regional and local authorities when and in so far as they implement EU law and policy.

The European Court of Justice in Luxembourg will develop jurisprudence in the field of fundamental rights, under the external supervision of the European Court of Human Rights in Strasbourg.

The UK government has fought a rearguard action to dilute the legal force of the Charter. The horizontal clauses (II-111, 112) were adjusted by the Convention to make clearer the difference between classic rights (for a breach of which the courts have to seek direct remedies) and fundamental principles (which inform the formulation, enactment and implementation of EU law). The IGC added a clause to say that the courts should give "due regard" to the explanatory memorandum drawn up by the Praesidium of the Charter Convention (II-112.7) – although these explanations are not in themselves justiciable.

The Charter does not give the EU carte blanche to dismantle Thatcherite trade union legislation in the UK. Its field of application is restricted to the competences of the Union (II-111.2); and its judicial scope is limited to laws and executive acts of the EU and by acts of member states when implementing EU law (II-112.5). The right to strike is recognised "in accordance with Union law and national laws and practices" (II-88). The Union is competent only to "support and complement the activities" in the field of industrial relations (III-210.1); and EU legislation in this area has to be adopted by unanimity in the Council (III-210.3).

IV. Common foreign, security and defence policy

The Constitution makes progress towards making a reality of the Union's common foreign policy. It creates a Union Minister for Foreign Affairs, who will chair the Foreign Affairs Council as well as being a Vice-President of the Commission, with powers to initiate policy (I-28). The European Council will decide on the general strategy and mandate the Minister (I-40.2 and 4). The Minister will run a new joint administration which will draw on the services of the Commission, the Council and national governments ("European External Action Service" – III-296.3). The use of QMV in the Council is introduced particularly ("following a specific request" – III-300.2 lit b) for proposals of the Foreign Minister that implement consensual decisions of the European Council. Even then, any member state, for "vital and stated reasons of national policy", may press the emergency brake and veto a decision. The Italian presidency proposed an extension of QMV to simple proposals of the Foreign Minister, but this did not survive the IGC.

The Convention has established the framework for the effective development of a real defence arm to the Union's foreign and security policy (I-41). The Constitution establishes a European Defence Agency in order to rationalise and coordinate arms procurement policies (III-311). It also provides for a coalition of the military capable and politically willing to form an integrated military hard core whose forces are to be made available to the Union (III-310 and 312). Decisions imple-

menting common defence policy, and to set up permanent structured cooperation (military core group) will be taken by QMV.

The Constitution includes a solidarity clause which anticipates that member states will respond jointly in the event of a terrorist attack or natural disaster (I-43), as well as a provision for collective mutual defence, in close cooperation with NATO (I-41.7 and 41.2).

The Constitution accords to the Union a formal legal personality in international law (I-7). The same right has been enjoyed by the European Community for many years in commercial and economic matters (Article 281 EC-Treaty): its extension will allow the EU to act as one in international negotiations in all fields, including security, and should be a spur to greater effectiveness in the UN.

V. Reform of the Councils

The Constitution makes changes to the organisation of the European Council of Heads of State or government and of the Council of Ministers – although not as significant as the Convention had proposed. Early on in the IGC the Convention's proposal for a separate General Affairs and Legislative Council was annulled. The current system of rotating six monthly presidencies, each with their own cumbersome programmes, is to disappear. A more permanent chair of the European Council will be appointed for a period of at least two and a half years (I-22.1). He and the President of the Commission will have to learn to cohabit.

As for the ordinary Council, the IGC accepted an Italian presidency proposal that there should be team presidencies of three member states for eighteen months for the ordinary Councils (apart from the Foreign Affairs Council, which will be chaired by the Foreign Minister). The IGC went on to accept an Irish presidency proposal that the three should rotate their chairs every six months.[6] The idea that there should be more rapid rotation of chairs got nowhere.

A more formal multi-annual political programme will be established by the European Council on a proposal of the Commission, having consulted the European Parliament, with which the Commission's annual legislative programme will have to conform (I-26.1.7).

Whether or not the new system will work depends on:

1. the equanimity of heads of government when they see the new President of the European Council speaking on their behalf in Washington, Beijing and Moscow;
2. the degree to which the President of the European Council exercises self-restraint in respect of the functions of the Commission President, the Foreign Minister, and the Council of Ministers presidency;
3. the capacity of three different governments to act as one Council presidency for the duration of 18 months.

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[6] Article 1 of the draft decision of the European Council on the exercise of the presidency.

In the long run, one can anticipate an extension of the practice whereby the responsible Commissioner chairs meetings of the Council in its executive formation, and that, correspondingly, legislative meetings of the Council become both separate and more open.

VI. Enhanced cooperation

The Constitution improves the provisions whereby a group of member states may determine, as a last resort, to integrate more closely than the whole Union in a given policy sector. Authorisation of enhanced cooperation shall be taken by the Council acting by QMV, with the consent of the Parliament (I-44.2, III-419.1). At the IGC the UK successfully opposed the use of QMV to trigger enhanced cooperation in foreign and security policy (III-419.2).

The British government was unsuccessful, however, in opposing use of the *passerelle* provision to a widening of QMV within the core group (III-422). This means, in effect, that in areas other than the Common Foreign and Security policy the core group will be able to integrate as far and as fast as it wishes. Whereas UK ministers may crow that they have won historic battles in order to prevent QMV, the fact is that they have propelled the Union forward to core group integration from which the UK is excluded.

Liberal Democrats do not believe that the further marginalisation of the UK is in the British national interest. We regret that the UK will shortly discover that the achievement of many of its notorious 'red lines' was something of a Pyrrhic victory. We anticipate that enhanced cooperation will soon be deployed in the policy sectors neatly defined by the UK government's performance in the Convention and the IGC - namely, indirect taxation, company taxation, social security for migrant workers, judicial cooperation in criminal matters, definition of criminal offences and sanctions, and, eventually, the European Public Prosecutor.

VII. Future revision

The European Parliament gains the power to propose future revisions to the Constitution, alongside the Commission and member state governments (IV-443.1). Parliament will also have to give its consent to a European Council decision not to summon a Convention to propose future constitutional amendment (IV-443.2). But all constitutional revision within the ordinary procedure will have to be agreed unanimously and ratified in all member states (IV-443.3).

To provide for more gradual constitutional evolution, the Convention proposed to enable the European Council, acting unanimously, to convert abnormal decision-making procedures (mainly, where the Council decides by unanimity) to the normal legislative procedure (IV-444.1 and 2). National parliaments would be properly consulted about such changes (IV-444.3). At the IGC the UK contested

this bridging clause, known as the *passerelle*. To accommodate the British, the Italian presidency put forward an amendment to allow any one national parliament to block use of the *passerelle* notwithstanding the unanimous decision of the European Council. Unfortunately, this remains (IV-444.3.2).

VIII. The patriotic questions

Three inter-related problems upset the equanimity of the IGC. They concern the balance of power between larger and smaller member states both within and between the three political institutions.

1. Formula for qualified majority voting

The Convention (Article I-24.1 of the Convention draft) proposed that the formula for QMV in the Council should be half of member states representing 60 per cent of the population of the Union. Following heavy quarrelling from Spain and Poland, which both lose out in the pecking order compared to their over-weighty position under the Treaty of Nice, the Irish presidency came up with a new equation of 55/65, but with the blocking minority having to be made up of at least four member states (I-25.1). In addition, in EU-25 the majority will have to comprise 15 member states (which is, in effect, 60/65).

As a further sweetener to the Poles, and as a transitional measure, member states representing at least three-quarters of the level of population, or at least three-quarters of the number of member states may insist on further discussions in order to delay the adoption of a measure by QMV. This version of the notorious Ioannina Compromise takes the form of a Council Decision.

At the IGC there was much talk of a rendezvous clause that would permit a postponement of the switchover to the new system. However, it is now decided that the new system will apply from 1 November 2009.[7]

2. Commission

The Convention proposed that, as from 1 November 2009, the European Commission should be made up of 15 members of the college plus non-voting juniors from all other member states, all selected according to the principle of equal rotation (Article I-25.3 of the Convention draft). This is deemed generally to have been an unsatisfactory proposal, not least by the Commission itself. The Irish presidency came up with a superior solution, which is that, as from 1 November 2014, the Commission shall consist of a number of members corresponding to

[7] Cf. draft decision relating to the implementation of Article I-24.

two-thirds of the number of member states, unless the European Council, acting unanimously decides to alter this number (I-26.6).

The possibility of not referring in the Constitution to any specific number of Commissioners was mooted at the IGC. Other options had included the suppression of the principle of rotation and the inclusion of a rendezvous clause for a decision that would have permitted a delay to the switchover from the present system (one full member of the college of each nationality) to the smaller Commission.

3. European Parliament

The European Council has established the future size and shape of the European Parliament. The IGC was always going to adjust the number of seats per member state as compensation for a perceived loss of Council or Commission privileges. Unfortunately, the chance was missed by the IGC (and by the Parliament) to agree a logarithmic formula that would have settled the matter in a neutral way for all time. From 2009 there are to be 750 MEPs ranging between 6 and 96 per member state (I-20.2).

IX. Entry into force

The Constitution can only enter into force once it has been ratified by all 25 member states according to their own constitutional requirements (Article 48 TEU and IV-447 TEC). A parliamentary revolt, a judicial challenge or failed referendums – as has been the case in France and in the Netherlands – will delay and possibly scupper the whole Constitution.

In the event of a narrow defeat at a referendum, precedent suggests that a second vote would be held in order to get the right answer. Persistent failure of only one member state to ratify the Constitution would lead to its withdrawal from the Union and the negotiation of a looser form of association (such as the EEA agreement) (I-60). Persistent failure by multiple member states to ratify will leave the Union in deep and possibly terminal crisis.

In order to minimise the likelihood of such a crisis, it would have been prudent for the IGC to revisit the question of how to give effect to the Constitution. Instead, it did not.

Some critical remarks on the Treaty establishing a Constitution for Europe

Peter J. Tettinger

Critical comments on the opulent work of the draft Treaty establishing a Constitution for Europe have been voiced not only by politicians and journalists,[1] but also by legal practitioners, including a judge at the German Constitutional Court.[2] The following ten hypotheses are intended to highlight the central aspects affecting Germany and in particular also the German *Länder*.

1. Notwithstanding the necessary on-going and future debates on the significance and the principles of the legitimacy of a Treaty establishing a European Constitution, despite the fact that it is far too long at 240 pages with two preambles and a total of 448 articles in four parts, of which the first is the most important, plus supplementary protocols, and its lavishly technocratic and not exactly subsidiarity-oriented emphasis, the revised version of the draft Treaty which *Valéry Giscard d'Estaing*, the President of the European Convention, submitted to the European Council on 18 July 2003 in Rome[3] and which was signed there on 29 October 2004[4] after the end of the IGC, should overall be given a positive reception. The current version is an extremely imposing and pragmatic document addressing current requirements serving to consolidate the current integration status by means of the establishment of specific structural reorganisations and options, prospects for the future, and also lines of demarcation, although these are unfortunately too weakly drawn.

2. Following the precedent of the Convention at the Cologne summit in June 1999 convened under the chairmanship of *Roman Herzog*, which attempted to make fundamental freedoms more evident in the form of a charter, this is the second time that a Convention of this kind has succeeded in completing the task assigned to it in a transparent process under the direction of a president in which the aim was to obtain a consensus without voting on the details. It was, and remains, a matter of preparing for the reorganisation of European Treaty law, which for its part is the responsibility of other bodies, namely an intergovernmental conference of the representatives of the Member States as "the Masters of the Treaties". Once again, this was a unique, unaffiliated committee with no fixed terms of reference endeavouring to produce a creative and conceptual text that was dependent upon

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1 See *G. P. Hefty*, Europäische Identitätsarmut, in: FAZ, Nr. 137 , 16/06/2003, p. 1.

2 *S. Broß*, Da hilft Euphorie nichts, in: FAZ, Nr. 181, 07/08/2003, p 4; *A. v. Bogdandy*, in: FAZ, Nr. 98, 27/04/2004, p. 8.

3 CONV 850/03, 18/07/2003.

4 CIG 87/2/04 REV2.

achieving a consensus and therefore disposed to seek compromise, a dually differentiated "Collegium Majus Europaeum" working cooperatively on various levels with direct democratic legitimacy. Its institutionalisation for procedures for amending the Treaty establishing the Constitution in Article IV-443 (2) was only logical. Whether it was really appropriate to accord special regard to the explanations drawn up by the Chair of a Convention of this kind as provided for in the supplement to the original text of the preamble to the Charter of Fundamental Rights and now affirmed by inclusion in Article II-112 (7) TEC[5] appears extremely dubious when subjected to imperative objective interpretation[6] and this is anyway contradicted by the express reference to the European Convention for the Protection of Human Rights (ECHR) and the constitutional traditions common to the Member States in Article I-9 (3) TEC for the purposes of maintaining a certain fundamental dynamism.

3. The European Council in Laeken[7] called on the European Convention, firstly, to make Europe more transparent to the citizens and, secondly, to make the organisational structure in a greatly enlarged Union workable and efficient and finally to develop Europe into a stabilising factor in a global context. It is no surprise that it was not so much transparency as the safeguarding of the workability of the institutions of the Union and the efficiency of the organisational structure that was identified as the central term of reference for those responsible for European policy-making, particularly as it is not only in the transition to majority decision-making in the European Council and Council of Ministers provided for in article I-25 TEC that the willingness to forgo manifests itself very differently in the individual Member States. This is precisely the point where the interests of the so-called large and small Member States diverge. Moreover, rules relating to rotation in the Commission and to the European President and Minister for Foreign Affairs are evidence of a minimum insight into the necessity of finding certain practicable organisational models for representing the Union to the outside world and for the avoidance of insufficient or overlapping competences for the Commission and for the President of the Commission.

On the other hand, despite the cautious mention of the role of political parties at European level and the inclusion of the right of the citizens' initiative, the frequently flowery statements in Title VI on the democratic life of the Union are rather bland and technocratic and contribute little to the spirit of integration. Despite the creation of a so-called participatory democracy (Art. I-47 TEC) – while still leaving the elements and rules of play vague – this still cannot really be described as closeness to the citizens. Apart from voicing opinions to fend off proposed legislation considered to be incompatible with the principle of subsidiarity, even national parliaments are denied any direct influence on the European decision-making process.

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5 *Th. Oppermann*, DVBl. 2003, 1234 (1242): only a declaratory notice.

6 See *R. Streinz*, EUV/EGV, 2003, preliminary note to the European Charter of Fundamental Rights, commentary, para. 17.

7 EuGRZ 2002, 662 et seqq.

4. The attractiveness of the European Union – and we should have no illusions about this – is still justified in the first instance by concept of the internal market based on the principle of an *open market economy with free competition* (see Art. 4 (1) EC-Treaty). It is extremely dubious that the introduction of the special emphasis on the idea of the "social market economy" and the choice of the expression "full employment" instead of a "high level of employment" in the statement of objectives in Article I-3 (3) TEC – following the last revision of the Convention "sustainable and non-inflationary growth" has become "balanced" economic growth – can provide regulatory helpful economic guidelines or will be able to increase enthusiasm for pan-European economic programmes and regulations in a spirit of national planning euphoria and a desire for intervention.[8] After all, despite the fact that its wording has now been changed, Article I-15 (1) TEC now permits measures for the coordination of the economic policies of the Member States in a more pointed way than, for example, Article 99 (2) EC-Treaty, in particular – dreadful phrase – by the establishment of "broad guidelines for these policies": is a planned economy on the horizon? The concentration of the basic idea in paragraphs 2 and 3 for the coordination of the employment policies (with the development of so-called guidelines) and the social policies of the Member States could serve to reinforce such fears. This so-called coordination with the different approaches as laid down in Articles I-15 and I-17 TEC must not encourage a sort of "Jeux sans Frontières". A term as vague as this urgently needs to be defined more precisely in order to prevent the creation of an effective competence-circumventing tool to the detriment of the Member States. Neither must the ambiguous concept of the so-called open method of coordination be implemented through the back door.

5. It was notable that the questions associated with monetary union attracted little or no attention. The impression given was that the thin ice on which we are at present skating in several countries inside and outside the Euro Zone, could not take any more weight. While the European Central Bank and the Court of Auditors were described as institutions in the Praesidium's original draft text,[9] they are now no longer included in the overview of the institutional framework in Article I-19 (1) TEC[10] and are instead only to be found in Chapter II ("The Other Union Institutions and Advisory Bodies") in Article I-30 (ECB) and I-31 (Court of Auditors) TEC, in the company of the Union's advisory bodies (Art. I-32 TEC), the Committee of the Regions and the Economic and Social Committee. Is this really the most appropriate place in the Treaty? Does not this approach reveal the attitude towards the value of these institutions within an organisational framework? As before, the text submitted identifies the primary objective of the European System of Central Banks as the maintenance of price stability (see Art. I-30 (2),

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[8] Critically *P. M. Mombaur*, Soziale Marktwirtschaft in Europa: Systemwandel per Etikettenschwindel, in: Orientierungen zur Wirtschafts- and Gesellschaftspolitik 95 (1/2003), p. 51 et seqq.

[9] CONV 724/03, 24/05/2003; Art. I-18(2) TEC.

[10] CONV 820/2/03 REV 2; 30/06/2003.

sentence 2 TEC).[11] However, it then continues: "Without prejudice to that objective, it shall support general economic policies in the Union in order to contribute to the achievement of the latter's objectives." However, at present, Article 105 (1) second sentence of the EC-Treaty and Article III-185 (1), second sentence of TEC, state more clearly: "As far as is possible without prejudicing this objective [of maintaining price stability] ...". A warning reference to the risk to the stability of the European currency would have been appropriate, particularly as the original concept of the stability pact – and this is not even mentioned in the Treaty – is evidently currently being tacitly judiciously watered down and – with significant negative impacts for the overall image of the Union – is being turned into nothing more than a paper tiger.[12] Simple stability-jeopardising concoctions with the category of constitutional lyricism would have devastating consequences here. In this regard, the changes proposed by the ECB[13], which evidently were partially taken into account, won full approval. German government institutions should from time to time remember the relevant barrier to this in sentence 2 of Article 88 of the German Constitution.

6. The safeguarding of a clear allocation of competences taking into account the principle of subsidiarity was the request of German representatives in the Convention. Here, to some extent at any rate a graduation of types of competence (exclusive/shared competence but also support, coordination and supplementary) has apparently succeeded in achieving some kind of regulative structure (Articles I-12 et seqq.) although the areas of shared competence listed in Article I-14 (2) TEC on a pan-European level is so broad that the Member States' scope for formative action is still endangered; we only need to look at the area described as "principal areas" described in vague terms such as "economic, social and territorial cohesions", "environment", "consumer protection", "energy", "area of freedom, security and justice" and "common safety concerns in public health matters". There are also grounds for similar fears in relation in particular to formulations in Part III that are actually only intended to provide a more detailed framework (however, see for example Article III-122 TEC, which seemed to appear suddenly out of nowhere and has been recently modified, concerning the principles and evaluation of services of general economic interest[14]) and also in relation to the flexibility clause in Article I-18 TEC.

As far as the regional and local level is concerned, we can identify a significant addition in Article I-5 (1) TEC. As before, the Union is to respect the national identity of its Member States, a precept that is, however, subsequently defined as follows: "inherent in their fundamental structures, political and constitutional,

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[11] Identically in Art. III-185(1) sentence 1 TEC.

[12] Cf. Council Regulation (EC) No 1055/05 of 27 June 2005 amending Council Regulation (EC) No 1466/97 and Council Regulation No 1056/05 of 27 June 2005 amending Council regulation (EC) No 1467/97, OJ L-174.

[13] See FAZ, Nr. 100, 29/04/2004, p. 12; Bundesbank Monthly Report November 2003, p. 67 et seqq.

[14] *Th. Oppermann*, DVBl. 2003, 1243: Kontrapunkt zu den wettbewerbsrechtlichen EU-Zuständigkeiten.

inclusive of regional and local self-government". The subsequent statement ("It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security") is then in clear contrast to the previously quoted ambitious legislation-permitting definition of the Union as an area of freedom, security and justice. This is clearly paving the way for tension in the future.

7. Although, in the light of previous case law, it is extremely dubious that the ECJ will actually prove itself qualified to defend the competences of the Member States as stated in the annexed Protocol on the Application of the Principles of Subsidiarity and Proportionality, even when treated with the utmost scepticism, its jurisdiction in the existing institutional framework is unavoidable;[15] the widespread published proposals for the establishment of an independent "competence court" might give rise to a virtually insurmountable overlapping of competences. The problem as such is anyway nothing new. Finally, the idea that the ECJ should not only act as an engine for integration, but increasingly take over the function of a constitutional court for preserving law and order in a civic society with a special interest in the overriding interests of the citizens has been a subject of debate for some time and is expressly reflected by the European Charter of Fundamental Rights anchored in Part I in Article 9 (1) TEC and reproduced in Part II, in that fundamental rights should now take precedence over the power of the Community. In addition, the rewording of the right of action in Article III-365 (4) should facilitate the reinforcement of legal protection for natural and legal persons that up to now has been blocked but is now required under the constitution.

8. One factor of central importance for the future of Europe is the *safeguarding of a homogeneous value orientation* as a common basis for the people of the European continent and as an impetus for identity formation in the sense of the reinforcement of a European "sense of unity" to increase the willingness for solidarity.[16] Insofar, the preamble to the Treaty establishing a Constitution for Europe contains much clearer statements than, for example, the preamble to the European Charter of Fundamental Rights, which was widely criticised for this reason, particularly by the Christian churches. The preamble to the Treaty quite justifiably emphasises the cultural, religious and humanistic inheritance of Europe from which have developed the values of the inviolable and inalienable rights of the human person and primacy of the rule of law in society. Even if this fails to make any express mention of God, for which for example, the preamble to the Polish version of 2nd April 1997 ("We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources ... recognising our responsibility before God or our own consciences, hereby establish this Constitution of the Republic of Poland") provides a universally acceptable wording, after a long delay, the final compromise, supple-

[15] See *U. Everling*, Quis custodiet custodes ipsos?, EuZW 2002, 357 et seqq.

[16] For a clear reference to this see *E.-W. Böckenförde*, in FAZ, Nr. 140, 20/06/2003, p. 8.

mented by the guarantee in Article I-52 TEC according to which the status of churches in the Member States is also to be respected by the Union – demonstrates at least as a minimum basis the outlines of a common European appreciation of values, which is capable on its own – if allowed to develop – of providing an acceptable basis for future steps towards integration. Old and new Europe are not mutually conflicting options, as has been suggested in faraway countries. With its declaration of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, Article I-2 TEC names the central common values to be nurtured. Complete freedom of movement for people, goods and ideas– and hence the safeguarding of economic, cultural and political flexibility, competition instead of spoon-feeding by the government– this is the most attractive aspect of the European Union.

At the same time, it would not at present appear to be helpful to discuss the geographical boundaries covered by these principles, such as, for example, whether Russia, Turkey or even Israel should be included, as *Berlusconi* frivolously suggested during his tenure as President of the Council.[17] In the here and now, the only matter of importance is to establish unequivocal organisational instructions to steer and frame the further process of integration, particularly as Article I-57 TEC already contains special statements concerning cooperation in an area of prosperity and good neighbourliness that provide evidence of the European Union's willingness to enter into beneficial cooperation projects even beyond its external borders.

9. The motto described as a conviction in the preamble and adopted as one of the symbols of the Union in Article I-8 TEC – "United in diversity" – must then be taken seriously with all its consequences. This applies, for example, to Article I-3 (3), sentence 5 TEC according to which the Union is to respect its rich cultural and linguistic diversity and ensure that Europe's cultural heritage is safeguarded and enhanced. This does not only mean full legal equality for all the official languages but also an administrative practice that feels itself obliged to maintain this heritage; any attempt to narrow this down to two or even one working language (in institutions) or relay language (for translations) in the Union would be in flagrant contradiction of a principle of this kind. An implementation of the requirement for three European languages as obligatory subjects in the higher school grades,[18] i.e. two other European languages in addition to the mother tongue, would also be beneficial in the long term in view of this situation.

The postulate of diversity should also offer the basis for administrative orders according to which Commission staff should in principle not use their own mother tongue for when expressing official opinions, but should articulate themselves in another European language.

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[17] Cf. the report of *F. Bruni* and *A. Carassava*, in: International Herald Tribune, 23/06/2003, p. 3.

[18] So the demand of *Böckenförde*, ibid.

10. To summarise the state of affairs so far: not brilliant, not a masterpiece, but nevertheless an important and vital step in the right direction borne of pragmatism, but which could have been still improved for the purposes of clarity, consistency and the consistent preservation of the leading elements of the present state of integration. However, with good cause, the Intergovernmental Conference neither questioned the basic concept of the Convention's four-part draft version of the Treaty nor jeopardised its implementation as such.

In view of the drastic impacts that it is forecast that this Treaty could have after the ratification in all Member States on the German (constitutional) legal system, we must agree with *S. Broß* when he states that a referendum on the subject is "vital" in Germany as well.[19] In any case, it is advisable that in parallel to the clear trend[20] observed in the constitutions of the German *Länder*, consideration should be paid in the future to changing the Federal Constitution in order, despite the "coalition of mistrust"[21] opposing this, to give the much maligned electorate in Germany the opportunity to vote on central socio-political questions, such those encountered with such a far-reaching step within the framework of the "view to establishing of a united Europe" referred to as a primary objective in Article 23 (1) of the German Constitution, in accordance with the basic democratic principle anchored in Article 20 (2), sentence 2 of the German Constitution.

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19 *S. Broß*, in: FAZ, ibid.

20 See for North Rhine-Westphalia the 18th amendment to the Constitution of 05/03/2002 (GVBl. p. 108) inserting an Art. 67a, amending Art. 68 and providing a new text of Art. 69; see on this the explanations of *Th. Mann*, in: *Löwer/Tettinger*, Kommentar zur Verfassung des Landes NRW, 2002.

21 On this FOCUS 19/2004, p. 50.

Expectations of the German foreign policy towards the European Constitutional Treaty*

Eckart Cuntz

I. Historical context

The European Constitutional Treaty brings to a conclusion a process which dates back at the very least to the last German Presidency in the first half of 1999. From the outset, Germany played a key role in advancing the Constitutional Treaty. It was decided at the Cologne European Council in June 1999 to draw up a European Charter of Fundamental Rights. It was also decided in Cologne to hold an Intergovernmental Conference which subsequently led to the Nice Treaty. This was intended to enable the Union to admit more members. However, as previously in Maastricht and Amsterdam, key questions were left unanswered in Nice. For example, the question of delimiting competences between the national and European levels or the question of the distribution of power among the Brussels institutions.

The Declaration on the Future of the Union, a clear expression of the dissatisfaction with the outcome in Nice, was included in the Final Act of this treaty and initiated the constitutional process.

A joint German-Italian initiative then enabled the Constitutional Convention to be launched in Nice. The next steps in this process were set forth in the Laeken European Council declaration with which the European Convention was convened. The establishment of the Convention proved successful. It resulted in a compromise with which everyone could be satisfied. It is therefore only right that the Convention format has been established as the standard procedure for future constitutional amendments.

II. The Convention outcome and the Intergovernmental Conference

The German Government believes that the Constitutional Treaty is truly balanced. It amounts to far more than the lowest common denominator. Rather, it represents a fair give-and-take which, above all, takes into consideration the interests of both

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* This contribution has been finalized by the author early in 2005 and reflects the thinking of that time. Later developments as the negative outcome of the referenda in France and the Netherlands could therefore not be taken into account.

small and large member states. This result was achieved thanks not least to the Convention's composition and working methods which were largely developed during the German Presidency in 1999 and then tried out during the elaboration of the Fundamental Rights Charter. Representatives of national parliaments, governments and the European Parliament and Commission as Community organs held public consultations involving civil society on the central issues of European integration. All Convention documents were made available on the Internet at the same time as they were distributed to Convention members. Citizens could take part in the debate via the Internet. The strong participation of parliamentarians in the Convention was particularly important: the draft constitution was drawn up in a body of which parliamentarians made up more than two thirds.

The Intergovernmental Conference which followed the Convention was fundamentally different to all previous conferences: for the first time a finished draft convention was available before the negotiations commenced and did not have to be negotiated by government representatives behind closed doors. This made it possible to overcome the lowest common denominator approach. Although the Intergovernmental Conference led to some concessions in the Convention's outcome, its substance was adopted and in some fields, for example security policy, the outcome went beyond what had been agreed before the Convention. By staunchly supporting the Convention outcome at the Intergovernmental Conference, the German Government played a key role in ensuring that most of the draft constitution was adopted.

The Constitutional Treaty brought the discussion about the institutional structure, the competences and the democratic legitimacy of the Union to a conclusion for the time being. In contrast to previous reforms, the next reform is not already in sight. The Treaty establishing a Constitution for Europe will indeed provide the cornerstone for a democratic and effective Europe.

Everyone involved therefore assumes that the European Constitution will form the legal framework within which European integration will be further developed for some time to come.

Immediately after the accession of ten new member states from Eastern and South-Eastern Europe to the European Union, the signing of the Constitution will send an important message: despite major differences in opinion, an enlarged Europe will find a way to work together and continue to grow closer. We are creating the prerequisites which will enable a larger Europe to remain able to make decisions and to act. This aspect of the Constitution debate should not be underestimated either. Our task is not only to make Europe bigger but also to ensure that it can work efficiently in political terms.

III. Resolving the institutional issues, progress in individual areas of policy

We have found solutions to the core institutional questions which will ensure Europe's effectiveness.

The double majority is of central importance here. It not only makes it easier to take decisions but also highlights the Union's twofold character: as a union of states and as a union of citizens. The state majority underscores the equality of all members. No decision will be made in Europe without it in future either. The additional requirement of a majority of Union citizens puts into effect a central principle which is a matter of course in every democracy: one citizen – one vote. Chancellor Schröder emphasized this in his policy statement on 2 July 2004.

Furthermore, the Constitution considerably extends the use of majority voting, for example in the sphere of justice and home affairs. The Commission will be substantially reduced starting in 2014. The newly created office of President of the European Council, who will be elected for two and a half years and can be re-elected once, will lead to a higher degree of continuity in Community actions and the Union's image. Another advance is the establishment of the office of Union Minister of Foreign Affairs and the European External Action Service answerable to him. The Foreign Minister will chair the External Relations Council and, at the same time, serve as Vice-President of the Commission.

This joint institution will do much to strengthen Europe's common foreign policy. Considerable progress has also been made in the ESDP sphere. The establishment of a European Defence Agency will ensure that Europe continues to be in a position to live up to its greater responsibility in a less predictable world (Articles I-41 83 and III-310 TEC).

We have also achieved crucial progress towards integration in other areas of policy, particularly in the sphere of justice and home affairs. The commencement of joint protection of borders and the expansion of Eurojust and Europol will help win the fight against terrorism and transnational organized crime.

The European Parliament, which was only involved to a limited degree in the area of justice and home affairs, will in future co-decide with the Council in this sensitive area via legislative instruments. The European Parliament and the German Bundestag had called for this time and again.

The security of its citizens is one of the Union's priorities. Eurojust and Europol are already taking action against organized crime in order to prevent drug dealers, human traffickers, money launderers and terrorists from abusing the freedom within the EU for their own ends.

The Constitutional Treaty will make it possible to systematically expand cooperation among police forces. This is taking place in particular within the framework of Europol which has its headquarters in The Hague and has large databases to collect, analyze and pass on information on criminal offences. The Constitutional Treaty has now created the prerequisites for Europol to be further involved in future in the operative work. Eurojust is the nucleus of a European public prosecutor's office whose task is to fight serious transnational crimes.

The Constitution also offers the legal foundation for the harmonization of substantive criminal law and the law of criminal procedure.

As there is freedom of movement within the EU, it is important that the persons in question have equal access to the law everywhere. Particular importance has therefore been placed on close cooperation among national judicial authorities and

care has been taken to ensure that court rulings are recognized and enforced in other member states.

These principles are especially important in civil law cases concerning divorce, custody of children, maintenance claims or bankruptcies and unpaid bills where the persons involved live in different countries.

IV. Realization of German priorities

In three areas in particular, the Constitution puts into practice key matters of particular importance to Germany which had already been included in the Nice Declaration:

1. The clear delimitation of competences which the German federal states had called for time and again: whereas the relevant provisions in previous treaties were spread all over the treaties, today they are brought together in Articles I-13 and I-14 of the Constitution and divided up in the different categories of competence: exclusive, shared and complementary competences of the Union. In future, every body applying the law will be able to establish with a quick look at the Constitution where the competence for a certain sphere lies. The unclear delimitation of competences was a constant bone of contention for the German Länder (federal states) in particular.
2. The anchoring of the principle of subsidiarity in a prominent place in the Constitution and a separate protocol on subsidiarity: subsidiarity means that government decisions should be made as close as possible to the citizens they will affect. Under Article I-11 (3) TEC, the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level. Subsidiarity had been a political goal since Maastricht. Now there is also an operative oversight mechanism. Control of subsidiarity has been considerably enhanced by involving national parliaments in the political early warning mechanism and, in particular, by granting individual parliamentary chambers a right of action should they suspect a violation of subsidiarity. In addition to this, the principle of regional and local self-government could be anchored within the bounds of the protection of national identity.
3. The third key priority was the incorporation of the Fundamental Rights Charter into the Treaty, thus rendering it legally binding, just as Germany had always demanded ever since the Declaration of Nice. The incorporation of the entire Fundamental Rights Charter into the Constitution was a key goal of the German Government both in the Convention and at the Intergovernmental Conference. The Fundamental Rights Charter represents the codification in the Convention on the Charter of Fundamental Rights of the legislation developed by the European Court of Justice on the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as of the constitutional traditions common to the member states.

Every German will instantly recognize the first fundamental right enshrined in the European Constitution: "Human dignity is inviolable".

The Union's Fundamental Rights Charter consists of two parts: firstly, the citizen's traditional rights which protect him from the state, such as the right to life and the right to physical integrity, freedom of religion, freedom of opinion. Secondly, the Fundamental Rights Charter also grants a wide range of participatory rights, such as the right to engage in work, the right to social assistance or the right of access to health care.

With incorporation into the Treaty, the fundamental rights chartered in it place the organs, institutions and other agencies of the Union, as well as member states, under certain obligations pursuant to Article II-111 when implementing Union law. In future, anyone can invoke the fundamental rights anchored in the European Constitution in a national or European court.

V. Strengthening the Union's democratic foundations

The Constitution strengthens the Union's democratic foundations:

One key contribution towards this is the election of the Commission President by the European Parliament. This will enable Union citizens to influence this appointment by voting at the European elections, thus making the European elections themselves more attractive.

Already in the run-up to the elections, the European parties can join together and put forward their candidates for top European posts. In future, Europe's citizens will no longer cast their votes for an anonymous list at the European elections but, rather, for individuals – just as voters cast their vote at national general elections as a rule for candidates and not for parties.

The Treaty makes this possible – now it is up to the parties to use this opportunity and to take advantage of the full range of options offered by the Treaty.

This has been confirmed by events within the EU this year. The incumbent Commission President Barroso had to withdraw the Commission he had put forward in order to avoid defeat in the European Parliament. This was the first time that the EU Parliament had forced the re-appointment of a Commission.

Furthermore, the current co-decision procedure will become standard practice in the legislative sphere. Once the Constitutional Treaty is implemented, it will no longer be possible within the European framework to adopt a legislative instrument without the cooperation of the European Parliament or of national parliaments. In addition to this, the rights of the European Parliament in the budgetary procedure have also been enhanced.

The European Union will then still not conform to the constitutional ideals of the traditional nation-state with its strict division of state authority into executive, legislative and judicial powers. However, the structural elements of a traditional nation-state cannot be simply applied one on one to the European Union.

But that does not make the European Union undemocratic.

It is a community in its own right with its own rules from which it derives its democratic legitimacy.

VI. The Treaty must now be put into force

In order to enter into force, the Constitution must now be ratified in all member states. Referenda will be held in some member states. We are confident that the Constitution will receive the support of a large majority.

The votes – whether in parliament or through direct democracy – offer an opportunity to highlight the common ground in Europe. In Germany, the Constitutional Treaty will be ratified in accordance with the provisions of the Basic Law. This procedure has already been initiated by the German Government.

With the ratification in the Member States, the public debate on the Constitution has entered its key phase. No-one will be able to claim that the governments have made decisions concerning the reform of the Union without consulting their citizens. On the contrary, the Constitutional Treaty was not debated behind closed doors. First of all, the Convention was public to begin with and attracted considerable interest in civil society and, secondly, the debate on ratification is also being conducted in public.

The EU will therefore rest on a broad basis once ratification has been concluded.

VII. Prospects for the future and application of the Constitution

The Constitutional Treaty takes into account enlargement and, at the same time, enhances integration. It contains solutions to institutional questions, strengthens democracy and protection of fundamental rights, as well as transparency and comprehensibility. Anyone summing up the Constitution's progress has to recognize that the Convention and the Intergovernmental Conference have been a great success. When it was stated above that the European Constitution would form the long-term legal framework within which European integration would more forward, this was not meant to imply that the Treaty in its current form cannot be amended for all time.

One feature of the Constitution is that it not only enhances the Union's current effectiveness but also holds out the prospect of longer-term development. It should be mentioned in this connection that the so-called passerelle (Article IV-444 TEC) which enables the European Council to decide unanimously that decisions in an area in which the Council has been required to make unanimous decisions until now may be adopted by a qualified majority. The option of enhanced cooperation (Article I-44 TEC) was also extended, in particular to the ESDP (Articles I-41 (6), III-312 TEC), and made more manageable. In future, we will be able to react

flexibly to current developments. The constitutional framework, as it is laid out, has sufficient dynamic elements to allow further development without having to enter into a discussion on institutional issues once more which will be increasingly difficult to conduct with the rising number of member states.

The Constitutional Treaty has thus brought the development of the Union's constitution to an end for the time being. This will allow us to shift the focus of the discussion to content instead of institutions in future. There are no more unresolved institutional questions. The scope for action which the Constitution offers must now be used.

In the political debate at European level, content instead of institutional questions will therefore be to the fore in future. This applies in particular to the sphere of justice and home affairs in which majority decisions will be the norm and the Common Foreign and Security Policy in which the Union will speak with one voice in future. The newly created, more efficient structure must now prove its worth.

The Constitutional Treaty will also lead to a more democratic and transparent Union. The lack of democracy which the Union has often been accused of has been overcome as the directly elected European Parliament is now involved in every important decision made at European level. The constitutional process which has lead us to this is public. That applied to the Convention as much as it does to the current discussion on the ratification of the Constitutional Treaty.

The Constitutional Treaty is up to the challenges the Union will have to master in the future. The long overdue institutional reforms which it has launched will enable the Union to cope with the recently concluded as well as any future enlargements. Once ratified, it could form the framework within which European integration further develops for a long time to come.

The purposes of the European Union according to the Constitutional Treaty

Federico Sorrentino

I. The purposes of the Union and the purposes of states. The problem of sovereignty

The issue of what the Union has been established for raises a number of basic questions regarding the very nature of the Union, and what its relations with the member states will be, following the adoption of the Treaty on a Constitution for Europe. The answer to these questions will depend essentially on how the political equilibrium develops within the Union.

It should be noted at once that the answer is not to be found merely by examining the provisions of the Treaty establishing a Constitution for Europe (TEC), but must be inferred from a comprehensive consideration of the relations that exist between the Union, on the one hand, and the member states on the other, by virtue of the fact that the territory and the personality of the Union and member states coincide, and both aspire to be benchmark for the process of political integration.

In reality, there is a much broader underlying question still: is it the case that the purposes of the Union are only the ones that are spelt out in the Treaties instituting the Communities, and then the Union, and which are now enshrined in the Constitutional Treaty? Or are they more general in scope, referring to the overall destiny of Europe? For in the case of a state, the problem of its 'purposes' is never an issue, because we take for granted that a state is an entity with general purposes, and it may pursue any particular purpose it considers important from time to time, in relation to the governance and the well-being of the community living within its territory. But it is a problem that arises in the case of the Union, in that it is considered in some way to be an entity which can only pursue the purposes vested in it by its founding charter.

Indeed, if the Union is considered to be an entity pursuing general purposes, a conflict could arise between them and the purposes of the Union's member states that might even pose a challenge their own sovereignty.

For since the power to pursue any kind of purposes is a typical character of a sovereign entity, any superimposition of the Union's territory and personality over those of the states would render their sovereignty a fiction, because it would compete with the Union's sovereignty.

The issue of the purposes of the Union is therefore bound up with the more general question of whether sovereignty is vested in the Union or in the Union's member states.

II. The development of relations between the various national systems, the role of the European Court of Justice in creating a common legal order

A first point to be borne in mind is that the Union is able to expand its competences and its purposes, as it has already done by implementing the original Treaties instituting the European Communities and the Treaties that followed.

This expansion has been partly done by placing a generous interpretation on the implicit powers clause, and it has above all been the outcome a long development of case law led by the Court of Justice (ECJ) and pursued by the domestic courts in individual member states, that ruled on the direct application and the supremacy of Community law over national law, including domestic constitutional law.

This is not, of course, the appropriate place to review the background history, within the Community or at the national level, that led up to this outcome.

All that needs to be said for our purposes is that a kind of legal or juridical unitary area has been created, above all through the judicious use by the Court of Justice and the domestic courts of the instruments for judicial cooperation (and in particular the preliminary rulings procedure). This single legal space comprises the European system and the domestic systems, governed by common principles and based on commonly shared values, of which the ECJ has put itself forward as guarantor.

For judicial cooperation between national and Community authorities has moved on from merely ensuring that Community legislation is uniformly construed by the ECJ under Art. 177 (today's Art. 234) EC-Treaty, to include its implementation and primacy over domestic law.

What has been even more significant is still that the ECJ resolved a number of issues in preliminary rulings procedures with a domestic law rationale, rather than an international law approach, requiring domestic courts to adopt specific procedures to ensure compliance with the principles of supremacy and effectiveness (*'effet utile'*). For it must be remembered that in 1978 the Court (in the *Simmenthal* case) criticised the rationale used by the Italian Constitutional Court for resolving conflicts between domestic and directly applicable Community legislation, successfully imposing on the Italian courts (see Constitutional Court Judgement n. 170/1984) something that was wholly novel to their thinking, namely, the requirement to "disapply" any provision of primary or secondary legislation incompatible with directly applicable Community law.

The extension by the ECJ of the area of directly applicable Community law and the recognition by the domestic courts of the direct effect of the European Court of Justice's preliminary rulings and judgements regarding breaches have given the ECJ the role of a federal Court, with jurisdiction to rule on disputes regarding the legitimacy of the law of individual member States in relation to supranational law.

Furthermore, the development by the Community of a principle of equality which started with individual prohibitions on discrimination soon became a general principle of Community law, and has proven to be a powerful means of unifying the member States' legal systems.

Against this background, any dualist barrier raised to protect state sovereignty was necessarily lowered, while there has been an increasing support in the legal and constitutional debate on relations between different legal systems for the idea of continuity between the Community legal system and that of the member States.

III. The purposes and the values of the Union: the European *demos*

It is clearly not sufficient, however, for the purposes of instituting a political system merely to declare that its law has supremacy over that of its member States, or the implications in terms of its direct application, or the 'disapplication' of any domestic provisions that contradict it, and so on. It is also necessary for the *societas* which identifies with it to express substantive values that are independent of the community that comprises it: in other words, as scholars and the literature repeatedly and critically emphasised many times, the members must increase not merely a temporary or contingent sense of belonging, but an established, structural membership of a common organisation in terms of its ideals and values, and above all the awareness of sharing a common destiny.

The lack of *demos*, *Öffentlichkeit* and so on, which has been insistently emphaised by the critics of the European constituent process is actually the evidence that a set of purposes and values is needed with which Europe's *societas* can identify, for the configuration of a legal order which is not only capable of affirming its formal supremacy over that of the individual States, but above all its ability to stand as the essential benchmark for all political processes.

It is in this way that the Community case-law on fundamental rights and common general principles shared by the member States can be explained and justified. This tends to set in motion a circular process, in which the principles and values enshrined in the national constitutions are re-elaborated by the ECJ and then imposed through the Court's decisions, on the national courts.

This process, which began in the 1970s, was both the response of the European Court of Justice to challenges raised on various occasions regarding the respect for fundamental rights by the Community's institutions and in general on "checks and balances", and the attempt by the Community system (in the absence of accession to the European Charter of Human Rights and the proclamation of an autonomous list of fundamental rights) to build up a set of shared values on which to found the legal order.

IV. A Constitutional Treaty or a Constitution for Europe?

Today, with the TEC to introduce a "constitutional" text enshrining not only rules for the organisation of the Union but also indications of values – defined as being

common to all the member States – a similar attempt is being made to build up the *demos* of the Union through these provisions.

Whether the attempt will produce the desired effects will only become clear when the Treaty, after being ratified, will be perceived by the people of Europe as their Constitution, hence becoming the main instrument to unify them in one single European people.

This being so, I personally believe that we have to consider not only the provisions of the TEC that explicitly stipulate the values on which the Union is based (particularly Art. I-2 which solemnly proclaims that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the right of persons belonging to minorities. These values are common to the Member States in a society of pluralism, non-discrimination, tolerance, justice, solidarity and equality") and those which generically set out its purposes (cf. Art. I-3: peace, well-being, an area of freedom security and justice, sustainable development, free competition, a highly competitive social market economy, full employment and social progress, protecting and improving the quality of the environment, scientific and technological progress, intergenerational solidarity, solidarity between States, safeguarding and developing Europe's cultural heritage, etc.), but above all the organisational provisions which apportion the competences between the Union and the member States in the pursuit of these objectives, consistently with the fundamental values.

For if those values and those purposes are to become the common values and purposes of the Union, and if the Union is to be perceived as a political system that is capable of incorporating all the member States, it has to be seen whether, on the basis of the provisions of the TEC, the Union possesses all the instruments in order to achieve them.

V. The purposes of the Union and the sharing of competences between the Union and States

As we have seen, the new Constitutional Treaty offers generic indications regarding the purposes and the objectives of the Union (Art. I-3), and provides that they must be pursued using appropriate means, domestically and in relations with other States and international organisations, by reason of the competences vested in the Union by the Constitution. The actual magnitude of those purposes can therefore only be gauged in the light of the Union's competences. We therefore have to see how far these competences can be freely modified by the Community institutions, mainly by reference to the principle of conferral, which was present in the previous treaties but has now been explicitly confirmed in the TEC (Art. I-11).

According to this principle, "the Union shall act within the limits of the competences conferred upon it by the member States in the Constitution", such that "competences not conferred upon the Union in the Constitution remain with the member States". In other words, the member States are once again seen as abstract

holders of all the competences: the Union's competences, by virtue of conferral under the Constitution, and the others by virtue of their continuing sovereignty.

But beyond these general statements, we have to see which are the actual criteria specifically used for conferring these competences. As *G. Amato* said, one of the tasks of the Convention, which was only partially achieved, was to simplify the competences and to move away from the present teleological indication, based, that is, on a criterion under which the competences were listed in terms of the function and objectives being pursued, to a breakdown of competences by subject matter. The extent to which this change is introduced into the European Constitution will objectively limit the possibility of expanding the boundaries of the subject matters, and hence the competences. And they will not be able to be expanded in future beyond a certain degree through the implicit powers clause or functionalist case law constructions, which have broadly enabled the Union in the past to infer Community competences from the purposes given to Europe's institutions.

VI. The supremacy of European law over national law

This, albeit partial, change of perspective with regard to the distribution of competences between member States and the Union is linked to the explicit provision in the Constitutional Treaty of the principle of the supremacy of European law over national law.

Thought must be given to the meaning and the extension of this provision, incorporated for the first time ever into a treaty.

There is no doubt that any international treaty, especially one relating to an organisation comprising several States, wants its rules and provisions to be enforced and complied with, also in the domestic legislation of the signatory States. And we have already seen how, in the case of the Community initially and then the European Union, this requirement has mainly been met thanks to the case law of the Court of Justice. But it should also be noted that in the experience of domestic legislation, the affirmation of the supremacy of Community law has always been referred to specific national constitutional provisions. There can therefore be no doubt that if States accept an explicit clause stating the paramountcy of Union law, this would make it possible to base that paramountcy on the Treaty provision.

With regard to the extension of this paramountcy, account must be taken of the type of division of competences (teleological or by subject matter) as between the Union and the member States. For the principle that *European law prevails over domestic law* can only apply in the case of the Union's exclusive and concurrent competences, whereas when individual states have competence, their domestic law will prevail over Union law.

It follows from this that the principle has a much broader extension when combined with a division of competences on a teleological basis, which makes it possible to functionally expand the subject matters for which the Union is competent, whereas a distribution by subject matter would tend to sharpen the borderline and better delimit the scope of that primacy.

VII. Normative continuity, institutional continuity and the new role of the European Parliament

From an initial examination of the subject matters which the TEC entrusts to the exclusive and concurrent competence of the Union, a quite varied picture emerges, in which matters vested wholly in the European institutions, and over which the individual nation States have no powers to intervene, are flanked by others for which the breakdown mechanism is such that, even independently from the act through which the competence is exercised, the borderline varies as a consequence of its exercise by the Union: the Union may exercise the competence totally, in which case the competence becomes exclusive, or it may exercises it partially, in which case the national States can intervene as far as the other part is concerned. The Union can also relinquish or shed a particular competence that it has previously exercised, enabling the national States to reappropriate it. It will obviously be mainly in this area that the tendency to expand the European Union's competences will be set against the tendency to defend national competences.

By examining the competences of the Union one can see a general indication regarding relations with States that is anything but simple and unambiguous. For there are some matters that can be construed in different ways, in which the distribution criteria can vary in terms of future equilibrium, such that it cannot be excluded *a priori* that they may eventually be expanded, or be attacked by the member States.

In addition to the indications regarding the matters falling within the exclusive and concurrent competence of the Union, the Treaty also indicates a number of sectors in which the European powers in relation to national policies become particularly elastic. For example, the coordination of the economic policies of the member States, the common foreign and security policy, and the flexibility clause itself, evidencing the fact that the old mechanism of implicit powers still remains.

Once again, we have to reflect on the principle of subsidiarity whose application is, as it were, procedurally formalised with the essential involvement of both the European Parliament (EP) and the national Parliaments. Since the principle of subsidiarity challenges the concrete distribution of competences, participation in the acts through which the representative institutions exercise their competences will not only help to democratise the new Union but above all, with the contribution of the national Parliaments acting as organs of the Union, will above all create an institutional continuity between the Union and the member States which should complete that continuity between the various legal systems, which has already been referred to above.

The involvement of the national Parliaments in a procedure under which decisions are adopted taking into account the relationship between the member States and the Union (even if this involves extremely laborious procedures), is not only a democratic improvement of the decision-making process, but is mainly a further element of integration.

Accordingly, the growing role of the EP, combined with the participation of national Parliaments in taking the most important decisions that the EP is required to

adopt, is opening a path that has so far not been adequately explored: to create European political parties that are not merely a projection of national political parties, but parties of which the national parties will be peripheral components. If this does happen, one might say that after overcoming "normative dualism", the institutional contrast between national authorities and supranational organs will have given way to a complex, but unitary, system.

It is therefore essential to understand how the new Union will act, what aims it will set for itself. And if it pursues further purposes, it will be necessary to know what balances will be established between the member States, and between them and the Union, with all the sensitive issues connected with majority or unanimous voting.

Lastly, there is also the problem of deciding on the balance of powers between the various organs of the Union, regarding the roles of the Commission and of the President of the European Council, which are also likely to affect the organisation of the Union's competences and the purposes it may pursue.

VIII. The incorporation of the Nice Charter into the European Constitution and the democratic role of European law

Lastly, a few ideas regarding the incorporation of the Nice Charter (CFR) into the Treaty, and the new arrangement of sources.

The formalisation of the CFR is the result of a specific decision following the drafting of a written list of fundamental rights of constitutional status, which are intended to be binding on both the States and the European institutions. The protection of fundamental rights therefore has as its natural legal benchmark the "Constitution for Europe", which despite the generic clause referring to constitutional traditions common to the Member States (Art. II-112(4) TEC) will ultimately limit the creative work of the Court of Justice in this regard.

However, the protection of human rights has been further perfected, not only by the self-evident fact of having them spelt out, but also by simultaneously declaring the law and referral to national or Union law, depending on the cases and the competences, in perfect harmony with national constitutional provisions to specifically delimit the powers (Art. II, 112(1) and II-113).

In this way, the balance between the general interest and individual rights will no longer be solely a judicial balancing act, but will be most appropriately spelt out in a legislative act. This appears to be opening up a scenario, as far as sources are concerned, in which European law, as the result of an institutional dialogue between the Parliament and the Council, is becoming a sphere of exclusive jurisdiction in the field of spelling out and delimiting fundamental rights.

Considering all the variables referred to here, it is difficult to see what purposes the European institutions will adopt for themselves: whether the process that has been pursued will continue so far with the instruments already used in the past, or not, and whether the Union will take upon itself the role of an entity with a general

mission or whether it will remain strictly within the limits defined by the new Treaty.

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The religious element in the Constitution for Europe

Cesare Mirabelli

I. Europe at the turning-point with the "Treaty-Constitution"

The Treaty establishing a Constitution for Europe (TEC) is one of the most significant stages in the development of the European institutions.

A critical reading highlights its ambiguous nature, ambiguities that are made evident by the terminology used. By linking the two terms *"treaty"* and *"constitution"*, which are held to be mutually incompatible, the European institutions seem to be moving along a path with an uncertain outcome. The shift from an international law approach, that is typical of an organisation made up of sovereign States, to a federal type of constitutionalist approach, has not yet taken place. But the originality of the Community experience and the integration of different legal systems that is characteristic of the relationship between the European Union and its Member States make it impossible to appeal to any existing models. The old models are not entirely appropriate for the new system that is being built up, which is based on the distinction between competences and not on the ranking of legal systems and their sources of law. It also creates a direct relationship between individuals and the Community order without needing the mediation of the Member States.

The originality of the new integration system is therefore emphasised both by the institutional configuration and by the status of individuals. From the former point of view, the instrument sets out the competences of the Union itself, which are either exclusive or concurrent with state competences. This entails the direct application of Community law and the prevalence of Community law over state law in all matters falling within the competence of the Union. With regard to the status of individuals, the originality of the Community integration system is emphasised by the two tiers of citizenship. "Citizenship of the Union" is additional to national citizenship and confers new rights on individuals, including the enjoyment of typical political rights such as the right to vote and to stand for election not only in the Union but also in the municipal elections of other Member States, with the same rights as those enjoyed by citizens of those States.

The ambiguities and uncertainties, which still remain, do not weaken the importance of having a "Constitution for Europe". This document marks a change of perspective, and has a far more radical significance than had previously been the

case with the recurrent amendments previously made to the Treaties in order to bring them up to date.

The use of the term "Constitution" has a powerful symbolic significance, making this instrument a means of creating supranational institutions whose independent existence no longer appears to depend on the Member States, each of which nevertheless, under international law, retains the right to accede to or withdraw from the Union.

The purpose of the TEC is not simply to change the institutional structures or the decision-making procedures of the Union's organs, in order to ensure that they continue to function even after enlargement and after the accession of new Member States.

The "Constitution" is something novel, which is much more than the sum of the individual elements that it comprises: recognition of European citizenship, the listing of inviolable rights with the incorporation of the Charter of Fundamental Rights of the European Union (CFR) into the second half of the Constitution, setting out the values and objectives of the Union as legal rules, and the criteria for membership of it, the changes in the organisational structure of the institutions, the rules governing the exercise of the Union's competences and the arrangement of the sources. It contains elements that are characteristic of a constitutional structure, even though it still fits into the international law rationale of a treaty committing States but not directly originating from the people, even though ratification procedures involve the representative Parliamentary Assemblies, which in some countries can also include a referendum. However, the lack of a procedure for revising the Constitution governed by the Constitution itself, emphasises the fact that it retains typical features of international treaties, albeit with original and novel elements, whose rules can only be changed by a new agreement concluded by the States signatories to the Treaty.

II. The European Constitution and the spiritual and religious element

The TEC is replete with ideals, going much further than a heightening of supranational unification features, and far more wide-ranging and radical than the a system for developing the institutions by heightening and increasing federal-type elements.

The TEC reflects the transition between two phases in the history of Europe, not only from conflict to cooperation - which was necessary to safeguard peaceful coexistence and pursue a number of common goals - but also from the notion of the exclusive nature of nation States to their integration by creating common institutions for all the nations of Europe no longer divided by ideological conflicts, but united by superseding the barriers of the nation States. The collapse of the Berlin Wall and the reunification of Germany, and the healing of the division of the European continent, as the dramatic legacy of the Second World War, are now opening up to the peaceful cultural reunification of Europe and the establishment

of common political institutions which will eventually be shared by all the nations of Europe, sharing the same traditions, values, and destiny.

Europe's common historical and cultural heritage is given even greater prominence than her important economic interests and the need to unify the market. The Union is not grounded on contingent and changing interests. Economic integration forms part of a broader design, based on the common values that inspire the Constitution of the Union but are already part of the constitutional traditions of the member countries.

The TEC therefore takes on both an ideal and a spiritual significance, anchored to the common roots, history and identity of the European peoples. The religious element cannot therefore be excluded; together with the humanistic element it constitutes the philosophical and ideological basis for the essential elements on which the Union expressly rests: human dignity and respect for human rights, equality, democracy, the rule of law, pluralism, tolerance, justice, solidarity and non-discrimination.

Seen in this way, the spiritual and religious element is not narrowly confined to any one or other provision of the TEC, but is the general inspiration of its values and whole approach, even when no explicit formal reference is made to it. The interpreter can identify traces of these fundamental religious and spiritual ideals and recognise the importance that they can have in reconstructing the Community system, the Community order and the interpretation of many of the provisions. Often the principles and wording of the rules referring to the values, demonstrate, imply or presuppose an identifiable spiritual and religious background.

The religious element, in its individual as well as in its collective and institutional expressions, is also explicitly and specifically considered in the TEC. The following comments only deal with this aspect, and will not examine the religious and spiritual background that inspires the basis and the values of the Constitution and leaves its mark on the less visible underlying structure.

III. The debate on the religious element in the European Constitution

The specific symbolic value of and ideals enshrined in the TEC with specific reference to the religious element can be gauged from the debate around the substance of the preamble.

Widely differing positions emerged over the preamble: from those who doggedly demanded explicit reference to Europe's Christian roots to those who were utterly opposed to any reference to religion. Indeed, during the preparatory phases there were doubts whether it would be possible to reach a solution with which all the countries required to sign the Treaty could agree.

Yet even the Constitutions of the Member States do not present a homogenous picture from this point of view. Most of them have no preamble to their Constitutions. Those that do, vary widely in wording, from a generic reference to the historical context to declarations of a religious nature that range from references to

the responsibilities that the people or the constituents take on before God and men to formulae with a powerful religious or confessional inspiration referring to the importance of religion and the Church in the fashioning or preservation of the national identity, emphasising their particular historical linkage between the State and the Church.

The preamble is therefore not an essential element of a Constitution. But the fact that it has been introduced into the text of one shows that it cannot be considered purely symbolic or pleonastic, because it sums up all the fundamental benchmark values and the principles from which the Constitution takes its inspiration, thereby indicating the ways of interpreting it.

The TEC has a number of distinctive features also in this regard. It has a double preamble: a preamble to the Constitution and a preamble to the CFR. The latter retains its own preamble, even after being incorporated into the second part of the TEC. Even though these two texts are similar they cannot be superimposed. Both, using different wording, acknowledge the central role of the individual, and the inviolable rights, freedom and equality of all human beings.

The religious element is not explicitly mentioned in the preamble of the CFR, which refers to the Union's "spiritual and moral heritage". Religion can be considered to be understood and implicitly present as a component part of the spiritual heritage. But the Preamble of the Constitutional text that was drawn up and approved by the Convention expressly refers to the "cultural, religious and humanist inheritance of Europe".

The difference in the wording of these two "preambles" is an invitation to reflect on the relationship between them, coexisting as they do in one and the same Constitution, albeit in two different parts.

The retention of the preamble to the CFR would appear to be due to the autonomous origin of that document which was "solemnly proclaimed" (Nice, 7 December 2000) by the European Parliament, the Council and the Commission, in the text drafted by the first "European Convention" that had been specifically convened and wound up upon completing its remit. The incorporation into the TEC – adopted (13 June-10 July 2003) by the second "European Convention" with the same structure and the method tried out by the first – of the whole text of the Charter rather than merely making reference to it as had previously been done in the constitutional provision recognising fundamental rights (Art. I-9) dispels any doubt regarding the legally binding value of the Charter.

When interpreting these two instruments the criterion of complementarity and integration apply. The preamble of the TEC does not absorb, but completes and supplements the preamble to the CFR. The religious element in that Charter was implied and could be inferred through an interpretation of the reference made to the spiritual heritage of the Union. The TEC explicitly refers to the religious element, considering it autonomously, as an element that contributes to giving substance to the specific common heritage of Europe. This, too, is the basis for the dignity of the person, as well as the resultant affirmation of the central role of the human person and his or her inviolable and inalienable rights, and equality.

It was here that the debate took place and the differences emerged regarding the ideological and religious notions that animated the debate at the Convention, in

public opinion and in the political and cultural debate in the representative institutions of the Member States.

It is not possible to examine here the numerous and differing positions raised in the debates, discussions, essays and scientific contributions, particularly as input for the drafting of the final text of the Treaty to be ratified by the Member States. Both sides of the debate were represented on one hand by a radically secular approach, that denied any social and political relevance to the religious dimension, and on the other hand by the opposite position that considered Christianity as a constituent element of Europe's values, and which unifies the culture of the European peoples, including its secular forms of expression. This polarisation excluded the stances of those who consider it either impossible or inappropriate to sum up in a single formula the many contributions, including the religious and particularly the Judaeo-Christian contributions that have percolated down across the centuries onto the Graeco-Roman tradition, to build up Europe's cultural heritage.

IV. The religious element and the cultural and humanist heritage of Europe

The first point of political mediation between these different concepts was in the language adopted by the Convention. The religious element, mentioned jointly with the cultural and humanist heritage of Europe, is not extraneous to the preamble, and neither is it concealed or dissolved in the more general and generic reference to the "spiritual and moral heritage" of Europe, as was done in the CFR. However, is left to the interpreter to identify the specific cultural, religious and humanist roots to which reference is made, because they are referred to without being explicitly named. This only partly takes up the request, backed by strong support for the progress of the European institutions, made by John Paul II (in the Apostolic Exhortation *Ecclesia in Europa*, and in particular no. 114) "to those drawing up the future European constitutional treaty" to include a reference to the religious and in particular the Christian heritage of Europe in the text of the Constitution. Conversely, as we shall be seeing, the text more broadly took up his request to respect the juridical status already enjoyed by Churches and religious institutions by virtue of the legislation of the Member States of the Union, and the specific identity of the different religious confessions and provision for a structured dialogue between the European Union and those confessions, while fully respecting the secular nature of the institutions.

The disagreements that also emerged between the Member States regarding reference to religion, and whether or not reference should be made to the Christian roots in the preamble to the Constitution, were finally settled with the incorporation into the final text of the Preamble of the TEC a short compromise formula mentioning "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law". This wording recognises the ideals on which the values characterising the European identity are

based. The reference in this context to the religious element, which is not expressly spelt out in detail, implies recognition of a public role for religious experience which in institutional terms is given specific recognition in the Constitution (Art. I-52).

The debate on the spiritual values and the Christian roots of Europe is not yet over, and cannot be limited purely to the legal and institutional dimension. The differences of opinion provide an opportunity for dialogue and are a stimulus for the debate rather than for a standoff. Europe's culture is being asked to reflect on what makes it what it is, and what unifies different peoples, above and beyond the contingent and changing interests at any given time. This is the most solid basis on which the common institutions are also built.

V. The provisions of the European Constitution regarding the religious element

The TEC deals specifically with the religious element both in the first part, dealing with the institutional structures, and in the second part, which incorporates the CFR.

In the first part it is the status of the churches and non-confessional organisations that is considered (Art. I-52) within the framework of the provisions governing the democratic life of the Union (Title VI). In the second part the religious element is considered in the framework of traditional fundamental rights: freedom of thought, conscience and religion (Art. II-70); equality without discrimination based on religion or personal convictions (Art. II-81); respect for religious diversity and hence respect for minorities (Art. II-82).

As already mentioned in connection with the double "preamble", both parts of the TEC must be read as one, applying the criteria of complementarity and integration. Both documents, which were drafted by Assemblies at different moments, not only form part of the same Treaty, but they comprise a unitary whole, which includes the rules governing the institutional architecture of the Union and the recognition of individual citizens' rights: the two traditional elements of all Constitutions. The combination of these two documents becomes even more evident in Art. I-9 TEC which refers to the "Charter of Fundamental Rights which constitutes Part II" when stipulating that the Union shall recognise fundamental rights.

Furthermore, the substance and the guarantee of fundamental rights, which includes religious freedom, is not set down or limited to any one single document or one single legal instrument. Indeed, the various documents, and the national, European and international sources which list and define the scope of fundamental rights are mutually complementary and complete each other in defining and safeguarding these rights.

This approach is confirmed both in the TEC and in the CFR. The former confirms the established case law of the European Court of Justice and, using a formula already existing in the previous Treaties (Art. F(2) of the 1992 Maastricht Treaty on European Union), provides that the fundamental rights guaranteed by

the TEC to safeguard human rights and fundamental freedoms (signed in Rome in 1950 and effective within the Council of Europe) and resulting from the common constitutional traditions of the Member States, constitute general principles of the law of the Union (Art. I-9 (3) TEC). The CFR considers both the Rome Convention, human rights (*i.e.* the European Convention on Human Rights and Fundamental Freedoms: ECHR), and the constitutional traditions common to the Member States (Art. 112(3) and (4) and unifies the scope of these rights in a harmonious interpretation of them. It is in this perspective that religious freedom has to be construed.

1. Religious freedom

Religious freedom is expressly guaranteed as an individual and collective right, and its institutional dimension is also recognised, as are relations between the Churches and the Member States and the Union.

Freedom of thought, conscience and religion is enshrined in the Constitution (Art. II-70(1) TEC) with wording that reiterates the words of the ECHR (Art. 9), reflecting traditional formulations of it: "Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observances".

But the TEC also contains a number of new elements with respect to the Convention. No specific provision is made to restrict the freedom to manifest one's religion or creed by law where these measures are compatible with a democratic society and necessary to protect law and order, public health and public morality, and the rights and freedoms of others (according to Art. 9(2) ECHR). However, a general clause in Art. II-112 TEC makes it possible, subject to the principle of proportionality, to limit the exercise of freedoms "only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". In short, when a particular specific conflict arises between several fundamental rights, the techniques for setting them off against each other, which the Constitutional Courts have several times applied in their case law, should make it possible to achieve solutions which safeguard the many jointly-existing values at stake. Another novelty in the CFR is the recognition, in Art. II-70(2), of the principle of the right to conscientious objection, even though this is governed by national legislation which ultimately sets the limits on the scope of that right.

In the documents relating to the fundamental rights of the individual, religious freedom is considered in both its individual and its collective dimension. The institutional aspect is left in the background, but is not absent altogether. The case law of the European Court of Human Rights has frequently affirmed the need to safeguard the religious freedom of the Churches and religious communities. The autonomy of the Churches, the ban on any unjustified or discriminatory limitations on the recognition of their status, autonomy and freedom to organise and manage themselves, and their right to be heard on issues relating to them, constitute a nec-

essary guarantee to ensure the right to individual religious freedom. The lack of guarantees for the liberty and autonomy of the Churches has an indirect impact on the freedom of the members of those Churches.

2. Recognition of the Churches

The implied recognition of the institutional dimension of religion, starting from the viewpoint of individual and collective rights, becomes explicit and autonomous recognition in Art. I-52 TEC which considers the status of the Churches and non-confessional organisations in terms of the democratic life of the Union (Title VI).

The fact that a special provision dedicated to the Churches has been enshrined in the Constitution separates the position of the Churches with respect to any other groupings in society and associations representing collective interests. The "open, transparent and regular dialogue with representative associations and civil society" and "consultations with parties concerned" indicated as the general means of expressing the principle of participatory democracy (Art. I-47) do not mean that all social grouping and associations enjoy the similar and distinct relationship that the Churches enjoy. The Union maintains "open, transparent and regular dialogue" with all of these, but it recognises "their identity and their specific contribution" (Art. I-52) and their specific role in a public and social sphere. Dialogue with them guarantees their autonomy, considered to be the expression of religious freedom, and enables the Union to receive their contribution to the life of the Union.

One might object to this interpretation by saying that the status of the Churches and the organisation of relations with the State (or in more general terms with the political institutions) fall within the competence of the Member States. For Art. I-52(1) TEC contains a specific safeguard: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States".

The status of the Churches in each State has followed different routes, which have led to the survival of a State Church, which in most cases is purely symbolic and formal, but in others is a matter of substance; in these cases the arrangement of relations between the Church and State have characteristic elements of union systems. In other cases a secular separatism has been established, originally driven by an anti-Church approach, with the legal status of the Churches tending to be governed by ordinary State law. In some countries there is a more sharply distinct dualist approach and a relationship based on cooperation, leading to the recognition of the public law character of the Churches and with relations with the State, governed by a concordat or on a bilateral basis.

The Union does not interfere with these types of relations which reflect national traditions and situations. But even here, in different countries, there is a slow process of rapprochement between the substantive laws governing many issues that affect relations with the Churches and religious communities, even though the systems remain different, while sharing the principles of freedom, the organisational and institutional autonomy of the Churches, pluralism, the prohibition on

discrimination and respect for minorities, and the distinction between the religious sphere and the political sphere, recognising the specific contributions that religious and ideologically inspired institutions have to make to social life.

Dialogue and relations with the Union do not interfere with the legal status of the Churches within the States; thus that status relates solely to the procedures for participation in governing matters that fall within the specific competences of the Union. From this point of view, relations with the Churches are not a closed "matter" attributed to the competence of States, but are "transversal" issues that cut right across the various areas in which the religious interest has a direct or indirect effect. Examples of this would include religious holidays or religious dietary systems in labour relations; the ritual killing of animals and the marketing of products produced according to religious rules; work in religious institutions and other similar institutions; the use and protection of sensitive religious data by the Churches or religious communities to which people belong.

The constitutional provision for dialogue with the Churches implies and presupposes recognition that they are lawfully entitled to have their say on matters falling within the competence of the Union. But it is difficult to see what the development, extension and substance of the application of this principle might be, both in relation to the matters forming the subject-matter of the dialogue, and the forms and substance that participatory cooperation might take. Opening up to regular dialogue with the Churches is the beginning of a process, but the path has still to be laid out, and is left to the attention, interest and initiative of all the parties involved in this new system of cooperation.

3. Philosophical and non-confessional organisations

Art. I-52(2) TEC provides that "the Union equally respects the status under national law of philosophical and non-confessional organisations", and holds the dialogue with them as for relations with the Church.

The parallelism between the Churches and philosophical and non-confessional organisations reflects the provisions of Art. 137 of the *Weimar* Constitution to which Art. 140 of the *Grundgesetz* of the German Federal Republic refers. Implementing the principle of the neutrality of the State, it becomes possible to establish an equivalence of treatment between organisations based on an overall ideological and philosophical view of the world and the Churches and religious communities. This hypothesis is part of a theoretical model which is difficult to establish in practice, because the Churches and the religious communities not only differ from philosophical/ideological organisations in terms of the underlying religious substrate, but also by their very structure and their functions.

Art. I-52(2) TEC provides that the status given to these organisations by the law of individual Member States should be respected, which places a safety clause on the national forms of regulation, and projects the effects of State-granted status on to the Community plane.

VI. The religious element in relation to interpreting the European Constitution

The spiritual and religious element transcends the scope of the individual provisions, and of the Constitution as a whole. Throughout the centuries it has been that element which has played such a decisive part in fashioning the values on which Europe is based, and on configuring the very identity of the European peoples.

In the present historical context, faced with this immense heritage of ideals and culture, the construction of the European Union tends to give an institutional form that expresses a more deep-seated reality, without claiming to exhaust or to comprehensively express the substance. Even the wording of the rules fails to fully encapsulate the wealth of values to which they refer. It is here that the role of legal culture re-emerges once again, and the responsibility of jurists to seize on these values in order to animate the substance of these formulae by interpreting and reconstructing the system.

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the liberty of the individual as well as the role of Churches and other religious associations, developing in such a way an European Staatskirchenrecht.

Citizenship of the Union and Fundamental Rights in the Constitution of the EU

Antonio López Castillo

Presentation

All theoretical considerations, as indicated by *Bobbio*[1] in the study of forms of government, hold an underlying two-edged and complementary descriptive and prescriptive focus, and the statement is almost certainly valid when it is applied to the problematic relationship between citizenship and fundamental rights. Whatever the case, whether valid or not, it can be seen to intermingle, one way or another, with what follows.

At the risk of oversimplifying matters and not wishing to fall into the trap of dispersion to which the enormity of such a statement invites, I approach the statute of citizenship and fundamental rights, firstly, from the evolution of the notion of citizenship in constitutional discourse and practice (I) and in view of its affluent recognition, together with fundamental rights, in the text of the *Constitution* (II); and, by way of conclusion, a summary (III).

I. Political citizenship and identity: an outline

1. Citizenship in constitutional practice and theory (of the Union)

Since the effervescence of constitutionalism at the end of the 18th century, citizenship has been the legal term for a differentiated political community constituted as a state. Without taking a detailed look at its meaning and legal system, I shall recall that nationality is still the *conditio sine qua non* of citizenship, a sign of identity in comparison with other subjects holding fundamental rights in the legal space of the state, without prejudice to the relative degree of the opening-up of constitutional systems and separate from possible variations in the rights and obligations set forth in the statute of citizenship.

As part of its development, the concept of citizenship is increasingly indeterminate in direct proportion to progress towards universal suffrage. Throughout the 19th and until well into the 20th century, by overcoming regimes that were based

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[1] *N. Bobbio*, La teoría de las formas de gobierno en la historia del pensamiento político. FCE, Madrid, 1994, p. 9 ("...all theory on forms of government has two characteristics: description and prescription.").

on fortune and capacity, the recognition of female suffrage and the lowering of the age required to vote and/or to be elected. And in recent years, by virtue of an extensive conception of the personal scope of equality which would be a privilege of nationals by exception only. Consequently, with this *post-national focus*, nationality would tend to be seen as a residual criterion in relation to the emerging criterion for the attribution of fundamental rights: establishment.

In this framework of change in the theoretical paradigm, the debate between nationnalist views, typically traditionalist and Universalist proposals, typically Utopian must be contextualised. The latter, either by lack or by excess, seemed to fail in focusing on the specific and inherent characteristics of a statute of citizenship of the Union, which could neither satisfy a requirement for political homogeneity considered incompatible with the diversity of languages and cultures in Europe[2] nor lie exclusively in the decanting of rationality represented by fundamental rights and values.[3]

Indeed, it is not possible to be unaware of the effects of globalisation on watertight state ownership; however, Universalist, Utopian ideas also fail to realise the citizenship that currently exists in the public space of the Union, where, as is well known, there is a conflux of different nationalities and cultural and linguistic peculiarities, even inside the borders of (some of) the Member States, such as Spain. The question lies in the fact that although said structural diversity has neither prevented the creation of a common currency, nor is it completely incompatible with the overlapping of strictly national interests by virtue of the ideological associations in the chamber of representatives of the peoples of the Member States, nor seems to be capable of closing the door to an incipient international projection of the Union, it will definitely prevent the transition to a universal republic, which is the ultimate reference of the post-national conception of the relation of subjection between people and public authorities.

It can be said that the constitutional complex of the Union neither rests on the homogeneous society of the (unitary) national states nor lies in the heterogeneous amalgam of a universal community held together only by values and rights and fundamental guarantees; in short, neither (only) State, nor (only) Constitution.

Therefore, it would be convenient for the constitutional complex of the Union, to make its approach from the conflux of the abovementioned two extremes through a commitment between the integration of (constitutional) law and the safeguard of state diversity (and identity) which, as is well known, rather than reminiscent of the nineteenth-century unitary State or the illustrious universal republic, recalls federative systems whose tools, without prejudice to the diversity of political forms that are consequent with its own historical evolution, could be used to illustrate the specifications of a statute of citizenship. In turn, this statute, although it includes its modulation, does not claim to overcome the traditional connection between citizenship and nationality to turn establishment into a crite-

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2 As the exponent of a thesis that is very present in German constitutionalism, cf. *D. Grimm*, Braucht Europa eine Verfassung?, in JZ 1995, 581, 587, et seqq.

3 One of the most eminent defenders of the thesis is *J. Habermas*, Factidad y validez, ed. *Trotta*, Madrid, 2000.

rion for the attribution of rights of participation, which are traditionally representative of a belonging to a political community.

Accordingly, it would seem clear that the citizenship of the Union represents an identity that is additional to the national identities of the Member States, which would add a further political dimension, superimposed on the national and local/regional identity, as applicable, to the personal and social aspects resulting from an autonomy and freedom of thought which, in the framework of the global society of network intercommunication, offer new possibilities for overcoming earlier physical limitations. They also relate the references as a consequence of the successive contributions of the immigrant population which, despite cultural resistance, would be necessary for the economic development and population rebalance of developed societies[4].

Furthermore, as is well known, if consideration is given to federative systems, including those of an asymmetrical nature, such as Switzerland or Canada, it is possible, albeit with difficulty to reconcile complementary political identities, within the framework of state legal systems.

A similar result is obtained from the progressive implementation of the programme for decentralisation begun by the Constitution in Spain. Indeed, within the framework of the State of Autonomous Regions, the same person is to be found on the base of superimposed orders, from local and regional levels to that of the general State, and the supplementary level of the European Union. Thus, whether naturally or by virtue of the corresponding process of naturalisation, Spanish nationals make the common legal statute compatible *ad intra* with the condition of member of the *electoral body* of the Autonomous Region, in accordance with the provisions set forth in the *block of constitutionality*[5], and *ad extra* with a shared citizenship of the Union, subject to the provisions set forth in the *Constitution*, together with the nationals of the Member States, all of whom make up an aggregate political subject *in fieri*. As a fragmentary electorate, this confers legitimacy to the European Parliament and, as a budding community, at local level, it modulates exclusive national legitimacy.

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[4] Thus, for example, even though in the last twenty years, the rates of immigration have increased notably, in the Europe of the 21st century, it will still be necessary to continue at a similar rate for a few decades before the low birth rate and consequent ageing of the population can be compensated (cf. Report on Human Development by the United Nations Development Programme (UNDP), regarding cultural freedom, published in Brussels on 15 July 2004).

[5] Or the territorial Constitution, expressions which Spanish doctrine uses to realize (not only) statutory completion of the (transitory) constitutional measures; cf. respectively, *F. Rubio Llorente*, El bloque de constitucionalidad, in *L. Favoreu/id.* El bloque de constitucionalidad. Civitas, Madrid, 1988; *P. Cruz Villalón*, La constitución territorial del Estado, in vol. col.: El Estatuto de Andalucía (I): Las competencias. Ariel, Barcelona, 1990, p. 9, et seqq.

At this point, it is appropriate to consider the meaning of the explicit recognition of the medium for citizen legitimation of the Union, which, *ex* Article I-1.1 TEC, is definitively added to the initial state legitimacy.[6]

The "will of the citizens" shall be understood not so much as a will of *nations* (without a State) of *peoples* electorally constituted which, in some structurally complex Member States, such as Spain, are recognised (constitutionally) and have their own scope of expression, as the volition of the emerging political subject which underlies the set of nationals of the Member States.

Consequently, citizenship of the Union neither encourages the fragmentation of the (more or less) complex peoples of the Member States, nor involves whatsoever exogenous extra-limitation of the current European political map which, albeit indirectly, it logically (in a federative sense of the word) safeguards; this is the only way of understanding the express reserve for the members of the Union, among others, of "their essential State functions, including ensuring the territorial integrity of the State."[7]

The popular discourse started up by the citizenship of the Union, against what some nationalist political forces (for example, with regard to the Spanish political stage, in the political subsystem of the Autonomous Region of the Basque Country) seek to validate, is not so much that of the disintegration of the members of the Union into minor political units as a consequence of the emancipation, by means of self-determination, of established peoples without a State, as that of the extra-limitation of political frontiers by means of a process of integration that is compatible with the presupposed state reality, in which the Union expressly lies and from which it is projected.

The fact that, although modulating a statute of nationality on which it is expressly based, the Union neither questions nor overcomes said statute is evident in the declaration, *ex* Article I-10.1 TEC, which states: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it". This approach is in line with the Amsterdam extra-limitation of initial suspicions of the novel *Maastricht* reform, through completion of the tenor of the then Article 8.1 EC-Treaty ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union") with one addition ("Citizenship of the Union shall be complementary and shall not replace national citizenship"). This is

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6 "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union... "; the Preamble ends along these same lines of duality with noticeable (self-)acknowledgement of the members of the Convention, "for having prepared the draft of this Constitution on behalf of the citizens and States of Europe".

7 The formulation of Article I-5.1 (Relations between the Union and the Member States), which, in its own way, translates the requirement for the articulation of an intended principle of intangibility of interior frontiers about which, as proposed by the Spanish delegation, a consensus shall be reached in the European People's Party, corresponds *servata distantia* with the federal clause for reserving its integrity for the will of the Member States of a Federation.

implicit to a controversial precept whose significance and scope were soon to be part of a political consensus to which, despite the limited scope for later jurisdictional interpretations to overcome the *status quo* in the EU/EC[8], the European Council was to return by means of a specific Decision annexed to the Presidency Conclusions.[9]

Citizenship of the Union continues to hold nationality as an essential prerequisite, but nationality as such is now joined by another nationality resulting from the projection of the clause on non-discrimination by nationality to residence in some of the other Member States of the Union. Neither (own) nationality alone, nor residence alone, but rather other nationality or substitution, as has been correctly pointed out, of the traditional "criterion of... the nationality of a certain State for (that of) belonging to one of the Member States".[10]

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8 Cf. Declaration (2) on the nationality of a Member State ("The Conference declares that when the EC-Treaty refers to the nationals of Member States, the question of whether or not a person holds a certain nationality shall be resolved exclusively by referring to the national laws of the Member State in question. For the purposes of information the Member States may declare, who shall be considered as their nationals for Community purposes by means of a declaration given to the Presidency, which may be modified if necessary"), annexe to the TEU (Maastricht).

9 Indeed, the meaning and scope of the (then) Article 8.1 EC-Treaty ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union"), was to adopt, after Denmark's initial referendum rejection to ratify the TEU, the sui generis decision of the Heads of State or Government meeting in the European Council, regarding certain problems put forward by Denmark with regard to the Treaty on the European Union (annexe 1 to the Presidency Conclusions of the European Council of Edinburgh of 12 December 1992, in 12 C 348, of 31 December 1992), Section A, Citizenship ("The provisions of part two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection... They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned"); as a complement, cf. the passages of Denmark's unilateral declaration on the citizenship of the Union (the emphatic insistence on the different understanding of the concept of citizenship in the Treaty on the Union and in the Danish Constitution is set forth in the firm assertion of point 2, which states: "Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules.").

10 Quoted from *S. Kadelbach*, Unionsbürgerschaft, in *A. von Bogdandy* (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge. Berlin, 2003, pp. 539, 575.

2. Political identity in the constitutional complex of the Union

In short, the question on the identity of Europeans, as well as on universal elements, has to do with the possibility for the configuration of shared political identities. And the question on the substance of political identities in complex societies or, in more recurring terms, on the conformation (or safekeeping, as applicable) of a *demos* based on (fragmentary *demoi* – largely thrown into the European debate on the basis of the decision of 1993 taken by the German Federal Constitutional Court on the (conditional) constitutionality of the Treaty of *Maastricht*[11] – neither allows for simplifications regarding the (change in) sovereignty, closer to the law governing property than compared politics, nor finds a satisfactory solution beyond federative references.[12]

If the basis is expressive references of a complex configuration of identity, with shared political loyalties, there could be greater understanding of why it is not possible to sustain the requirement for German-style homogeneity in the constitutional space of the Union unless, paradoxically, it is in the style of the French. It would also be a mistake to approach the process of integration of the Europe of recent years as if the European Union were to give rise to a type of universal republic at any moment, an event which would not seem likely in the near future.

The political Europe *in fieri* continues to be an essay on the re-accommodation of state sovereignties largely formalised by an international order based on the world power, the United States of America, and tends to be constituted around large States such as Russia, China and India, as well as on regional blocks in the process of integration, such as MERCOSUR, whose instability is in proportion to the hegemony of the position of some of their members.

And, to move forward in said political process, the constitutional complex of the Union requires the guarantee of constitutional substance, i.e. fundamental guarantees and rights and the opening-up of the political process through democratic legitimation. Owing to its complex structure, this must be both close at hand – state, or corresponding to the (representatives of the) nationals of the Member States – and immediate – corresponding to the citizens or of the (representatives of the) citizens of the Union. Said constitutional complex also requires a certain filtering of references on which to base shared loyalties, without prejudice to the elements of identity which, explicitly or otherwise, characterise state legislations.

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[11] Cf. *J. H. H. Weiler /U. Haltern / F. Mayer*, European Democracy and its Critique, in West European Politics 18, 1995, p. 4, et seqq.; *B.-O. Bryde*, Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie, in StW&StP, 1994, p. 305, et seqq.; *A. López Castillo*, De integración y soberanía. El Tratado sobre la Unión Europea ante la Ley fundamental alemana, in Revista española de derecho constitucional 40, 1994, p. 207, et seqq.

[12] About (Bodinian, Rousseaunian, etc.) ideas related to the indivisibility of sovereignty, cf. *N. Bobbio*, in La teoría de las formas de gobierno (note 1), p. 83, et seqq.

References which could not be confused with rational principles and values that are sufficiently inexact as to realise their tradition of plurality.[13] Undoubtedly, a good example of this is the recent controversy concerning the (im)pertinence of an express mention of the Christian roots of Europe in the Preamble of the Constitution.[14]

And this brings us to the question about the identification of what European citizens of the Union have in common. When seeking to compute this community, statements come to mind such as that made by *Ortega y Gasset*, where four-fifths of our interior would be European heritage.[15] Without the need for judging the correctness or otherwise of such a consideration, what would seem clear is that, with regard to the aspects that are specific to and typical of the Spanish or the Germans, the Polish or the Italians, the British or the French, etc., there do indeed seem to be more than a few elements in common. Another thing would be to decide whether said elements make up a *specificum* or whether they are expressions shared by other political communities not yet constituted, regional or otherwise – such as the West – and even universal, which could be made general to the community of nations.

Furthermore, mention must be made of the fact that the existence of the transatlantic link is an expression of a community of values and interests that seriously hinders the affirmation of a European identity that is not based on particularities and does not bring together perspectives of the Member States. This is to avoid situations such as that produced during the invasion of Iraq by the United States, which led to the internal fracture of the Union as a result of its Member States' alignment with or against the policy of the North American power.[16]

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[13] The recourses to the Constitution which, besides acting as calls to its principles and values, base themselves on highly emotional discourses about both the name of the country and its flag, which covers its soldiers killed in action, and laden with warnings about the dangers of evil and the imperious destiny of defeating it in order to cast it into darkness (discourse which is by no means uncommon in the political system of the United States) are of another kind.

To a large extent as a result of this, without judging what is right or wrong in said characterisation, the Hegelian view of the United States as a society more than a State (cf. *G. W. F. Hegel*, Lecciones sobre la filosofía de la historia, Alianza ed. Madrid, 1986), is today inadequate.

[14] Cf. the dialogue-epilogue by *F. Rubio Llorente* and *J. H. H. Weiler*, Constitución europea y tradición cristiana, in Revista de Occidente, December 2003, p. 87, et seqq.; to the exploratory essay of the latter, titled "Una Europa cristiana", ed. Encuentro, Madrid, 2003.

Despite the appearance of dialogue, it is more of a monologue by the current President of the Spanish State Council, accompanied by the occasional, not always necessary, marginal note by the essayist.

[15] *J. Ortega y Gasset*, Meditación en Europa, in Obras completas, Vol. 9, 3rd edn. Alianza, Madrid, 1987.

[16] The lucid criticism on the essay *Weiler*, Una Europa Christiana (fn. 14) cit. points precisely at this.

II. The citizenship and fundamental rights of the Union in the Constitution

1. The parallel nature of the fundamental rights and citizenship of the Union *in conical perspective*

The vanishing point of this focus lies in Title II of Part I of the Constitution, in an eloquent treatment "of the fundamental rights and the citizenship of the Union" similar to that of the second paragraph of the Preamble of (the Charter [...] which constitutes) Part II of the Constitution, where the declaration (of the principles on which it is based) and the values that provide the base for the Union is followed by a reference to centralism, whose actions affect the individual: "The Union shall constitute an area of freedom, security and justice...", *ex* Article III-257.1 TEC, "with respect for fundamental rights and the different legal systems and traditions of the Member States".[17]

a) Fundamental rights, ex Article I-9 TEC

With regard to fundamental rights, the aforementioned Title II sets forth a double declaration and a clause of authorisation; the first, concerning the recognition by the Union of the rights, freedoms and principles laid down in the Charter of fundamental rights which constitutes Part II (Article I-9.1) and the reminder that the fundamental rights guaranteed within the framework of the ECHR and those resulting from the constitutional traditions common to the Member States form part of the Law of the Union as general principles (Article I-9.3); and, the second, about the jurisdictional protection of this entire set of references, outlining, by means of an unmistakeable clause of authorisation, the Union's accession to the ECHR (Article I-9.2).[18]

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[17] The provision, corresponding to Articles 29 TEU and 61 EC-Treaty, set forth in chapter IV of Title III (Community policies and action), in Part III TEC, requires that "1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders. 2. For the purposes of paragraph 1, European laws or framework laws shall establish measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders. 3. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law."

[18] The unmistakeable nature of the above comes from replacing the affirmation that the Union "shall seek to accede" (version of the text delivered to the European Council of

aa) From the closeness of the constitutional references and those in international law to the immediacy of a catalogue in the light of the ECHR

The initial lack of foresight for a catalogue and system for the protection of fundamental rights by the European communities (tied to the constitutional knot of the attributions of competences whose delimited implementation the Member States sought to simply transfer or delegate) has been compensated in the space of Community Law by virtue of a near and casuistic jurisprudential extraction of the reserves collected in constitutional traditions and catalogues, including the contribution from the ECHR, as *general principles*, as reiterated in Article I-9.3 TEC. As a subsidiary clause of remission to such a huge set of references formally outside the primary Law of the Union, this is based on the Amsterdam version of Article 6.2 TEU.[19]

Despite everything, the search for principle equivalences has not been an impediment for the occasional adoption of gradual solutions by remission to the constitutional orders of reference, after recognition of the common features, since "the Community shall not allow measures that are incompatible with the fundamental rights recognised by the Constitutions of the States".[20]

Salonika) with "shall accede" (draft version of the final text); another meaning is given, in fine of the same Article I-9.2, to the modulation of the possible effect on the Union's competences which the Union's accession to the ECHR "shall not modify" (instead of the previous "shall not affect").

19 As a base, Article I-9.3 TEC would not exhaust its regulatory nature by mere declaration, proceeding, if not to constitute an area exploited by jurisprudence for more than thirty years, then to constitutionalize certain standards, not by virtue of its express declaration in the text, but rather by remission to other (con)texts, by virtue of an opening provision of opening which, if not as a result of its location, then as a result of its structure, is more similar to instrumental opening clauses which to be activated, as that set forth in Article 93 SpC (cf. *A. López Castillo*, La cláusula constitucional de apertura a la integración: balance y perspectivas, paper at an international congress on "The Spanish Constitution. 25 years...", Bilbao, 2003; at the printers), require intervention by the legislator additional to the other opening clauses systematic to a main irradiation mediated by jurisprudence, similar to the mandate of interpretation of conformity of Article 10.2 SpC and/or the way in which, with regard to the Declaration... of 1789, it is carried out, after the integration of the preamble of that of 1946, in paragraph fourteen of the preamble of the French Constitution of 1958.

20 Warning made to the standards of the ECHR from the Judgment of 18/06/1991, case C-260/89, ERT, paragraph 41 (cf. with additional references, *A. F. Chueca Sancho*, Por una Europa de los derechos fundamentales (La adhesión de la Unión Europea a la Convención de Roma), in *N. Fernández Sola* (ed.), Los derechos fundamentales en la Unión Europea, ed. *Dyckinson*, Madrid, 2003.

About the Community parameter of control, in Spanish, cf. *A. López Castillo*, Constitución e integración, ed. CEC, Madrid, 1996, p. 52, et seqq.; cf. also, *M. Poiares Maduro*, Las formas del poder constitucional de la Unión Europea, in REP 119, 2003, monograph on La reforma de la Unión Europea ante la cita de 2004 (coord..: *A. López*), p. 11, et seqq.

Accordingly, it must be remembered that the jurisprudential protection of fundamental rights, as general principles of Law, would have been substantially spoiled by a reticent attitude of certain constitutional jurisdictions. A particular exponent of this would have been the German formulation of a conditioned reserve on the application of the national standard of protection insofar as the Community scope did not have its own catalogue of fundamental rights, debated, prepared and adopted by the European Parliament.[21]

Since then, there has been a succession of attempts to reach the objective of the clarification of the Community protection of fundamental rights by means of institutional initiatives issued by the Commission (Report of 4 February 1976; *Pintasilgo* Report, etc...) and from the EP (Solemn Declaration of 12 April 1989; Article 4 of the *Spinelli* project, of 14 February 1984; Title VIII of the *Herman* project, of 10 February 1994).

For its part, in the (European) Council, the debate has been mainly the result of the controversial (re)interpretation of the scope of the clause of unforeseen circumstances of Article 308 EC-Treaty – similar to that of Article I-18 TEC – by virtue of a measured implementation of *reactive* or *inverse activism*,[22] a point of inflection concerning the controversial constitutional dimension of the protection of fundamental rights in the scope of application of the Law of the Union.[23]

Said restrictive reading of the scope of the generic clause of completion undoubtedly lies in the origin of the preparation of a Charter for fundamental rights of the Union and in the anticipation of the clause of authorisation of Article I-9.2 TEC, concerning the future accession of the Union to the ECHR.

bb) Part II TEC constitutes the Charter as an (own) catalogue of fundamental rights in the EU

As part of the idea of dealing with the challenges of time regarding the declaration and with the will of the system, the Charter undertakes, in its own way, to update a consensus that lies in a set of constitutional and conventional references in Community and international Law.[24]

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[21] About the changing jurisprudence of the German FCC, "in its to-ing and fro-ing" Solange-I - Solange-II, and Maastricht - Bananas, cf., in Spanish, *T. Stein*, La sentencia del Tribunal constitucional alemán sobre el Tratado de Maastricht..., in RIE 1994, p. 745, et seqq.; *A. López Castillo*, Constitución e integración (cit.), passim; *id*, Un nuevo paso en la andadura iuscomunitaria del Tribunal constitucional federal de Alemania. El Auto de 7 de junio de 2000, in REDC 61, 2001, p. 349, et seqq.

[22] Concerning this expression cf. *A. López Castillo*, ¿Cerrar o cuadrar el círculo?: a propósito de la revisión del "sistema de fuentes del derecho" de la UE, in REDE 5, 2003, pp. 47, 68-9.

[23] Cf. *P. Alston / J. H. H. Weiler*, An "ever closer Union" in Need of a Human Rights Policy, in *P. Alston* (ed.): The EU and Human Rights (1999), p. 658, et seqq.; *A. von Bogdandy*, Grundrechtsgemeinschaft als Integrationsziel?, in JZ 2001, p. 157, et seqq.

[24] According to the Preamble of the Charter, which constitutes Part II TEC, the intention is to "reaffirm, with due regard for the powers and tasks of the Union and the principle of subordination, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European

Indeed, the catalogue of rights of the Union reveals the originality through the synthesis in one single document of the varied content set forth in a collection of texts of different kinds and scope and through the assertion of new rights and the identification of novel facets of old rights, by virtue of a configuration of content which, until conventionally set forth, needed to be either inferred from almost bare and/or silent texts, or, owing to the fact that they referred to international sectorial conventions, were characterised by casuistics that corresponded with their variable incorporation into State laws. This was usually outside the Constitution, and was completed by means of a State regulation of (infra)legal rank which, possibly by a main connection to horizontal clauses such as the prohibition of discrimination, in the scope of equality and/or dignity and free development of the personality, or to directives or principles governing economic and social policies, might also form an additional part of constitutional protection.[25]

The novelty of the catalogue of fundamental rights of the Union also reveals another set of characteristics, such as the option of a Swiss-style clause of general limitations in comparison with the more traditional model of differentiated configuration, or an Iberian-style form of constitution of rights, freedoms and (ruling) principles, or a systematic declaration of rights based on the fundamental values (and principles) of the Union, which will reappear immediately from both a general point of view and in relation to the rights to citizenship.[26]

cc) The (immediate) bond between the EU and the ECHR

This measure must be set within the context of the growing presence in the scope of application of (Community and) Union Law of the standards of the protection of rights and freedoms which, with the content and scope declared by the ECHR, limit the action of States, as an indicative criterion, together with other international standards and those resulting from State constitutional legislations.

Without prejudice to specific disagreements about, for example, the possession of the right to inviolability of the home in the overlapping scopes of application of

Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights", cit. from paragraph five.

25 Concerning this close extension of the constitutional protection of socio-labour rights in the jurisprudence of the Constitutional Court of Spain, cf. *A. López Castillo*, La Constitución de Europa a debate. Estudios sobre el complejo constitucional de la Unión, ed. *Tirant lo Blanch*, Valencia, 2005, pp. 121, 143-4.

26 Even in the specific Title (V) of the Charta of Fundamental Rights, citizenship shares the attribution of possession with the general rule of attribution of rights (all individuals or, put inversely, no one); as in other reference texts, the existence of specific rules of attribution is also declared, of a functional nature (workers, in Articles II-87, 88, 90, 91) or of a structural, political nature (foreigners or stateless individuals, in Articles 78 and 79) or (bio)social (minors, in Articles II-84 and 92, and the elderly, in Article II-85; the disabled, in Article II-86).

the ECHR and the Law of the Union[27], observance of said common denominator has been progressively imposed in such a way that the jurisdiction of Strasbourg has shown itself to consider naturally and decisively the progress made in supranational integration when effectively applying the standards of the ECHR to the Member States of the Union. As is well known, this would have been the case regarding the statute of citizenship of the Union, based on the recognition of which national legislations have been reinterpreted and action by the legislator has been encouraged in the States concerned, by virtue of the mediation of the jurisdiction of the ECHR, which, at the same time that it has provided nationals belonging to the Member States with the effective judicial protection they required, has contributed to greater effectiveness of the Law of the Union through the "adaptation to Community Law of the conventional standards applied to the Member States of the Union".

The meaning of Opinion 2/94 on the intended accession to the ECHR by means of the completion clause was perhaps not completely new to such a decisive line of jurisprudence which, with regard to certain antecedents of the now extinct European Commission on Human Rights, goes back ten years earlier.[28]

Since then, in view of the regularization of the dialogue between tribunals[29], the explicit precautionary measure of a clause of authorisation of the EU's accession to the ECHR would be only a matter of opportunity, despite the background of competences.[30]

The occasion has arisen in the process of the birth of a *Constitution* for Europe. However, the precautionary measure set forth in the clause must have overcome

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27 On the sequence started up with the Hoechst decision of the ECJ, cf., among others, *A. F. Chueca Sancho*, Por una Europa de los derechos (fn. 20).

28 The potentiality of the statute of citizenship of the Union for the purposes of the delimitation ad extra of nationals belonging to Member States becomes effective in the scope of application of the ECHR by means of the ECtHR judgment of 27/04/1995, case Piermont / France, paragraph 64.

29 Cf. Declaration for incorporation in the Final Act Article I-9.2 (The Conference agrees that the Union's accession to the European Convention of Human Rights should be arranged in such a way as to preserve the specific features of Union Law. In this connection the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights. Such dialogue could be reinforced when the EU accedes to the European Convention of Human Rights).

30 Cf. Protocol relating to Article I-9.2 on the accession of the Union to the European Convention of Human Rights (1. "The agreement relating to the accession (...) shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: the specific arrangements for the Union's possible participation in the control bodies of the European Convention of Human Rights, the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and / or the Union as appropriate 2. The agreement referred to in paragraph 1 shall ensure that accession shall not affect the competences of the Union and the powers of its institutions... "); and Declaration for incorporation (fn. 29).

the imprecision of its initial formulation due to the members of the Convention having been limited to establishing that the Union would seek accession to the ECHR. As is common knowledge, that initial text of Article I-9.2 TEC has now been changed to the unequivocal 'The Union shall accede to the ECHR... ".

dd) About the complex configuration of the standards for protection in the scope of application of EU Law

The measures set forth in Title VII of Part II of the Constitutional Treaty must contribute to legislating, as far as possible, this triple concurrence of control parameters and protection standards. Accordingly, the double determination that in the case of rights guaranteed in the ECHR, the "meaning and scope of these rights shall be the same as those laid down by the said Convention" (Article II-112.3) and those formulated on the basis of common constitutional traditions "shall be interpreted in harmony with traditions" (Article II-112.4), is worthy of particular mention.

This logical tension could not result from the contrast between the requirement of interpretative unity typical of all systems. This leads to the consideration of the conditions and limits of the exercise of the rights declared in view of "other Parts of the Constitution (in which they are mentioned" (Article II-112.2)) and the minimum protection standard clause dealt with in Article II-113. One thing is to begin with the recognition of the autonomy of the supreme jurisdictional interpretation of the Constitution and another is to maintain that said autonomy implies the intranscendental nature of all external parameters, since the law of the Union shall continue to feed on exogenous, internal parameters which are presented as general principles *ex* Article I-9.3.

With the requirement of an identity of meaning and scope which, *in fine* of Article II-112.3, is compatible with a possible "more extensive protection", and the mandate of the interpretation of conformity, or "in harmony", with constitutional traditions, the doubt does not lie in assuring firm ground; the doubts are of another kind, dogmatic and pragmatic, and point to the meaning of the expression *more extensive protection.* They also have to do with the perplexity involved in constituting a differentiated system on a base of equivalences which, outside a framework of uniformity that is incompatible with the new currency of the Union ("united in diversity"), remains pending a jurisprudential examination which the accession of the Union to the ECHR, *ex* Article I-9.2, would undoubtedly help resolve. Consequently, without denying the difficulty of linking an equivalence of principle with (additional) constitutional standards, it is necessary to recognise the (relative) utility of a (broad) minimum common denominator.[31]

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[31] As far as Spanish doctrine is concerned, cf. *F. Rubio Llorente* (in Revista española de Derecho constitucional 69, 2003), about the recently Constitutional Court Declaration (1/2004) of 13 December cf. among other contributions of interest, those put forward by *A. López Castillo* and *A. Sáiz Arnáiz*, in Constitución española y Constituciòn europea, 1/FORO, CEPC, Madrid, 2005, pp. 13, 39, et seqq.; and 51, 71, et seqq. respectively.

The idea that, as an element for promoting the integration of the standards themselves with other common standards, the Constitution must draw up a corresponding document (de)constituting the State base and, consequently, one that alters the balances that uphold the radical systemic complex on which the EU rests, is another (or the same?) thing.[32]

b) Citizenship of the Union ex Article I-10 TEC

As for Citizenship of the Union, the complementary nature of a legal statute annexe to that of nationality is first of all confirmed (Article I-10.1). This, by virtue of its denomination, refers back to the failed *Spinelli* project.[33] Then, before proceeding to the breakdown of certain rights to citizenship (Article I-10.2), whose scope is referred to the Constitution and the secondary legislation (Article I-10.2, in fine), *ab initio* of Article I-10.2 TEC, it emphatically declares that "citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution".

aa) News of the preface of the statute of citizenship of the Union

At the same time as the development of a jurisprudential protection of fundamental rights as general principles of Law, in the programme of integration, prior to the start-up of the Union and, consequently, a citizenship of the Union, particularly promoted from Spain[34], news appears regarding a diversity of initiatives related to the citizenship of Community Law which was in the perspective of the gradual culmination of the common market at that time.

From the nearest antecedent, on the initiative of the Commission, in relation to the right to suffrage on local elections, in the period from the ratification of the Single European Act (SEA) to the preface of the Maastricht Treaty, up to the first signs of the debate on the Citizens' Europe, together with the announcement by the ECJ of its availability for protecting fundamental rights as general principles in the scope of application of Community Law, at the end of the sixties, a variety of

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[32] As to the "Charter...", cf. *F. Rubio Llorente*, Mostrar los derechos sin destruir la Unión, in REDC 64, 2002; and, on a more general level, *A. López Castillo*, Constitución e integración, 1996, p. 515.
The structural basis of State resistance to the projection of a standard inherent to the EU can be understood in the light of the United States federative experience, where only the passing of time made room for a (certain) projection into the State space of federal standards (thus, for example, the scope of application of the clause of free religious exercise had to wait until Cantwell v. Connecticut, 310 US 296, 1940).

[33] "Citizenship of the Union" was, in fact, the title of Article 3 of the Treaty Project for the Constitution of a European Union, of 14 February 1984 (JO 84 C, 77,33, of 19 March 1984).

[34] Cf., among others, *D. J. Liñán Nogueras*, La ciudadanía de la Unión, in *G. C. Rodríguez Iglesias / D. J. Liñán Nogueras* (eds.): El derecho judicial europeo. Civitas, Madrid, 1993.

initiatives appeared, some of which were as relevant as those resulting from the *Tindemans* Report and from the work of the so-called *Adonnino* Committee.

In both cases, and in the proposal for recognising the right to active and passive suffrage in local elections, it sought the extraction of additional performance from the fundamental (economic) freedoms through the promotion of student exchanges or the mutual recognition of diplomas, as well as progress in overcoming the problems involved in accessing public employment and the elimination of controls on internal borders, etc.[35]. This led to a preliminary statute of citizenship of the Union, whose initial ups and downs with the start-up of the Union, appeared *in fine* of section I.1.

bb) On the rights and duties of the citizenship of the Union - On duties

Acknowledging that a less hasty examination could lead to a different result, the Constitution mentions duties only in the section on conscientious objection, which, in accordance with national regulations, is recognised in Article II-70.2 TEC. If this is so, the incorrect mention of the duties of citizenship in Article I-10.2 TEC must be taken as a programmatic reference open to future development in the constitutional complex of the Union.

Whether apt or not as a foundation for a hypothetical insertion in Article I-10.2 TEC, by means of the completion clause, of some kind of duty corresponding to citizens of the Union, inferred from secondary legislation, it is something that has yet to be clarified. In whatsoever case, this is worthy of more than a simple paragraph.

Indeed, express reform of the Constitution could consider measures covering constitutional duties in the scope of the Union. However, State legislations of reference, such as Spanish Law, indicate that the other side of the citizenship coin is ordinarily measured in the generic requirement of personal and/or patrimonial services in the areas of defence policy (compulsory military service, before being abolished in favour of a professional system) and fiscal policy (duty of fiscal contribution), areas which are of an incipient and/or unconsidered competence of the Union.

And the dogmatic imprecision which, with the same reference, can be seen (not only) in Title I of the Spanish Constitution, in the duties of working or using the Spanish language, or in the compulsory attendance during the obligatory cycle of education, not to mention other supposed constitutional duties[36], does not need to be reiterated in the constitutional complex of the Union.

The duties are most definitely the corollary of a statute of citizenship, the zenith of its consolidation, connecting to the requirement for loyalty they involve. And, accordingly, without prejudice to the progress made, with regard to peace missions abroad or those which may take place in the framework of assistance in catastrophes, etc., the Union (whose corresponding symbols *ex* Article I-8 TEC

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[35] Cf., in Bull. EC, Suppl. 1/76, p. 29, et seqq., and Suppl. 7/85, 9, et seqq., respectively.

[36] A systematic treatment of duties (not only) in Title I of the Spanish Constitution, cf., among others, *F. Rubio Llorente*, Los deberes constitucionales, in REDC 62, 2001, p. 11, et seqq.

are merely symbols) still has some way to go before it can be sure of direct citizen commitment to the Union and not one that is mediated by the Member States.

In short, the duties of citizenship of the Union, as referred to in Article I-10.2 TEC, are still to be specified. Perhaps they are the most complete expression of the programme of maximums of integration which, based on the current Article 17.2 EC-Treaty, draws up the Constitution.

- *On rights.* Refer to the following (2.) and, in more detail, please see other contributions, where the rights set forth in the statute of citizenship of the Union are understood as follows [37]:

-- From the prohibition of discrimination by nationality to the statute of citizenship, between the market and the state:

1°. Non-discimination by nationality: -) in the area of fundamental economic freedoms *-market citizenship-*, in particular, with regard to the right to free movement and establishment, and -) within the strictly political scope of the statute of citizenship of the Union, in relation to the -aliquot- citizen loyalty to the complex political system of the EU (right to ask for protection on behalf of diplomatic and / or consular authorities...), as well as to the principle of democratic participation and legitmation in the constitutional space of the EU (right to suffrage in the elections to the EP and in local elections in the Member States...); and

2°. The right to citizenship in the strictly political scope, or -subsidiary- legislative function (initiative´s proposal of -at least one million- citizens...) of the EU.

-- As far as other rights and guarantees with regard to the EU:

1°. Rights related to the maxims of transparency and proximity and opening-up of the institutions..., as the right to good administration and the right of acces to documents; and

2°. Institutional guarantees of rights about the control and monitoring of the regular functioning of the institutions..., as the right to complain to the Ombudsman and the right of petition to the EP.

2. From the values (and principles) to rights, freedoms and (ruling) principles: an essay of clarification

The constitutional declarations of rights are usually systematised by reference to higher or fundamental values (and principles) and consequently, beyond the casuistic configuration of catalogues, they largely refer to fundamental rights of freedom (or fundamental freedoms), of equality, in both a formal (rights of participation) and material (rights of payment) way, and of solidarity (rights of reflexive ownership), etc.

This method of the systematic reformation of the declared rights to the fundamental values (and principles) of the legislation, would be shared - in the same

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[37] And, don´t forget, the possible -emerging- rights... by means of completion´s clause, *ex* Article III-129.2 TEC (*vide*, recently, my paper "Derechos fundamentales y estatuto de ciudadanía de la Unión", in the 3rd Congress of the association of constitutionalists of Spain (ACE), on the subject *La Constitución Europea*, 21-22 December 2004, Barcelona; available at http://constitucion.rediris.es/ace/Inicio.html).

way as, more or less explicitly, other constitutional texts of reference, such as the Spanish Constitution – by the Charter of fundamental rights of the Union, along the lines of the Declaration of Rights of Man and the Citizen of 1789, traces of which can be found in the second paragraph of the Preamble to Part II of the Constitution, which solemnly declares that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."

In the effort "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments" (paragraph four of the Preamble), of the old revolutionary motto of 1789, "liberty, equality, fraternity", in the framework of European supranationalism, the transition has been made, after two long centuries of constitutionalism, to a renewed motto which aims to be that of the constitutionalism of the 21st century, as expressed by the fundamental values of "human dignity, freedom, equality and solidarity."

One would have thought that in the clamour (political document, simple rewriting, etc.), problems as easily solved as these would have been left for later on.

In such an approach, albeit more confusing, the Preamble and Article I-2 TEC mix together values, principles, maxims and rules. In one case, as well as the values of freedom and equality, there is a generic reference to the universal values of inviolable and inalienable rights of human beings and to the structural principles of democracy and the rule of law, elements developed on the basis of the "inspiration from the cultural, religious and humanist inheritance of Europe"[38]; this previous formulation is joined, in the case of Article I-2 TEC, by a mention of human dignity and the rights of individuals belonging to minorities.[39] It then clarifies that it is a reference to the societies' own values (the societies of the Member States of the Union) characterised by the "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

So, call it a *Turkish clause* or, put another way, what can be anticipated in the light of this conflux of higher values common to the constitutional systems of the Member States and the main axes, and the structural principles of the societies that

[38] Quoted from the first paragraph of the Preamble to the Constitution. At this point, it is not possible to remain silent before the unusual nature of a Preamble which, not doing justice, as it so evidently does not, to the efforts underlying the preparation of the Constitution, regarding both the structure (in one word, fragmentary) and the content (to put it bluntly, nonsensical). The IGC '04 should have revised the text perhaps based on the understandable and acceptable discourse of the Prologue which begins Part II TEC. Unfortunately, this is not the case.

[39] With such precision, the (unachieved) aim has been to constitutionally anchor a collective right of the minorities or said precision is of the idle rather than detestable kind, whereby the individuals who belong to a minority are people, like the rest, with the very same class of dignity.

uphold them is the relevant role their underlying conception may realize in the response to the Turkish candidature for joining the Union.[40]

Since here it is a matter of simply clarifying the sequence which runs from the values (and principles) to the rights (freedoms) and (regulating) principles, the complex nature of this clause[41] warrants a return to the Preambles which, in view of their greater intelligibility and dogmatic precision, show how to understand the Preamble of Part II TEC, together with its tetrarchy of values and (accompanying) (structural) principles, which include rights which, inasmuch as they are declared as expressive thereof, become integral elements of a system that seeks to be congruent with said values (and principles) of reference.

In Part II of the Constitution, said correspondence is evident in the six-chapter declaration of *Dignity*, *Freedoms*, *Equality*, *Solidarity*, *Citizens' Rights* and *Justice*: "The Union ... recognises the rights, freedoms and principles set out (in here)" (Preamble of the Charter).

Without prejudice to other critical considerations,[42] on this occasion, it is a question of considering the meaning of the chapter on the rights to citizenship; citizenship if it considers the values (and principles) of reference, is valid here due to (the structural principle of) democracy.

And that idea is prevalent not because there is doubt as to the aptitude for generating the subjective rights of a few principles related to political structure and more or less immediately related to higher values, but rather precisely because of the latter. The way in which they refer to them and contribute to their expression by means of the political process (or, in the case of the so-called rights of justice, by means of principles and guarantees related to the jurisdictional procedure), the corresponding principles and, what matters right now, citizenship (i.e. democracy), and to a large extent justice, would be limited to relating the title of exercise to contents that basically express freedom and equality, thus introducing an

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40 Without the need for whatsoever kind of judgement of more or less evident intentions, after months of mumbled comments and inferences, the first signs of an open debate in the public space of the EU concerning the controversial accession to the Union of Turkey can now be seen (cf. Commission report of October 2004; European Council of 17/18 December 2004).

41 In its correspondence with that of Article I-5.1 TEC, it alludes to the constitutional anchoring to the Union of the constitutional legislations of the committed Member States, in view of the (pending) enlargement, in the safekeeping of standards of constitutional excellence which, lacking in preliminary State guarantees, could hardly be asserted on the superimposed plane of the Union and which, if questioned, would lead to the initiation of the sanction procedure *ex* Article I-59 TEC (suspension of the rights of belonging to the EU).

42 Of the great number of contributions in this field, I shall refer to my own (*A. López Castillo*, Algunas consideraciones sumarias a propósito de la Carta de derechos fundamentales de la UE, in REP 113, 2001, p. 43, et seqq.; *id*, in *N. Fernández Sola* (ed.): Los derechos fundamentales en la Unión Europea, ed. *Dyckinson*, Madrid, 2003; *id*, La Constitución de Europa a debate. Estudios sobre el complejo constitucional de la Unión, ed. *Tirant lo Blanch*, Valencia, 2005, p. 122, et seqq.) published, like so many other contributions to Spanish doctrine, in the (universal) Spanish language.

element of incongruence in the system resulting from the constitution of fundamental values.

Indeed, consideration could also be given to the constitution of a catalogue based on the systems for the possession of the rights declared. However, what does not respond to clear logic is the hotchpotch of material and formal cataloguing criteria by reference to the content declared and to the holders of the exercise thereof. However, as far as possible, this has been the case of the declaration of rights that makes up Part II TEC.

The meaning of this appreciation, which shall be better understood after examining the declared rights of citizenship, has to do with the limits of intentionality. Consequently, for example, the mere declaration in the title of citizenship does not imply the conversion of the right of petition into an exclusive citizen faculty.

At this point, consideration should be given to whether this chapter could have been configured by citing a stricter conception of citizenship, in the same way as Title VI of Part I TEC, in order to provide a breakdown of subjective facets based on the democratic principle[43]; and, then, the questions would be as follows: with regard to the generic right of democratic participation[44], *ex* Article I-46.3, what rights would it affect? Only the rights of political association when constituting

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[43] And, as a mere complement, what would the correspondence about the principle of the rule of law be? How could the principles of legality and constitutionality be formulated subjectively? Would the substantial part of the principle of legality not already be (un)configured in the chapter on justice? And could the principle of constitutionality be understood as mediated by the parent guarantee of effective judicial protection which, as it is (hesitantly) mentioned in the recent judgement of the Spanish Constitutional Tribunal 58/2004, might affect the safekeeping of the system of regulatory controls and sources?

[44] A similar principle underlies the conventional protection of Gibraltarians regarding their initial exclusion form participation in the elections to the EP in British legal space, by means of the ECtHR Judgment of 18 December 1999, *Matthews* v. United Kingdom. To the preliminary sequence on the significance and scope of the citizenship of the Union (Spanish invocation of the provisions of the British Declaration on the definition of the term nationals, annexed to the Treaty of Accession of 1972, substituted by a "New declaration... ", in accordance with the enactment of the British Nationality Act (BNA) of 1981; cf. Judgment of 20/02/2001, case C-192/99), room must also be made for the Declaration by Spain considering the term nationals, annexe (CIG 87/04, of 17 July 2004) to the consolidated version of the Constitution. At this point, mention must be made of the participation of the Gibraltarians in the recent election to the EP, as an annexe to the combined region of the Southwest, by virtue of the Statutory Instrument 2004, No. 366, which results from the European Parliament (Representation) Act 2003, adopted in fulfilment of the related judgment *Matthews*. The political dimension of this reaffirmation, by means of the projection to the scope of application of the Law of the Union of the democratic standard of the ECHR, of the British responsibility over the Rock has taken just days to become patent by means of sovereignist overacting, grotesquely out of proportion and particularly irritating in the matter of Gibraltar (cf. L. I. Sánchez Rodríguez, Sobre el derecho internacional de los derechos humanos y comunitario europeo, en Revista de derecho comunitario europeo 5, 1999, pp. 95, et seqq.).

European parties, *ex* Article I-46.4, in relation to Article II-72.2 TEC, and of (plurinational) citizen initiative in search of an activation of the Commission, *ex* Article I-47.4? Or the rights of something else? For example, in the framework of social pluralism (Article I-48) and ideological and religious pluralism (Article I-52)?

Questions aside, the alternative that offers the greatest congruence with the tetralogy of fundamental values would substantially dilute the expressive content of citizenship in other chapters of Part II, regarding freedom and equality. Furthermore, in certain cases, such as the political institutional guarantees of rights, it would maintain the structure of Title VII of Part II, possibly in Part III TEC, as is the case with the primary legislation that is currently in force.

III. Summing up, by way of conclusion

Insistence has often been placed, not unfairly, on the instrumental nature of the jurisprudential configuration of fundamental rights and guarantees in respect of economic objectives and/or the objective of greater effectiveness of Community law.[45]

However, sufficient emphasis has been placed on the direct proportionality between the efficiency of Community Law and the immediate nature of the legal statute of citizens which, Community law safeguards of the structure of their full status as subjects of the new legislation, has enabled their legal position with regard to the Member States to be strengthened to a certain extent, in the context of procedural protection, extending its effect to the limits of the requirement of state responsibility... by virtue of radical systemic inference.[46]

With regard to the other Member States the status of citizens has been considerably strengthened by virtue of the systemic and extensive interpretation of the prohibition of discrimination by nationality which, together with other facets of the anti-discriminatory clause, has made possible the creation of a powerful instrument for overcoming state reluctance stagnancy in the deployment of the effectiveness of Community legislation.

This situation has given rise to some dysfunctions, such as those regarding the controversial internal discrimination, and gaps as a consequence of the levelling of legal positions in secondary law. With regard to the updating of legal positions recognised in regulations of a lower rank than that of the Constitution, the direct proportionality should be emphasised that exists between the regulatory anchor

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[45] Cf., among others, *S. O'Leary*, The relationship between Community citizenship and the protection of fundamental rights in community law, in CMLRev. 32, 1995, pp. 519, 544-5; *J. Coppe /A. O'Neill*, The European Court of Justice: Taking Rights Seriously? in: CMLRev. 29, 1992, p. 669, et seqq., cf. *J. H. H. Weiler/N. J. S. Lockhart*, Taking Rights Seriously: The European Court of Justice and its fundamental Rights jurisprudence, in CMLRev. 32, 1995, I (p. 51, et seqq.) and II (p. 579, et seqq.).

[46] *R. Alonso García*, La responsabilidad patrimonial del Estado por.., ed. Civitas, Madrid, 1997.

and the potential of the anti-discriminatory clause. Although this potential could be increased by jurisprudential integration of constitutional rules from the area of socio-economic freedoms (social security, labour relations), including traditionally regulated civil rights in legal codes (in an institutional perspective rather than a subjective one, same-sex marriages for example[47]), into political rights (freedom of thought and expression, rights of assembly and association), and ,in particular, the right to suffrage and to access and carrying out of public functions and positions.

As further progress is made, in overcoming discontinuities in the legal space of the Union, this anti-discriminatory clause seems to appear as a constitutional(ised) parameter of equality in the constitutional complex of the Union, which should be used as a basis for) European (framework) laws (articles III-123 and 124 TEC) and for the provisions for regulatory development and implementation. Even so, it is not the same to formalise in a provision of constitutional rank a complementary rule on the principle of equality before the law, which is inserted by way of reaction and intensified by the systematic clause of non-discrimination by nationality, and to anchor in a provision of constitutional rank, with reference to all the public powers, including the legislator, of substantive rights, of substantive equality, of civil and political independence and freedom, and also of solidarity, indicative of the dense parameter of control in the complex legal space of the Union.

Furthermore, the episode of the controversial initial birth of the federal United States Constitution without fundamental rights and guarantees, later supplemented by amendments, and the occasional rediscovery of the state constitutions as an (additional) source of understanding of the corresponding limits[48] can illustrate the final meaning of state resistance, in the successive tract of integration to the overcoming of the state political frameworks in its base.

A good example of this is the precautions adopted accordingly, firstly in the heart of the first Convention, and, subsequently, in the work group II sessions and, albeit in the plenary session, of the second Convention, in order to observe the competential dividing line set forth in the Constitution, and to hinder, if not prevent, the emergence of a parameter of reference and validity besides other standards of protection.

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47 Recently, a regulation on the marriage of homosexuals was enacted by the Spanish Parliament, cf. opinion by the State Council (DCE), num. 2628/2004, of 16 December 2004, available at http://consejo-estado.es; as another European example cf. German STCF of 16 July 2002 (at http://www.Bundesverfassungsgericht.de) and resolution of the Great Instance Tribunal of Bordeaux, of 27 July 2004 (reference, for example, in El País of 28 July 2004) and, on the United States debate, cf. Resolutions of the Supreme Court of the State of Massachusetts, *Goodridge* and Others v. Department of Public Health and another, of October 2003 and February 2004.

48 The revival of federalist dualism in the North American system is of particular interest (cf., in Spanish, *M. Ballbé / R. Martínez*, Soberanía dual y constitución integradora. La reciente doctrina federal de la Corte Suprema norteamericana, ed. *Ariel Derecho*, Barcelona, 2003).

Despite the state reservations in matters of nationality, the statute of citizenship of the Union speaks of the move from international law towards a complementary political statue, expressive of the community in process (article I-8) guided, without prejudice to other economic purposes, by political objectives (article I-3) and maintained on constitutional values common to open societies (article I-2).[49]

Mention has been fairly made of the heterogeneous nature of the amalgam of rights which, to a good extent, are not exclusive to the nationals of the Member States and, by extension, citizens of the Union. Even so, it is not a matter of exception; not, of course, in constitutional legislations of reference, such as that of Spain, which combines a dual reference to the statute of citizenship in the strict sense of support for the legitimacy of the political system (article 13.2, in relation to article 23, SpC) and in a broad sense which, notwithstanding the modulations in the exercise thereof, does not exclude the possession of rights and duties by non-citizens (article 13.1 SpC).

Without considering this broad and strict double use of citizenship, it is not easy to progress in the clarification of the meaning and scope of the statute of citizenship of the Union. In its incorrect sense, the rights to marry or to carry out a freely chosen professional activity, if we are speaking about Spanish legislation, or, about the law of the Union, the rights of access to information and documentation of the institutions and bodies or petition to the EP, for example, are not only exclusive to citizens (nationals of the States), but could also be formulated as universally owned rights, without prejudice to nationality, which, by eccentricity with regard to the scope of legitimation of the political system, the historical seed and nucleus of the statute of citizenship, notwithstanding the formal paradox, should come as no surprise.

Consequently, only in the strict sense would it be possible to classify a right as an integral part of a statute of citizenship which, in its evolution, allows participation in local elections by non-nationals, by virtue of an updated clause of reciprocity by the conventional route, and in some legislations, it includes the political integration of residents, of a medium or long term duration (in accordance with the legislative provisions which, in accordance with the respective dogmatic tradition, can consist of a regime for nationalisation and of the constitution of a differentiated statute. On the one hand, political integration would be complete and on the other, it would ordinarily be limited to the local level). Even so, the journey from the local level to the (regional and) national level can only be completed with a nationality ticket.

As is well known, in the constitutional legislations of reference, the statute of citizenship and ownership of fundamental rights are categories that can be only partially assimilated. The statute of citizenship expresses the basis for the legiti-

[49] Cf., on the road set forth by article 63.4 EC-Treaty, the clause of attribution to the Council of the competence for agreeing the extension of the benefits of free movement resulting from the statute of establishment in a Member State to other Member States (cf. *A. Olesti Rayo*, El estatuto de los residentes de larga duración: comentario a la directiva del Consejo 2003/109, of 25 November 2003, in Revista general de derecho europeo, 4 2003, available at http://www.justel.com) ex article III-267 TEC.

mation of the political system (subjective dimension of the democratic system to be realized in a certain institutional framework[50]), the fundamental rights are the stronghold with regard to the majority (of citizens) and, consequently, the ultimate figure of personal freedom.

The Charter of fundamental rights of the Union, perhaps due to the forced nature of its birth as a political document and not as an authentic initiative of reform of the Treaties, would have proceeded with the Constitution, inconsequent with the tetralogy of the corresponding declaration of principles, of rights to citizenship and justice, as well as those related to dignity, freedom, equality and solidarity.

And emphasis has been placed on the fact that prior to *before* or *in* the Union and its institutions, bodies and organisations, its exercise should verify *before* or *in* the Member States of origin or residence of the citizens of the Union.

When dealing with the exercise of rights regarding the institutions and bodies of the Union (rights to complain to the Ombudsman and to petition before the EP and rights to information and access to documents), the citation of the citizenship of the Union (besides the main meaning and scope of the instrumental guarantees and rights to greater transparency and efficiency of public administrations) is completely appropriate.

In the other cases, the EU, in its position as guarantor[51], would only come into play if and when the exercise of said rights by the nationals in their own States or in those of residence affected the freedom which the legal statute of citizenship recognises for all without distinction in a common legal space for which the Union is ultimately responsible.

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[50] Accordingly, mention is made of the jurisprudential inference of a similar subjective aspect of article 38 German Grundgesetz, in the STCF Maastricht, of 12 November 1993.

[51] The EU's position as guarantor is underlined, for example, by *M. Nettesheim*, La ciudadanía europea en el proyecto de Constitución Europea ¿Constitución del ideal de una comunidad política de europeos? (translated by *I. Crespo Ruiz de Elvira*), in Revista de Estudios Políticos 125, 2005, p. 211, et seqq.

From the European Convention on Human Rights to the European Charter of Fundamental Rights: The prospects for the protection of human rights in Europe

Klaus Stern

I. International recognition of fundamental human rights

For centuries, the protection of fundamental human rights has been part of the historical conceptual and constitutional legacy of the peoples on both sides of the Atlantic. Great thinkers from all nations have contributed towards the generation of human and fundamental rights. Nowadays these rights (or at least their substance) are universally recognised, beyond the continents of Europe and America. Virtually all the UN nations recognise them at least verbally. The fact that they are not put into effect, let alone observed, everywhere, does not alter their claim to validity. Practice and theory operate at different speeds, and politics carries the duty to change this.[1] The academic world is only able to send out reminders and to encourage progress.

The General Assembly of the UN adopted a "Universal Declaration of Human Rights" on 10 December 1948. Following on from the origin of their spiritual forefathers, it was rooted in the European and American declarations of human rights, and embodied human dignity, protection of personality, individual rights to freedom, equality under the law, basic judicial rights and rights to political co-determination. However, these traditional rights were extended to include more recent legal rights, which had become manifestly threatened through experiences in the Thirties and Forties, namely bans on torture and deportation, the right of asylum and the right to citizenship. Certain social, economic and cultural rights were also added. However, it must be noted that the Declaration has not acquired the status of a binding international legal rule, despite the fact that a minimum standard (irrespective of how this may be circumscribed), has by now become a constituent of customary international law.[2]

Further markers *en route* to an international Charter of Human Rights have included numerous special declarations and conventions, and in particular the International Covenants on Civil and Political Rights and on Economic and Social and

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1 Cf. *N. Bobbio*, Das Zeitalter der Menschenrechte, 1998, p. 63, 84.

2 Cf. *K. Doehring*, Völkerrecht, 1999; para. 974; *K. Ipsen*, Völkerrecht, 4th edn. 1999, § 50.

Cultural Rights dating from 1966.[3] Internationalisation, positivisation and generalisation have all seriously intensified.[4] However, it cannot be denied that the international protection of human rights exhibits a number of deficiencies. Whilst a global desire for improvement prevails, this is not what we are concerned with at the present time.[5] We are concerned with Europe, where the situation is better.

II. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Following the disaster of the Second World War and the horrors and ravages afflicted upon it in the 20th Century, Europe was predestined to become especially actively involved in the protection of human and fundamental rights beyond the provision of guarantees at national level. Following lengthy preparatory work, the first Congress of the European Movement, which came about through private initiative, was held in The Hague in May 1948. In addition to the formation of a European Parliamentary Assembly, as the basis of a future union of the European states, it demanded a charter of human rights and for this to be protected by a European court of justice. The initial result of these communications was the Statute of the Council of Europe, within which the free democratic states of Western Europe united in 1949, and a draft text of the Convention of Human Rights drawn up by an international committee of legal experts.[6] Art. 1(b) of this Statute set out in concrete terms what appears in the Preamble, which speaks of the common heritage of the peoples of Europe, their individual freedom, political liberty and the rule of law, and states that agreements are to be concluded which relate to the "maintenance and further realisation of human rights and fundamental freedoms". According to art. 3, "Every member of the Council of Europe" (which now has 45 Members States, so that it includes virtually the whole of Europe) "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms".

It took until 4 November 1950 before the Committee of Ministers of the Council of Europe adopted the "European Convention for the Protection of Human

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3 Cf. *K. Stern*, Handbuch der Grundrechte, Vol. I, 2004, § 1 para. 38.

4 Cf. *G. Peces-Barba* (ed.), Derecho positivo de los derechos humanos, 1987, p. 13 et seq.

5 The development of international human rights has been widely discussed; only a selection can be offered here: *Henry J. Steiner/Philip Alston*, International Human Rights in Context, 2000; *Chr. Tomuschat*, Menschenrechte – eine Sammlung internationaler Dokumente zum Menschenrechtsschutz, 2004, 2nd edn. 2002; *E. Riedel*, Die Universalität der Menschenrechte, edt. by *Chr. König* and *R. A. Lorz*, 2003; *Th. Schilling*, Internationaler Menschenrechtsschutz, 2004; *A. Weber*, Menschenrechte – Texte und Fallpraxis, 2004.

6 Cf. *Chr. Walter*, in: *D. Ehlers* (ed.), Europäische Grundrechte und Grundfreiheiten, 2002, § 1 para.. 5 et seqq.

Rights and Fundamental Freedoms" (ECHR), following painstaking preparatory work in the government committees and committees of experts, with the involvement of the Advisory Committee of the European Council. This has been extended and supplemented over time by the addition of 13 protocols. The 11th Protocol, which dates from 1994 and which entered into force on 1st November 1998, was especially important. This not only adds to the list of fundamental rights within the Convention, similarly to the previous protocols, but drastically alters Art. 19 et seqq. of Section II of the Convention. This ability of the Convention itself to alter means, first of all, that it was not possible for it to be ratified subject to reservation (as could the protocols), and secondly, that it was necessary to wait until all the Convention States had ratified the Protocol. In summary this means that the second section of the Convention, entitled "European Court of Human Rights", was amended in its entirety and converted to a monistic court system. At the same time, new Rules of Procedure for the Court was adopted with effect from 1st November 1998.

The core of the 11th Protocol is therefore the establishment of a new permanent European Court of Human Rights (ECtHR) as the single controlling body for the protection of European fundamental rights. The Commission and the formerly non-permanent Court were abolished. The duties of the Committee of Ministers are restricted to supervising implementation of the judgments, by which the parties are required to abide (Art. 46 of the new version of the ECHR).

Every natural person or group of individuals, including non-governmental organisations, may now make an individual application to the Court, claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto (Art. 34 of the new version of the ECHR). No High Contracting Party may hinder in any way the effective exercise of this obligatory right.

The ECHR is a multilateral international treaty, which in contrast to most international treaties, not only governs relationships between individual states, but primarily the relationship between individuals and states, and which creates rights and obligations in this area. Internationally therefore, it ranks amongst the law-making treaties, and has acquired considerable significance in relation to the behaviour of states towards their citizens, in view of the large number of human rights cases referred to the ECtHR (and previously to the European Commission of Human Rights). Under constitutional law, the Convention has had a significant effect on the interpretation of national fundamental rights, and in general terms on individual legal systems. This applies in particular to Art. 6,[7] which is afforded a broad sphere of application.[8] Moreover, in Great Britain, where human rights were not formalised, the Convention initiated the 1998 Human Rights Act, forced the

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7 Cf. in particular the acceleration of the judicial procedure in the ECHR, NJW 2001, 211, 213; on fair procedure: *Pache*, NVwZ 2001, 1342, and on the presumption of innocence in the ECHR: EuGRZ 1987, 399; NJW 1988, 3257 as well as BVerfGE 74, 358 (370); 82, 106 (115); BVerwG, DÖV 2004, 206 et seq.

8 Cf. *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, 2003, § 24.

British courts to develop a greater range of case law in relation to fundamental rights, but failed to impact upon the sovereignty of the Parliament.[9]

The ECHR only enjoys the constitutional status in Austria. In many countries it ranks above simple statutes,[10] whilst in others, including Germany, Italy and Scandinavia, it enjoys the status of a statute. Therefore, in Germany the rights contained in the ECHR are not capable of supporting a constitutional complaint. although the German Federal Constitutional Court is prepared to take the ECHR rights into account when interpreting the fundamental rights laid down in the Grundgesetz ("Basic law" of the Federal Republic of Germany – GG).[11] Attempts to afford the ECHR constitutional status have not so far been accepted in legal practice.[12]

The system of fundamental rights laid down in the Convention essentially comprises the same elements as those fundamental rights guaranteed under the individual constitutions of Member States. They primarily include the traditional rights of freedom and political co-determination, complemented by the ban on torture and inhuman treatment, the equality rights and the special ban on discrimination set out in Art. 14 ECHR with a supplement in the shape of the 12th Protocol and also far-reaching judicial guarantees. As a result, a pan-European standard of fundamental rights is guaranteed, equivalent to the high level of most of the constitutions of Western European since the Second World War. During that era following the Second World War, which was so traumatic for the nations of Europe, the European legacy of fundamental rights, for which we have to thank the best that all the nations of Europe had to offer, was translated into a set of legal rules of which all those involved could be proud. In these rules, Europe became for the first time the real embodiment and precursor of that close integration that we now know as the European Union. In legal parlance, we can now truly describe the Convention as the "First European Statute", and in fact as part of a European Constitution. Without doubt, the Convention is an element of a European constitution of fundamental rights, which has also achieved regard under supranational law since the Maastricht Treaty, as expressed in Art. 6.2 TEU.

III. Further developments in the course of European integration

These soon followed the first cautious stage towards European integration, taken by the Council of Europe, with the formation of the – no more existing – European Coal and Steel Community on 18 April 1951, although this was of no great significance in terms of fundamental rights. Developments in the sphere of funda-

9 Cf. *Grote*, ZaöRV 1998, 309 et seqq.; *M. Baum*, EuGRZ 2000, 281 et seqq.

10 Cf. *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, 2003, § 3.

11 Cf. BVerfGE 74, 358 (370); on the significance of the ECHR for administrative Courts and authorities: *G. Britz*, NVwZ 2004, 173.

12 Cf. finally F. Hoffmeister, Der Staat Vol. 40 (2001), 349 et seqq.

mental rights and freedoms only came with the Treaty signed in Rome on 25 March 1957 establishing the European Economic Community, known since the 1992 Maastricht Treaty simply as the European Community. Art. 3 EC-Treaty (in the version of the 1997 Treaty of Amsterdam) describes the creation of an "internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital". These are referred to in commonly accepted parlance as the four fundamental freedoms, and occasionally even as fundamental rights.[13] An indispensable associated freedom was the free movement of payments (Art. 56.2 EC-Treaty). Furthermore, the ban on discrimination on grounds of nationality and other criteria are anchored in the Treaty (Art. 12.1 and Art. 13 EC-Treaty). The case law of the European Court of Justice has developed the general principle of equality into a fundamental right, both on this basis and on the basis of Art. 34.2.2 and Art. 141 EC-Treaty.[14] The Court of Justice (ECJ) has also laid down and applied other Community fundamental rights in individual cases.[15] It has considered these fundamental rights as elements of the unwritten general principles of the Community legal system and the general constitutional principles transmitted by Member States. As its "sources of inspiration", the Court has primarily taken the ECHR and other European and international agreements, and also individual national constitutional rules. Art. 6.2 now explicitly obliges the Union to respect the fundamental rights laid down in the European Convention on Human Rights.

Two principal problems arise, the first being "What are the fundamental freedoms?" and the second "What does the clause in Art. 6.2 TEU relating to the respect of fundamental rights mean?"

1. Neither the TEU nor the EC-Treaty contain a numbered list of fundamental rights like those in the national constitutions of individual Member States, although they do include individual statements relating to fundamental rights, principally to general and special prohibitions against discrimination, the right of equal pay for male and female workers (Art. 141 EC-Treaty), the right of association (Art. 137.1 (f) EC-Treaty), the right of citizenship of the Union and the associated rights of free movement, the right to vote and to stand as a candidate at municipal elections, the right to petition and to protection by the diplomatic and consular authorities (Art. 17 et seqq. EC-Treaty) and the right to data protection (Art. 286 EC-Treaty). However, specific fundamental freedoms, also referred to as fundamental freedoms, are inherent in Community law. These are freedom of movement of goods (Art. 23 et seqq. EC-Treaty), freedom of movement of work-

[13] Cf. on the development *G. Hirsch*, Gemeinschaftsgrundrechte als Gestaltungsaufgabe, in: *Karl F. Kreuzer* (ed.), Europäischer Gundrechtsschutz, 1998 p. 9 et seqq.; *A. Bleckmann*, Europarecht, 6th edn. 1997, para. 755 et seqq; *R. Streinz*, Europarecht, 5th edn. 2001, para. 652; *J. Hengstschläger*, Grundrechtsschutz kraft EU-Rechts, Juristische Blätter 2000, 409 et seqq., 494 et seqq.; *R. Steinberg*, Zur Konvergenz der Grundfreiheiten auf der Tatbestands- und Rechtfertigungsebene, EuGRZ 2002, p. 13.

[14] *U. Kischel*, Zur Dogmatik des Gleichheitssatzes in der EU, EuGRZ 1997, p. 1 et seqq.

[15] Cf. the cases listed in *Streinz*, (note 13) para. 372.

ers (Art. 39 et seqq. EC-Treaty), freedom of establishment (Art. 43 EC-Treaty), freedom of provision of services (Art. 49 et seqq. EC-Treaty) and freedom of movement of capital (Art. 56 et seqq. EC-Treaty). In the light of national dogma relating to fundamental rights, these primarily constitute characteristics of the principle of equality and of certain economically-related fundamental rights. As demonstrated by the Bosman judgment of the ECJ, these Community fundamental rights, just like the national fundamental rights, are capable of developing duties of protection as a third party effect. In the case in question, these applied to sports associations, although their fundamental right of association arising out of art. 11 ECHR was not examined.[16] We were therefore spared the conflict of laws involving Community fundamental rights versus the ECHR. However we should be aware that this question needs to be addressed.[17]

The fundamental rights under Community law that are set out above have undergone a major enhancement as a result of the case law of the Community courts. In its development of the law, the ECJ primarily relies on the common constitutional principles transmitted by the Member States and on the international treaties designed to protect human rights, in particular the ECHR and its protocols, in their interpretation by the ECtHR.[18] On this basis, important fundamental rights such as human dignity, protection of private life, home and postal communications, religious freedom, professional freedom, freedom of opinion, property, the ban on the retroactivity of criminal statutes and procedural guarantees have been transformed into Community law.[19]

2. This ECJ case law was contributory to the addition of the following wording to the Treaty in 1992 (Art. 6.2 TEU (formerly Art. F (2) TEU), as mentioned above: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ...and as they result from the constitutional traditions common to the Member States, as general principles of Community law". Art. 46 (d) TEU explicitly affords the ECJ jurisdiction to apply this provision. This was in some respects already heralded in the Preamble to the 1986 Single European Act, in which reference was made to the ECHR and the European Social Charter.

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16 Case C-415/93 ECJ Union Royale Belge des Sociétés de Football Association Jean-Marc Bosman [1995] ECR I-4921; see recently also Case 60/00 ECJ Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.

17 Cf. *Chr. Grabenwarter*, (note 8) § 4; *D. Ehlers*, (note 6). § 13 para. 12 with fn. 30.

18 Cf. for the first time Case 11/70 ECJ Internationale Handelsgesellschaft [1970] ECR 1125 and [1974] 2 CMLR 540, German Constitutional Court, and Case 4/73 ECJ Nold v Commission [1974] ECR 491; since then constistent case law. Cf. *Th. Kingreen*, in: *Chr. Calliess/M. Ruffert* (eds.), Kommentar zu EU-Vertrag und EG-Vertrag, 2nd edn. 2002, art. 6 TEU, para. 19 et seqq.

19 Cf. *Th. Oppermann*, Europarecht, 2nd edn. 1999, para. 492; *D. Kugelmann*, Grundrechte in Europa, 1997; *Wetter*, Die Grundrechtscharta des EuGH, 1998; *E. Chwolik-Laufermann*, Grundrechtsschutz in der Europäischen Union, 1994.

Art. 6.2 TEU henceforth explicitly links the law of the European Union with the ECHR, although the use of the term "respect" makes for a good deal of ambiguity. There are many indications that it is not thereby intended to make the ECHR into a direct component of Union law, "but 'only' to gain access to it in the guise of the general legal principles".[20] Only in this way can we explain the political attempts to achieve the accession of the Union to the ECHR, which dominated the fundamental rights debate within the Community for a long time.[21] These attempts have not yet been subdued, and have gained momentum through Art. I-9.2 of the Treaty establishing a Constitution for Europe, although they must now tackle the strong position which favours of the European Union having its own schedule of fundamental rights, which originates from the declaration by the European Parliament on 12 April 1989 on fundamental rights and freedoms.[22] There is no doubt that Art. 6.2 TEU "emphasises the constitutionalising, integrating and legitimising function of a written schedule of fundamental rights".[23]

We should not therefore have been surprised by the fact that in Cologne in June 1999 and in Tampere in October 1999, the European Council set the course towards the establishment of a positive schedule of fundamental rights. It was resolved to establish a Convention comprising 62 members of the European Parliament, the national parliaments and governments of Member States and the Commission, with the mission of drafting a Charter of Fundamental Rights. The ECHR and its protocols and the other relevant Conventions of the European Council, together with the national fundamental rights and statements made in the EC-Treaty, were to be used for orientation purposes.

The background of the mission of the European Council was the acknowledgement that despite the fundamentally positive case law of the ECJ, it was considered necessary to explicitly draw up a schedule of fundamental rights, in view of the shortfalls in the Treaty text, in particular given the lack of legal certainty, precision and visibility of the fundamental rights. Moreover, it was believed that on constitutional grounds, the increasing range of powers of the Community institutions necessitated an explicit schedule of fundamental rights, guaranteeing citizens their fundamental rights even in relation to "Brussels". Fundamental rights are after all an element of European identity and part of the incipient process of European constitutionalisation.

When the Convention was established (it was the committee itself, not the instituting resolution, which chose the name), the evolution of the Community moved along a new path, which is not envisaged in the Treaty text and is not therefore exempt from reservations in relation to legitimacy. Therefore, a greater degree of

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[20] See *Chr. Grabenwarter* (note 8) § 4 para. 2; *Th. Kingreen* (note 18) para. 18.

[21] See Memorandum EC Commission, Bull. EC 1979, Annex 2; opinion 2/94 ECJ [1996] ECR I-1759; *K. Strasser*, Grundrechtsschutz in Europa und der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention, 2001; *S. Winkler*, Der Beitritt der Europäischen Gemeinschaften zur EMRK, 2000; *Chr. Grabenwarter*, Festschrift Steinberger, 2003, p. 1129 (1145 et seqq.).

[22] Cf. OJ 1989, C 120/51; *B. Beutler*, EuGRZ 1989, 185.

[23] *Th. Kingreen* (note 18) para. 18.

transparency was ensured that had been the case during traditional intergovernmental conferences. The Convention chairman, former German Bundespräsident *Herzog*, steered it towards a generally welcomed submission in less than a year. Parliamentary committees in particular immediately demanded that it be legally anchored in treaty law.[24]

In contrast, the Nice European Council in 2000 noticeably wavered. It simply solemnly proclaimed the Charter and declared that it would become legally binding in the future. The pros and cons of the Charter have since been a topic of lively debate, and a vast body of literature has been generated on the subject.[25] The future of the Charter has now become closely linked to the fate of the European Constitution, into which it is to be incorporated as the Second Part. Since legal experts make poor prophets, I do not intend to prophesy about the Constitution, but will instead concentrate on the Charter itself. In summary, it is clearly easier to reach agreement on fundamental rights than on institutions and competences, because a homogenous legacy in relation to fundamental rights has accrued over the centuries amongst the European nations.

IV. The implications of the Charter of Fundamental Rights

1. There is no doubt that the Charter of Fundamental Rights is (still) not a constituent of binding Community law. Despite this fact, reference is made in Commission documents, including draft directives, to the fact that the Commission is acting in accordance with the Charter.[26] Even the European Ombudsman, and some of the Advocates General at the ECJ, including the German one, and the European Court of First Instance,[27] have made reference to the Charter and have pleaded in favour of some kind of self-commitment on the part of the European institutions.[28] It remains to be seen what attitude the European Court of Justice will take. The German Federal Constitutional Court has drawn on the Charter at least as an instrument of support.[29] Nevertheless, it cannot develop the nature of a

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[24] Cf. *S. Magiera*, in: Europäische Verfassungsordnung, edt. by D. H. Scheuing, 2003, p. 118.

[25] Cf. *Chr. Calliess*, in: *D. Ehlers* (note 6), § 19 para. 3; *S. Magiera* (note 24); *P. Dagtoglou*, in: Festschrift für W. Schmitt Glaeser, 2003, p. 569, fn. 1; *U. Haltern*, AöR 128 (2003), 512 (522, fn. 75).

[26] Cf. *A. Zimmermann*, Die Charta der Grundrechte der Europäischen Union zwischen Gemeinschaftsrecht, Grundgesetz und EMRK, 2002, p. 17 et seq.

[27] Case T-54/99 ECJ *max.mobil Telekommunication Service GmbH v Commission of the European Communities* [2002] ECR II-313.

[28] Cf. *A. Zimmermann* (note 26); *M. Borowsky*, in: *J. Meyer*, (ed.), Kommentar zur Charta der Grundrechte der EU, 2003, preliminary note to art. 51 para. 3 et seq.; *S Alber*, EuGRZ 2001, 349 (351).

[29] BVerfG, EuGRZ 2002, 669 et seq.

legally binding instrument, nor can it be adopted "through the back door".[30] The proper treaty amendment procedure laid down in Art. 48 TEU must be adhered to.

Despite the proclamation in Nice, the Charter is not binding in relation to Member States. The Charter could therefore be amended prior to its incorporation into the EU Constitution Treaty, bearing in mind that the Constitution Convention has incorporated it unchanged (apart from a few exceptions introduced for clarification purposes, e.g. Art. II-112) into the draft Constitution. If it should become legally binding in the form submitted, then Art. II-111.1.1 TEC determines its sphere of application somewhat restrictedly. The Charter applies to the institutions and bodies of the Union and Member States "only when they are implementing Union law". The reference to the Union therefore extends the scope beyond the Communities to common foreign and security policy and to police and judicial cooperation in criminal matters. In order to avoid being seen as an extension to the sphere of competence of the Union, despite the fact that the principle of subsidiarity is explicitly mentioned and paragraph 2 contains a clause which affords Member States protection in matters of competence. There is no doubt that the fundamental freedoms of the Treaty are progressing and apply within the entire sphere of application of Community law, and to this extent also influence national law, as the ECJ has ruled on a number of occasions.[31]

2. The provisions laid down in Chapter VII of the Charter under the heading "General Provisions" also govern the relationship between the Charter and the ECHR. It is a known fact that the wordings of the ECHR have significantly influenced the text of the Charter. It was also a known fact that the power of the Community was not and is not immune from committing breaches of the ECHR. For example, the ECtHR declared the withholding of the right to vote in the European Parliamentary elections from British citizens resident in Gibraltar to be in breach of the Convention.[32] We cannot therefore exclude the possibility of conflict between fundamental rights under the Charter and those under the ECHR.[33] They may also affect the relationship between the two jurisdictions established to protect them. Art. II-112.3 and II-113 TEC offer solutions for the substantive conflict situations.

First of all, the rights under the Charter which correspond to those of the ECHR have the same meaning and scope as they are afforded in the Convention. However, this does not affect the possibility of more extensive protection under Union law. This "transfer clause" also transfers the case law of the ECtHR and thereby establishes a dynamic referencing procedure. Meanwhile, we have the problem of when rights do correspond. We could be confronted with the same questions as those which arise in relation to Art. 142 GG with respect to the "correspondence"

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30 *A. Zimmermann* (note 26), p. 19.

31 See references in *S. Magiera* (note 24), p. 127 fn. 32 and generally *S. Jones*, Die Bindung der Mitgliedstaaten an die Grundrechte der Europäischen Gemeinschaft, 1999.

32 Cf. *Matthews v United Kingdom*, Appl.No. 24833/94, judgment of 18 February 1999, RJD 1999 – I, p. 251 et seqq.

33 Cf. *St. Kadelbach/N. Petersen*, EuGRZ 2003, 693.

of fundamental rights under the Grundgesetz and those in the constitutions of the individual German Länder.[34]

Secondly, Art. 113 TEC states that "nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States' constitutions". This "principle of favour" and this "most favoured status clause" guarantees any existing higher standard of fundamental rights laid down in the ECHR or in Member States' constitutions. On this basis, the highest "level of protection" of fundamental rights must always apply. This could be considered to constitute a certain level of "rationalisation" of European protection of fundamental rights and to put at risk the priority status of Community law. However, in practical terms, the "added value" of a national or Convention-based standard of fundamental rights will arise extremely seldom, so that we need not fear any prejudice to Community law.[35] Therefore, the analogous incorporation into the Charter of the almost identically worded Art. 53 ECHR was in line with the well understood principle of subsidiarity.

Nevertheless, it cannot be denied that in practice, Art. II-112.3 and Art. II-113 TEC will bring about serious conflicts or competition, which will in particular truly put to the test the cooperative willingness of the jurisdictions involved, i.e. the ECJ and the constitutional courts of Member States. Since every institution sees itself as a supreme court, tensions and rivalries are bound to arise.[36]

3. If we examine the guarantees under the Charter of Fundamental Rights, we need pay less attention to the inclusion of the traditional liberal fundamental rights of freedom, equality and fair hearing, because these largely correspond to the rights under the ECHR and under the European tradition of fundamental rights. I do not intend to examine these in detail.

We need to pay greater attention to some innovations, which go beyond the German list of fundamental rights, to numerous economic and social promises, and also to the lack of a catch-all fundamental right in accordance with Art. 2.1 GG. Finally, we must examine the limitation system and the Preamble.

a) In Art. II-63.2 TEC, the Convention sought to tackle risks which progress in the fields of medicine and biology could generate. For example, the Charter prohibits reproductive cloning of human beings and eugenic practices and also making the human body and its parts a source of human gain. The provision was the subject of lively and contentious debate by the Convention.[37] This cannot be considered as a true fundamental right. "Observance" of the

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[34] Cf. on this *K. Stern*, Staatsrecht III/2, 1994, § 93 V 3.

[35] Similarly *Chr. Calliess*, in: *D. Ehlers* (note 6), § 19 para. 26; cf. to the primacy of Community Law *H. D. Jarass/S. Beligu*, NVwZ 2004, 1.

[36] Cf. *J. Limbach*, EuGRZ 2000, 417; *J. Schwarze*, Festschrift 50 Jahre Bundesverfassungsgericht, Vol. I, 2001, p. 223; *Th. Von Danwitz*, JZ 2003, 1125 (1130).

[37] Cf. *N. Bernsdorff/M. Borowsky*, Die Charta der Grundrechte der Europäischen Union, 2002, p. 272.

prohibitions which are based on the Convention of the European Council on Human Rights and Biomedicine of 4 April 1997 is of a purely objective legal nature and obliges Member States to introduce protective measures during the exercise of fundamental rights, namely that of the freedom of research referred to in Art. II-73 TEC, this being the provision in which the time-honoured "academic freedom" surprisingly appears again.

b) On the other hand, Art. II-67 TEC is a broadly worded fundamental freedom to general and special protection of private life. This is accompanied in Art. 68 TEC by a right to protection of personal data, albeit subject to a restrictive statutory reservation. Both rights together are incapable of replacing the right to free personal development. In this respect the protection of fundamental rights contains a loophole, which was not closed even when the Charter was incorporated into Part II of the TEC.

c) The chapter headed "Solidarity", which proved to be the subject to most dispute during all the Charter consultations, deserves special attention. This chapter was modelled on the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. The advocates and opponents of the fundamental social rights, which are granted under twelve articles within this chapter, "were initially so irreconcilably opposed that the entire negotiation process threatened to collapse".[38] In fact, several circumstances tipped the balance in favour of the inclusion of fundamental social rights, the first being the demand by the Cologne European Council that the Charter should afford legitimacy to EU citizens. Secondly, the failure to include fundamental social rights would have been a retrograde step from the acquis communautaire of Community law (see Art. 136 et seqq. EC-Treaty) and from the legal status according to the International Pact on Economic, Social and Cultural Rights and the European Social Charter. Thirdly, the intention was to future-proof the Charter, so that no State was to be involved in rights of freedom without social safeguards. This itself could constitute the added value of the Charter in comparison with the ECHR. "European citizens may not be given stones for bread" commented the German Convention delegate *Peter Altmaier*.

The compromise achieved between the advocates and opponents was radically influenced by the German Parliamentary delegate *Jürgen Meyer* and the French Parliamentary delegate *Guy Braibant*. This provided for a Three Pillar Model. As the first pillar, fundamental social rights were initially to be based on the Preamble or, in a separate provision, on the principle of solidarity, as a value decision additional to liberty, equality, democracy and the rule of law. The economic and social rights which would generally be undisputed within Member States, were to serve as the second pillar. As the third pillar, the fact was to be acknowledged that rights to be included should not be allowed to fall below Member States' national or international standard. In the light of this, the Preamble refers to solidarity, social progress and the European Social Charter.

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[38] See *E. H Riedel*, in: *J. Meyer* (note 28), preliminary note to Art. 27 para. 4.

Art. II-87 et seqq. lay down rights to participate and duties to protect in relation to individual and collective employment law, protection of children and young persons, family protection, health protection, social security and support, environmental and consumer protection and "access to services of general economic interest". However, some provisions may only be considered to be "Union objectives". The extensive requirements of the statutes of Member States confirm this. At all events, no clear line has been drawn to indicate when a true right is granted. *P. J. Tettinger* rightly demands more extensive "work on the structure of the dogma" in this area.[39]

d) As regards the limitation system, no special limits (for example a statutory reservation) have been laid down, in contrast to the ECHR, in which there are limits in virtually all the fundamental rights provisions (with the exception of Art. 8, 17 and 23.2), because it was believed that this would have doubled the length of the text. Instead an extremely complicated limitation provision has been included in Art. II-112 and 114 TEC, which states that all limits to the fundamental rights require legislation. This may be an act of Member States or of the Union. In the latter case, we must of course question whether the legislative acts in question will require the involvement of the European Parliament in the competence and participation procedure, so that the reservation must be understood as one of a parliamentary nature. This wording does not match Art. 249 EC-Treaty, although it perhaps anticipates Art. I-33 et seqq. TEC. The commentating literature considers both sides of the question of the quality of the legislative act.[40] The limitation system is occasionally even described as the "Achilles heel" of fundamental rights protection.[41]

Even Art. II-112.3 TEC, which we have already discussed, and which subjects to the ECHR limitation system those Charter rights guaranteed under the ECHR, does not contribute anything towards legal clarity.

Over and above the statutory reservation, sentences 1 and 2 of Art. II-112 TEC require, in the manner of a substantive limit of limitation, respect of the "essence" of the rights and freedoms and of the principle of proportionality (welcomed by Art. 19.2 GG and the case law of the German Federal Constitutional Court) and of a similar wording which arises both in the case law of the ECJ[42] and in that of the ECtHR,[43] the latter of which states as follows: the restriction must be "necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others". This statement is certainly more

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39 *P. J. Tettinger*, NJW 2001, 1014 et seq.; see also *A. von Bogdandy*, JZ 2001, 157.

40 Cf. on pros and cons: *Chr. Calliess* (note 35), § 19 para. 15.

41 See *M. Kenntner*, ZRP 2000, 423 et seq.

42 Cf. for example Case 292/97 ECJ *Karlsson* [2000] ECR I – 2737.

43 Cf. the legitimate objectives stated in the second paragraph of the ECHR and the case law emanating from this.

precise that the phrase "protection of legitimate interests"[44] which was originally employed, but it will equally give rise to serious problems of interpretation.

Art. II-114 TEC contains a misuse clause, the content of which corresponds to that of Art. 17 ECHR. It is contextually related to Art. 7 TEU, and also seeks to be seen as a warning against moves towards totalitarianism. There was no major debate regarding its content, since even Art. 17 ECHR has been applied relatively seldom.[45]

4. We cannot conclude our cursory consideration of the fundamental Charter rights without examining the Preamble to the Charter. Since such preambles are common in Community treaties, other international human rights documents and the constitutions of Member States, there was never any doubt regarding the need for a Preamble in the Charter. Despite this, the Convention hotly debated the question of whether the Charter Preamble should be excluded if the fundamental rights were to be incorporated into a constitutional treaty.[46] Meanwhile, the TEC in its submitted form contains Preambles both before Part I and also before Part II which deals with fundamental rights. In the event that the TEC enters into force with the Charter of Fundamental Rights incorporated into it, this situation cannot remain. It is absurd to have two preambles in a single legislative act, so that they should be fused into one. They already have common features in some respects. They also both have their weaknesses, especially their excessive lengths[47].

a) It is true that both Preambles do emphasise traditional political, legal, intellectual, moral and ethical values on which a European union of states is based. They are evidence of the community of values which Europe represents.[48] The first and second paragraphs of the Preamble to the Charter are more felicitous than those of the Preamble to the Constitution itself. Paragraph 3 of the Charter Preamble is also more attractive, although it would have be sufficient to simply make a general reference to the fundamental freedoms in the Treaty. In contrast, paragraphs 4 and 5 of the Constitution Preamble are more convincing than the wordy paragraphs 4 to 7 of the Charter Preamble. Paragraph 6 of the Constitution Preamble constitutes self-adulation on the part of the members of the Convention, with the reference to the establishment of the Constitution "on behalf of the citizens" of Europe being somewhat arrogant, since they neither commissioned nor legitimised the Convention. Paragraph 8, which was added by the Constitution Convention at the last minute to the Preamble of the Charter of Fundamental Rights, and which stated that the Charter will be interpreted by the courts "with due

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44 Cf. *St. Barriga*, Die Entstehung der Charta der Grundrechte der Europäischen Union, 2003, p. 159.

45 Cf. *J. Meyer-Ladewig*, EMRK-Handkommentar, 2003, remarks on Art. 17.

46 Cf. *N. Bernsdorff/M. Borowsky* (note 37), p. 245.

47 On the ‚identity buildingsbricks' of the preamble, cf. *A. von Bogdandy*, JZ 2004, 53 (54 et seqq.).

48 On this Teoria del Diritto dello Stato – Rivista Europea di Cultura e Scienza Giuridica 2003 N. 1-2 with contributions of *O. Höffe, H. Schambeck and others*.

regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter" was deleted by the IGC. No court would allow itself to be influenced by such a "softener".[49]

b) Both Preambles avoid the invocatio Dei. The Charter Preamble refers in German to the "geistig-religiöse und sittliche Erbe" [scil. – literally: "spiritually, religious and moral heritage"] of Europe, whilst the Constitution Preamble refers to the "cultural, religious and humanist inheritance". In contrast, the French version uses the word "spirituel" in place of "geistig-religiös", and the other language versions copy this approach. The translation into German using the term "geistig-religiös" is somewhat bold.[50] However it is worded, this reference is far too sparse for a Europe whose roots are unquestionably Christian, albeit alongside other factors of influence. Let us recall the defensive slaughter committed by the knights originally known as Europaeenses in the Battle of Tours/Poitiers in 732 against the Arabs.

As we know, the "religious question" was the hottest point of dispute within the Preamble of the Charter[51] and of the Constitutional Treaty alike. The French in particular were vehemently opposed to any religious reference (apparently the French Prime Minister made an approach to the Convention Chairman Herzog), because it would not be compatible with the lay Constitution of France,[52] although the French Declaration of the Rights of Man and of the Citizen is still made " under the auspices of the Supreme Being". I cannot envisage why a reference to the responsibility of "God", such as appears in the Grundgesetz, the Swiss Bundesverfassung and other European constitutions, should amount to constitutional sacrilege and should be deemed to exclude religions other than the Christian religion. Works of Man, which include constitutions, all take place in the face of a higher authority, whatever our beliefs and indeed, whether or not we have any. Following the disasters and injustices of the past century, it is more important than ever before to make the accountability and responsibility of all political acts to be recognised before a higher power and to be established in the form of rules. Who else should this higher power be than God? Such a reference does not create a Christian religious state. Neither Germany, Switzerland, nor any other state incorporates the use of the word God in the Preamble to its Constitution.[53] As *Herbert Schambeck* correctly notes, "People have many different concepts of God, dependent upon their religious affiliation. However, this difference does not exclude the fundamental reference to a God who, according to our belief (excluding

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49 To the point *V. Epping*, JZ 2003, 821 (826).

50 Cf. on this *J. Meyer*, in: *Meyer* (note 28), preamble, para. 18, 32 et seqq.; *Bernsdorff/Borowsky* (note 37), p. 246 et seqq.; *St. Barriga* (note 44), § 69 fn. 265.

51 Cf. *C. Busse*, EuGRZ 2001, 565; *P. J. Tettinger*, NJW 2001, 1011.

52 On laicity in France, cf. *H. G. Franzke*, ZRP 2003, 357.

53 On the invocation of God in constitutions, cf. generally *P. Häberle*, Rechtsvergleichung im Kraftfeld des Verfassungsstaates, 1992, p. 213 et seqq.; *Chr. Starck*, in: *von Mangoldt/Klein/Starck*, GG I, 1999, preamble para. 36 et seq.

that of strict atheists) accompanies mankind even in a pluralist democracy.[54] At least the compromise found in the Polish constitution, which both mentions God and includes those who "derive universal values from other sources", could have been adopted. If it is correct that a Preamble is an expression of the constitutional culture of the Constitution drafters and of those whom they represent, then the invocatio Dei must not be omitted from the Constitution for Europe.

V. The incorporation of the Charter into the Constitution Treaty

All in all, the Charter of Fundamental Rights may be considered to have taken us a long way towards the goal of a European Constitution. It was accepted by a majority of 80% (410 against 93 with 27 abstentions). This does not mean that it does not need to be improved upon and touched up. I have referred to a few points, but there are others.[55] The Convention members may be rightly satisfied with their work. Their text was approved in December 2000 at the European Council meeting in Nice and was the subject of a solemn proclamation. It was signed unchanged by the Presidents of the Council, the Commission and the European Parliament. The Charter thus constitutes "a visible and credible crystallisation" of European constitutional development.[56] If it were to enter into force, this would significantly improve the protection of fundamental rights vis-à-vis the institutions of the EU.[57] But of course, the Charter is not yet legally binding. The question posed in Cologne in 1999, namely "whether, and if so how the Charter should be incorporated into the treaties",[58] remains unanswered. The Nice Council failed to answer this question, as it failed to answer to many others, but simply postponed it to a "later date".[59]

On 15 December 2001, the Laeken European Council established the European Constitution Convention, whose mission was also to deal with the fate of the Charter of Fundamental Rights during the creation of an EU Constitution. In fact the Convention incorporated the Charter into the Constitution Treaty virtually unchanged, making it Part II. In doing so it followed ideas which the Fundamental Rights Convention had already considered, namely to include the Charter in the form of a protocol to the Treaties, instead of proposing it independently alongside

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[54] *H. Schambeck*, Gott und das Verfassungsrecht, L'Osservatore Romano of 16/01/2004 (weekend edition in German).

[55] Cf. e.g. the points for revision mentioned by *St. Barriga* (note 44), p. 176 et seq.).

[56] *S. Magiera* (note 24), p. 128.

[57] Cf. *U. Everling*, EuZW 2003, 225.

[58] Cf. Conclusions by the Presidency, Annex IV EUGKZ 1999, 364.

[59] Cf. the declaration on the future of the Union adopted by the European Council, OJ 2001 C 80, 85.

the Constitution.[60] In my view, the incorporation into the Constitution Treaty is correct and logical, since fundamental rights are generally understood as an essential element of the Constitution, although that of the European Union is not that of a single state but a union of states, and at all events where it exercises sovereign powers of a legislative, executive and judicial nature in the manner of a state. Of course, the fate of the Charter of Fundamental Rights is linked to the decision on the Constitution, which remains in the lap of the gods. However, I am hopeful that we shall be able to experience the two texts as a binding legislative act in the not too distant future, as a more intensive move towards integration via constitutional law than we have experienced in the former treaties.[61]

[60] On the draft, cf. e.g. *J. Schwarze*, Europarecht 2003, 535 et seqq.; *Th. Von Danwitz*, JZ 2003, 1125 et seqq.

[61] Cf. *St. Korioth* and *A. von Bogdandy*, VVDStRL 62 (2003), p. 117 et seqq., 156 et seqq.; *I. Pernice* and *P. M. Huber*, VVDStRL 60 (2001), p. 148 et seqq., 194 et seqq.; *A. Peters*, Elemente einer Theorie der Europäischen Verfassung, 2001; *A. von Bogdandy* (ed.), Europäisches Verfassungsrecht, 2003.

Social rights and European neo-constitutionalism

Antonio Cantaro

I. Children of a lesser God

1.

In the constitutional systems of the post-war European nation states, attempts have been made, in various ways, to cast off the minority legal status of social rights and the institutional diversity to which they seemed to have been condemned by history, legal dogmatic thought, and by a sort of biblical curse, and rise up from being "children of a lesser God" to acquire the same status as all other rights, at least symbolically and in terms of constitutional rank.[1]

But what remains of the status that social rights won in the 20th century social-democratic constitutional systems, when Europe's states first became part of the European Community - and subsequently of the Union order?

As a rule, this 'worrying' question is answered with some embarrassment, and rarely directly and explicitly. In the various legal reconstructions there is an underlying understanding that something of their previous status has been lost, that the risk still exists that much more may be lost, and that something must be done to safeguard the legacy of social rights that are unanimously considered to be an essential component of what has become known as the *European social model.*

These concerns are sensible. But how reasonable is it to hope that the adoption of the Charter of Fundamental Rights of the Union (CFR) and its incorporation into the Constitutional Treaty (TEC) will open up a new phase in the process of constitutionalising social rights? Is it realistic, as some neo-constitutionalists hope, that social rights will become entrenched at the European level with a similar, and perhaps even greater, force and incisiveness than they already have in the national constitutional systems? [2]

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1 *M.A. Garcia Herrera*, I diritti sociali nella vecchia Europa, in: Quad. rass. sind., 2004, 99 et seqq.; *G. Maestro Buelga*, Il costituzionalismo democratico sociale e la Carta dei diritti fondamentali dell'Unione Europea, in: Quad. rass. sind., 2004, 115 et seqq.

2 In the Italian literature, this optimistic position is held, among others, by *Andrea Manzella, Stefano Rodotà, Augusto Barbera, Luigi Ferrajoli, Paolo Ridola*, and *Cesare Pinelli* (for bibliographic references see the notes to sections 5 et seqq.).
Not all these authors would be likely to define themselves as "neo-constitutionalists". The opinion of the writer is that "neo-constitutionalism" is the dominant, albeit latent and not always explicitly declared, approach of contemporary legal science. This is the

2.

The novel character of the Nice Charter was certainly intended to be very far-reaching. For it considered social rights, in formal and systematic terms, to possess the same status as other categories of rights: in other words, a *legal status equivalent* to that of civil and political rights.

The drafters clearly set out to reconcile social rights with constitutionalism, to put an end to the broken promises of the code of human rights and by the "constitutionalism of rights".

The symbolism used there purposely and unequivocally evokes this intention. Titles II, III, IV[3] on "freedoms", "equality" and "solidarity" patently echo the trilogy of the French Revolution,[4] almost as if to remind us that the many liberal revolutions of the 18th and 19th centuries had brought a great deal of freedom, not much equality, and no fraternity. But above all, it emphasised the epoch-making character of the enterprise being attempted at the dawn of the third millennium: the completion of the political and juridical programme of modernity.

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approach in the literature to which reference is made here when construing the Nice Charter.

As far as legal theory is concerned, the most commonly cited and authoritative reference works on "neo-constitutionalism" are by *Dworkin*, *Alexy*, *Nino*, *Zagrebelsky*, *Ferrajoli* and *Guastini*. As has already been observed, (*L. Prieto Sanchis*, Neocostituzionalismo e ponderazione giudiziali, in: Ragione pratica, 2002, m.18, 169 et seqq.), despite their wide differences, the works of these legal theoreticians share many crucial points in common which constitute the common denominator of neo-constitutionalism: a) the constitution as a general constellation of (quasi) moral values rather than a set of common and mutually consistent principles: more principles and values than rules, more weighting than subsumption; b) fundamental rights as potentially conflicting values and principles, such that in the event of conflict even though it may be possible to 'give way' on a principle in a concrete case, it nevertheless remains valid; c) the all-pervading presence of the constitution in all areas of law, and in all conflicts, even of minimal importance: everything becomes constitutional law, and statute law ceases to be the primary benchmark by which to solve cases; d) judicial omnipotence replacing the autonomy of the ordinary legislator: every judicial decision is always taken in terms of the constitution.

If this is a fair summing-up of neo-constitutionalism, is it hardly surprising that the Nice Charter was a kind of metaphor of it, because of its declared intention to constitutionalise the European legal order, and its explicit linkage of fundamental rights to values.

[3] Henceforth, every reference to the Charter of Fundamental Rights of the Union (CFR) will normally follow the titles and numbers given in the provisional consolidated version of the "Treaty Establishing a Constitution for Europe" (TEC) of 29th October (C 310/1, Official Journal of the European Union, 16 December 2004.

[4] *J. Pereira da Silva*, Alcune note sui diritti sociali nella Carta dei diritti fondamentali dell'Unione Europea, in: DPCE, 2002, 1120 et seqq.

3.

From a legal and institutional point of view, it nevertheless remains a matter of controversy and debate whether we have really reached the end of the age of the weak status of social rights.[5] In the CFR, a heightened universalistic vocation is coupled with a number of unresolved and problematic issues which, according to some constitutionalist writers, could make the levels of guarantees and protection even more controversial than in the past. The universalistic vocation itself, in some respects resembles the other side of an increasing "desocialisation" of social rights that the Nice Charter stresses, and completes it.

This position is very distant from the optimistic opinions of most neo-constitutionalist writers. But it also differs substantially from the pessimistic opinion being expressed increasingly in the literature regarding the status of social rights in the original *economic Community constitution.*

4.

There is no doubt that social rights do have a weak – indeed, an extremely weak – status in the Treaty of Rome. Yet equally there can be no doubt that the strong status attributed to them by the post-Second World War national constitutions was not "derecognised" by the Community legal system, at least until the latter half of the Eighties, when a radical change in the Community's economic constitution began to threaten national social rights. For the strong status attributed to social rights in the social-democratic constitutions remained essentially intact until the adoption of the Single European Act and the birth of the Union. Although their formal constitutionalisation, which was advocated from Maastricht onwards, has now become a reality, in substantive terms there is a risk that it may eventually turn out to be *opaque and weak constitutionalisation.*

Neo-constitutionalism holds that the *fragile nature of the legal bases* of the social Europe is the cause of the marginal nature of social policies and rights in the Community and in the Union order. Conversely, one might argue that the political *marginal position of the social Europe* is the cause of the lower legal, institutional and constitutional status of social rights and policies.

The neo-constitutionalist analysis and debate are anything but "innocent". On the contrary, they are instruments serving the wholly normative philosophy of the identity of the Union, its citizens and the "European constitution", which I have defined elsewhere as the "European ideology".[6]

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[5] *B. Bongiovanni*, Diritti dallo "statuto" difficile. Aspetti del dibattito italiano sui diritti sociali nel secondo dopoguerra, in: S&P, 2001, 75 et seqq.

[6] *A. Cantaro*, Europa sovrana, Bari, 2003.

II. Rights in Community constitutionalism: functional rights

1.

Every school of constitutional thought has its own fundamental rights. It will give certain rights a paramount value, and will imperialistically view other rights using the anthropological paradigm and with the juridical structure of its own rights.

Liberal constitutionalism axiologically gives pride of place to the right to freedom *from* the state – the freedoms of the natural man, personal freedoms, and private ownership: the rights of self-defence.

Democratic constitutionalism gives pride of place to rights to freedom *in* the state – the freedoms of "political man", the freedoms of the citizen – political participation rights.

Social constitutionalism gives pride of place to rights *through* the state, the freedoms of social Man, the freedoms of workers, and freedom from material needs – social participation rights, and rights to provide services.

Community constitutionalism (Court of Justice case law and Community Law literature) also has its – equally demanding – mindset. It has its 'own' fundamental rights and a comparable imperialist pretension to relate all other rights to the anthropological paradigm and the structure of its own rights.

From the outset, Community constitutionalism was far away from the code (or better, codes) of classical (national) fundamental rights. But it is by no means without its own image of Man – a Man who is certainly very different from the one found in modern constitutionalism, but vested with a number of equally fundamental rights.

Fundamental Community rights are those which are functionally linked to the "fundamental political decision" taken up in the Treaties by the Member States, to create both a single market without internal borders, and an open market economy with free competition. The freedoms that these rights are intended to protect, guarantee and foster are the freedoms of the *market citizen*, the *Marktburger*:[7] the *fundamental rights to free movement and competition*.[8]

The genetic *lacuna* in the Community system regarding classical fundamental rights therefore lies in the prevalence of *a functional rationale of freedoms*, far away from the idea of the fundamental rights of the individual, *uti sic*, but also from the idea of citizenship on which modern constitutional states are founded.[9]

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[7] *S. Giubboni*, La libertà di circolazione e protezione sociale dell'Unione europea, in: Dir. Lav. Rel. Ind., 1998, 111.

[8] *O. De Schutter*, La garanzia dei diritti e dei principi sociali nella 'Carta dei diritti fondamentali', in: *G. Zagrebelsky* (ed.), Diritti e Costituzione nell'Unione Europea, Bari, 2003, 201.

[9] Regarding the different concept of citizenship, see *S. Bartole*, La cittadinanza e l'identità europea, in: Quad. cost., 2000, 39 et seqq.

This is not to suggest that the Community order is inherently incapable of recognising that individuals may also claim other types of rights for themselves, which are equally fundamental from the point of view of the Community order. Indeed, it is the taking on board of a functional rationale of freedoms as a categorical imperative that makes the Community a public authority, genetically a dispenser of subjective legal situations that national orders do not (always) recognise.

The heirs of modern (liberal, democratic, social) constitutionalism, and above all the neo-constitutionalists, still find it hard to accept this epoque-making novelty. They may perhaps grant that some of the provisions of the Treaties create individual subjective situations, but they consider that these are not real fundamental rights. In this, they are mistaken.

2.

The powers vested initially in the Community and then in the Union are not likely to give rise to the sort of problems which are dominant in national constitutional systems, relating to the conflict between public authority and private freedom.[10]

For since its inception, the Community has worked with the intention of broadening the sphere of the citizens' freedoms, and of placing restrictions on states acting against them.[11] This differentiates it from states, which originally set out to limit the sphere of independence of their citizens through the powers that they claimed for themselves, in relation to war, religion, taxation, and only at a later stage, through the Declaration of Rights, to give these same citizens constitutional guarantees of wide-ranging areas of freedom.

The work of the Union/Community, with only a few exceptions (*dirigisme* in agriculture, and common customs tariffs), is more liberating (from state constraints and private monopolies) than it is restrictive of freedom. It operates in areas (the economy, environment, public services, etc) in which blatant and glaring invasions of citizens' freedoms are not necessary. Indeed, it works for the benefit of private individuals, promoting freedom of movement, competition and liberalisation.

This general liberalising purpose of Community law – denationalising the markets and creating a single, open and freely competitive market[12] – underlying "the spirit, the general scheme and the wording" of the Treaties establishing the Com-

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[10] *S. Cassese*, La costituzione europea: elogio della precarietà, in: Verso la Costituzione europea, Milan, 2003, 1 et seqq.

[11] *S. Cassese*, Is there really a "democratic deficit"?, in: Institutional reforms in the European Union, Rome, 2002, 23 et seqq.

[12] For an overall view *F. Galgano, S. Cassese, G. Tremonti, T. Treu*, Nazioni senza ricchezza, ricchezza senza nazione, Bologna, 1993.

munity[13] is interpreted by Community constitutionalism as a precept, and not as having some general purpose creating a mere pre-juridical position.[14]

3.

As long ago as 1963 the European Court of Justice (ECJ) made it clear, in a landmark case setting out its case law,[15] that when primary Community law, and subsequently secondary Community law,[16] lay specific and unconditional obligations on individuals, Member States and Community institutions (such, in other words, that there are no significant margins of discretion in enforcement) these obligations are directly applicable (effective) to relations between private individuals, becoming *subjective rights* in municipal law to be protected by the domestic courts, in all cases not expressly mentioned in the Treaty.[17]

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[13] To use the Community case law expression: see ECJ judgment of 5 February 1963, Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Beslatingen* [1963] ECR 5 et seqq.

[14] *E. Picozza*, Il diritto pubblico dell'economia nell'integrazione europea, Rome, 1996, 82.

[15] See the *Van Gend & Loos* judgement with which the Court first established the doctrine of the direct effect – the direct applicability – of Community law.

[16] As a consequence of the doctrine of the supremacy of Community law over municipal law, as unequivocally expressed in the ECJ case law in its judgment of 6/1964, *Costa v. Enel* [1964] ECR 1135 et seqq.

[17] The normal assumption in international law is that international juridical obligations are generally obligations to achieve a result, and are addressed only to states, such that even when an international commitment is designed to vest or confer rights, individuals may not invoke international law before the domestic courts, unless a constitutional or ordinary domestic law, to which international law is indifferent, provides a similar judicial remedy (see *M. Cartabia, J.H.H. Weiler*, L'Italia in Europa, Bologna, 2000, 241).
However, as *F. Sorrentino*, Profili costituzionali dell'integrazione europea, Torino, 1996, 21, has noted, this transformation of obligations on states in two rights of individuals, and the resultant shift of the source of these rights from the Community to the domestic area, did not create serious theoretical problems when the Court first began laying down its case law, all substantial differences in relations between the Member States. Indeed, from the former point of view, the case law of the Court, while emphasising the originality of the Community order, ruled in the best international law tradition dating back to the permanent Court of Justice which, in the 1920s, had already elaborated the notion of the direct applicability of international law provisions. Furthermore, the transformation of international law provisions into domestic law provisions is in line with the most broadly accepted series of adaptation.
The "revolutionary" scope of direct effect emerges when the Court no longer limits direct applicability (effectiveness) to the clauses of the Treaty which have been transposed into domestic law using the normal constitutional instruments (the *Van Gend & Loos* case, cit.) but extends it by applying the supremacy doctrine (the *Costa v. Enel* case, loc. cit) to all secondary Community legislation: every Community norm prevails

Underlying the whole of the Court's reasoning is the fact that the clause of the Treaty is structurally directed at states, creating rights and duties in their mutual relations. It emphasises the position of the individual by recognising that individuals are vested with subjective rights which, while having their source in Community law, operate in the domestic orders of the Member States.[18]

Having established the existence of Community subjective legal situations[19] – and in particular subjective rights – the question that arises is whether they can be elevated to the rank of fundamental rights, *fundamental Community rights.*

Constitutional law literature generally mistrusts the ability of the original Community system (the one which subsequently became the first pillar of the Union) to protect fundamental rights as such.[20] At most, it admits that some provisions of the Treaty of Rome enshrine rights that are "similar"[21] to fundamental rights.[22]

The undisputed importance to the Community order of these subjective legal situations is no justification, according to some constitutional law writers, for labelling any of them fundamental rights[23] even though they are Community

over domestic law in the event of conflict, whether the latter has been enacted before or after the Community law provision.

18 See *F. Sorrentino*, Profili costituzionali, cit., 21. See also *P. Mengozzi*, Il contributo dell'Unione Europea, cit., 71.

19 For a brief, but very effective overview of the wide variety of protected interests and subjective legal situations produced by Community law governing the single market, see. *S. Cassese*, La nuova costituzione economica, Bari, 1995, in particular 47-54. A thorough examination of the different Community subjective legal situations in the light of ECJ case law can also be found in *L. Azzena*, L'integrazione attraverso i diritti, Torino, 1998, 192 et seqq.

20 For example, see *G. Ferrara*, I diritti politici nell'ordinamento europeo, in: *A.I.C.* (ed.), Annuario 1999. La costituzione europea, Padova, 2000, 473 et seqq., which categorically rejects the idea that the Community order can recognise political rights because "only territorial legal systems, which have a general or vocational inclination for territoriality, are filled with political elements, which may be expressed in all kind of forms through the recognition and the practice of rights (...)" (p. 502). *M. Luciani*, Diritti sociali e integrazione europea, in: Annuario 1999, cit., 507 et seqq., on the other hand, points out that the Community order does not make provision for "the protection of social rights as individual subjective situations" (p. 517) and in more general terms, fosters a highly singular concept of fundamental rights "which are constantly interpreted as a reflection or a consequence of substantial positions with an economical meaning" (p. 526).

21 *B. Beutler, V. Biagiotti, J.H.H. Weiler* (eds.), L'Unione Europea, Bologna, 1998, 304.

22 The prohibition on discrimination in the EC-Treaty (arts. 7, 36, 40, 67, 68, 85 and 86); free movement of workers (arts. 48 et seqq.); the right to establishment (arts. 52 et seqq.); freedom to provide services (arts. 59 et seqq.); free movement of capital (arts. 67 et seqq.); free movement of payments (Art. 106); professional and business confidentiality (Art. 214); right of association (Art. 118); equal pay for equal work between men and women (Art. 119). (*L. Azzena*, L'integrazione attraverso i diritti, cit., 222).

23 Blaming the Court of Justice (see below) for labelling as fundamental rights not universal human rights, but the Community's 'most important' rights as evidenced, *inter alia*,

rights.[24] Conversely, the ECJ has specifically described as "fundamental Community rights" the freedoms of movement within the common market (the so-called four fundamental freedoms, and in particular the freedom of movement of goods and workers), free competition, the free exercise of trade, free access to work[25] and the right to private property.[26]

4.

From the structural point of view, fundamental Community rights share similarities with the economic freedoms in the conventional sense, in many respects resembling rights of defence.

First and foremost, rights of defence against the State, and against the Member States, which are required to refrain from distorting the dynamics of the free and competitive market (with obligations, prohibitions, requirements to remove obstacles, barriers, restrictions, and forms of discrimination), but also rights of defence against private individuals and powers. For example, the principle of non-discrimination, as a clause opening up access to areas of freedom, not only operates with respect to States but also, in terms of competition law, directly with respect to relations between companies, giving horizontal effectiveness to freedom to compete.[27]

The structural analogy with the economic freedoms of classical liberal systems does not, however, imply a full analogy with the freedoms of protected persons and interests. The economic freedoms that lie at the heart of the Community order only partially coincide with the freedoms of the *homo oeconomicus* in the 19th century liberal constitutions and codes of private law. Private ownership, the freedom to conclude contracts, and freedom of enterprise are not protected *in se* but

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from the fact that they are only vested in Community citizens. (*L. Azzena*, L'integrazione attraverso i diritti, cit., 222).

24 The notion of Community fundamental rights, even though it is not given any particular emphasis, is not entirely unknown in public law literature: see *A. Reinhard*, La tutela dei diritti fondamentali nella Costituzione tedesca e l'influenza del diritto comunitario. Alcune considerazioni generali, in: RIDPC, 1992, 1157 et seqq.; *F. Sorrentino*, Profili costituzionali, cit., 28 et seqq.; *S. Mangiameli*, Integrazione europea e diritto costituzionale, in: *S. Patti* (ed.), Annuario di diritto tedesco 2000, Milan, 2001, 68 et seqq. In these papers a distinction is quite rightly drawn between fundamental Community rights and fundamental rights common to all the member countries.

25 The explicit statement of these freedoms as fundamental rights was made in the ECJ judgment of 7 February 1985, Case 240/83, *Procuratore della Repubblica/ADBHV* [1985] ECR 531 et seqq. and in the ECJ judgment of 15 October 1987, Case 222/86, *Unectef/Heylens* [1983] ECR 4097 et seqq.

26 ECJ judgement of 19 June 1980, in joined cases 41, 121 and 796/79, *Testa c. Bundesenstalt für Arbeit* [1980] ECR 1979 et seqq.

27 *P. Ridola*, Diritti di libertà e mercato nella «costituzione europea», in: Quad. cost., 2000, 21.

only in so far as they serve to help producers, consumers and workers operating in an integrated and competitive market.

In other words, fundamental Community rights are very strongly and robustly instrumental to creating a specific type of economic order (the competitive economy). Fundamental Community rights are therefore *functional rights* – rights which make no reference to the common constitutional traditions of the Member States, but are explicitly bound up with the fundamental political objectives of the customs union, the common market, and of an open and fully competitive economy.[28]

III. Fundamental Community rights and Community social policy

1.

Is the functionalist code of fundamental Community rights compatible with the existence of welfare policies and the recognition of a set of social rights?

It is widely held that the social dimension of the Treaties instituting the Community has been seriously sacrificed. Strong images and metaphors have been used to describe the way in which the *social Europe* has been marginalised and given a minor legal/institutional status in comparison with the *economic Europe*. Some have spoken of the "social coldness" of the Community order. And this "social coldness" is put down to a constituent flaw in the Community order: the free trade philosophy of the original Treaties and the scant attention paid to the labour dimension.[29]

To avoid falling into apodictic judgements here, a distinction has to be drawn between Community social policies and rights on the one hand, and the social policies and rights of the Member States, on the other. It should also be borne in mind that the Community's, the Union's, and the Member States' social policies have developed in different phases.

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[28] *P. Ridola*, Diritti di libertà, cit., 21.

[29] "The Treaties celebrate from the beginning the wedding between Mr. *market* and Mrs. *labour*, a couple bound by the traditional subordination pact of her 'social' ambitions and his 'economical' career. The reduced social dimension of the EEC was, after all, 'coherent' with the theoretical model and the political compromise on which the Treaty of Rome was founded: the EC wasn't (and still isn't) founded on labour, differently from the Italian Republic": *G. Arrigo*, Il diritto del lavoro dell'Unione europea, Milan, 1998, 109.

2.

The founding fathers of the European Community never foresaw that, one day, the common policies would include social policy. Even from the topographical point of view, the few social provisions that were set out in the Treaty of Rome were scattered without any systematic arrangement: Arts. 48-51 EC-Treaty (the free movement of workers), Art. 100 EC-Treaty (harmonisation of national law); Arts. 117-122 EC-Treaty (social provisions in the true sense of the term); Art. 128 (vocational training), and Arts. 193-198 EC-Treaty (the Economic and Social Committee).

The little space devoted to social policies and a lack of any reference whatsoever to social rights should not, however, be construed as a lacuna, and certainly not as a lack of appreciation of the importance of the social dimension in the construction of the economic Europe.

Although the Treaty of Rome seems to have paid little attention to this issue, it did concern itself with giving the Community *exclusive competences* over the free movement of workers, social security for migrant workers, and equal pay for men and women workers – in other words, over the matters that are *instrumental or functional* to the purpose of building up the single market and removing inequalities likely to affect the conditions for competition.

We therefore have to look beyond the quantitative and external data. A careful examination of the social provisions in the Treaty establishing the Community (and the apparently 'abstentionist' policy followed by the Community with regard to the welfare state and social rights, see section 4 below) demonstrates to us another truth: it reveals an economic and social philosophy that is far more organic and deliberate than is commonly assumed.

3.

The stated purpose of the social provisions set out in the Treaty of Rome was, first and foremost, to institute *a common labour market.*

This was the purpose lying behind the provisions guaranteeing and fostering the principle of *the free movement of workers*, which is an essential condition for unifying the national markets. It is no coincidence that the free movement of producers within the common market is considered to be the foundation of the Community. On an equal footing with the free movement of capital and services.[30]

There are two immediate social implications from having established the economic principle of the free movement of workers in the Community order: *the abolition of all forms of discrimination* with regard to labour, wages and salaries and working conditions between the workers of the Member States, based on nationality (arts. 48-49 EC-Treaty), and *the guarantee of Social Security rights* for

[30] *G.F. Mancini*, L'incidenza del diritto comunitario sul diritto del lavoro degli stati membri, in: RDE, 1985.

migrant workers, seen as the essential condition for making the free movement of workers practicable (Art. 51 EC-Treaty).

There is no dispute over the significance of these normative choices.

The Community's social policy does not have any existential (constitutional) autonomy with respect to the fundamental Community rights to free movement. It is, however, as necessary as the fundamental Community rights for the implementation of the fundamental political decision to integrate the markets.

This necessary nature of social policy has not remained purely theoretical or rhetorical. The European Community has built up a robust social protection network around workers' freedom of movement within the common market, for the benefit of the employees (alone, initially) and (subsequently also) for their family members to move within the borders of the Community.

The promotional and integrationist approach that has constantly inspired the ECJ case law has given migrant workers total access to what is virtually a full range of social services and other services guaranteed by the host Member States to their own citizens (primarily, access to their pension systems). Indeed, it has frequently given migrant workers an advantage over national workers; at all events, it has guaranteed them full participation in the most important forms of social citizenship instituted at Member State level.[31] As the third recital of Regulation 1612/68 states, "freedom of movement constitutes a fundamental right of workers and their families", and "mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States".

We can therefore certainly say that on the basis of the fundamental right of freedom of movement by workers – an "economic principle" and the "Community's economic constitution" – a fully-fledged system of typical "labour" and "Fordist" social guarantees and rights has been developed, as a necessary and essential corollary: a system that is consistent with the paradigms of the so-called "social market economy".[32]

4.

In many respects, the same could also be said to apply to the social provisions in the strict sense of the term (arts. 117-122 EC-Treaty), particularly with regard to the principle of *equal pay for equal work* between men and women (Art. 119 EC-Treaty) and "paid holiday schemes" (Art. 120 EC-Treaty).

Affirming these principles is also evidence that the fundamental political decision to foster a competitive market (and remove differences of treatment which

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[31] *S. Giubboni*, La libertà di circolazione, cit., 83.

[32] *A. Cantaro*, Lavoro e diritti sociali nella 'costituzione europea', in: Dem. e dir., 1999, 103 et seqq., *S. Mangiameli*, Appunti sullo "Stato sociale sussidiario", in: TDS, 2002, 245 et seqq.

distort competition conditions between national economies or in specific social sectors) also has "social" implications for the Community order.

For we are obviously dealing here with provisions and principles that are designed to prevent forms of competition on the Community market based on low-paid labour – provisions and principles which the ECJ has substantially related to the more general social purposes of the Community order (Art. 117 EC-Treaty, "improve working conditions and an improved standard of living for workers"), considering equality of treatment of men and women to be a *fundamental social right* which is directly justiciable in the systems of the individual Member States, regardless of any specific domestic measures to implement it.[33]

IV. Fundamental Community rights and domestic social rights

1.

The normative and judicial "creation" of Community social rights and policies based on fundamental economic freedoms is not the same as codifying an autonomous catalogue of social rights, let alone creating a "European welfare state".[34]

Notwithstanding the institutionalisation of the virtually inclusive paradigm of Community citizenship, the recognition of a number of guarantees and social rights (even after the institution of Union citizenship at Maastricht) remains structurally subordinate to the functional rationale of the integration of the Member States' markets,[35] far from the rationale of the principle of citizenship and of the fundamental rights of the individual *uti sic*.

We are still far away – as was noted at the end of the 1990s – from the completion of that "Copernican revolution" that many were predicting, and which would have shifted the Union's centre of gravity from the Member States towards the Community citizens, and from *homo oeconomicus* to individual citizens with all their many different aspirations and needs.[36]

It is therefore hardly surprising that the absence of any autonomous reference to rights in the Treaties establishing the Community is generally considered to be a serious shortcoming – an original lacuna – in the Community order, which betrays not only the undeniable fact that the process set in motion fifty years ago was

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33 *S. Giubboni*, Diritti sociali e mercato, Bologna, 2003, 74.

34 For a recent account, see *C. Pinelli*, Diritti e politiche sociali nel progetto di Trattato Costituzionale europeo, in: RDSS, 2004.

35 *S. Giubboni*, Libertà di circolazione, cit., 84.

36 *P. Ridola*, Diritti di libertà, cit., 19.

mainly for economic purposes,[37] but also to leave European integration as a whole to be driven by a blatantly free-market public ethos, with no regard for the social dimension.

2.

The fact that Community social policy is strictly instrumental to the fundamental political decision to create a single market and a competitive economy might justify the self-evident nature of these judgements (albeit, as we have seen, only to a certain extent). They are, nevertheless, judgements that ignore the fact that the free-trade element is only one part of the *economic constitution* of the European Community. Or so it was until the mid-1980s.

But if we look more broadly at the national social systems and the balance that is being pursued between the protection which citizens continue to enjoy in the Member States and the tasks attributed to the Community order, this judgement loses some of its justification. However widespread it may be, it appears to be the result of ignoring certain crucial – historical/political and legal/institutional – elements.

It is true that the original Treaties made no reference to social rights, or even to civil and political rights; the only fundamental rights they mentioned were the economic freedoms to be used as a means of creating a single market (the free movement of goods, services, people, capital, and free competition). This seemingly general apathy to the values of the 20th century democratic/constitutional State was not a lacuna, and even less a failure to acknowledge the value and importance of fundamental rights.

The truth is that it was felt at that time – with some justification – that the need to protect the fundamental rights of the citizens against Community law would be fully met by the national constitutions of the Member States, all of which were signatories to the Rome Convention for the Protection of Human Rights and Fundamental Freedoms.[38] It seemed useful and appropriate not to enshrine an acknowledgement of these rights in the Treaties, because this would have helped to stave off the danger of a surreptitious expansion of the powers vested in the Community, as it had been the case with federalist experiences in which a *Bill of Rights* had paved the way for central government powers to expand at the expense of the individual national state units making up the federation.[39]

This applied in particular to the social rights that the post-war constitutions of the Member States recognised, to a far greater extent than had been the case in the

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[37] To create a single economic area among the CEE member countries by setting up "a common market" and harmonising the economic policies of the Member States: see *B. Beutler*, in: L'Unione Europea, cit., p. 43.

[38] *S. Giubboni*, Diritti sociali, cit., 127.

[39] *J.H.H. Weiler*, *Il* sistema comunitario europeo. Struttura giuridica e processo politico, Bologna, 1986, 139.

past, albeit with different emphases and degrees of sensitivity; and it was thought that they would not be restricted or threatened by the gradual integration of the economies of the Member States.

Integration was expected to give a powerful boost to the Community economy, which would supply the necessary resources to more adequately and extensively meet the needs of the whole Community, and consolidate social rights in all the national systems.

3.

This philosophy reigned supreme for a long time. The economic constitution of the Community order was the result of an all-out constitutional balancing of two political imperatives: the need to integrate the markets competitively, which was entrusted to the powers and economic freedoms of the Community, and the need to foster and redistribute prosperity, which was entrusted to the powers and social freedoms of the Member States.

But even though the Treaties made no reference to social rights, they were far from lacking solemn declarations on social matters. They were certainly not immediately preceptive, or 'programmatic' declarations (to use the language of the Court of Justice), but neither were they entirely rhetorical and irrelevant considering that the ECJ felt the need to emphasise their importance in order to interpret other provisions of the Treaty and secondary community law in the social sector.[40]

These general declarations clearly show that the Member States of the Community intended to pursue social goals and objectives, purposes and objectives that were economic as well as social. In other words, joining the Community by no means required them to give up developing their welfare systems and social guarantees and rights which were being extended at that time, becoming entrenched at the domestic level.

In the Preamble to the Treaty of Rome, this close linkage between the two sets of objectives emerges expressly and emphatically, as one of the constituent features of the Community ethos. For the Member States that signed the Treaty undertook to pursue the economic and social progress of their countries, the constant improvement of the living and working conditions of their peoples and their harmonious development, by reducing the differences existing between the different regions and the backwardness of the less favoured regions.

These ambitious objectives were deliberately not entrusted to a Community social policy, and certainly not to the construction of a European welfare state. The nation states were to remain the main protagonists of social policy. The Community institutions were only to be given managerial and coordination functions. And it was in this distribution of tasks between the nation states and the European

[40] Most recently, the value attributed by Community case law to the social objectives and principles enshrined in the Treaties has been viewed critically by *G. Maestro Buelga*, Il costituzionalismo democratico sociale, cit., 119.

Community – in this constitutional equilibrium – that the most certain guarantee of social rights resided.

This is why the EC-Treaty did not vest any exclusive competencies in the Community to implement the great goals of social solidarity and social justice; it did not indicate any explicit (or specific) legal bases, but merely set out general objectives which the Member States were supposed to achieve in the exercise of their "reserved" competences.[41]

The primacy of national policies over Community initiatives was clear-cut; indeed, for a long time the Community's social harmonisation work had to be left to Directives adopted unanimously, which were difficult to implement.[42] As one can clearly see from both Art. 117, which states that this harmonisation would "ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation of administrative action", and Art. 118 EC-Treaty which gives the Commission the task of "promoting close cooperation between Member States in the social field, particularly in matters relating to [...] labour law and working conditions".

In other words, Community intervention in the social sphere was subordinate to convergence between all the Member States, and stood as a constitutional guarantee of the specific forms of social protection provided by each national system.

4.

The distinct pre-eminence of national policies in social matters was certainly a sign that the Community institutions and the Community order were above all to be used as a special instrument for integrating the markets.

This original choice has been interpreted by many, then as now, as a restrictive, sacrificing ideals and social motivations to economic and mercantile motivations, which for a long period of history, which has not yet ended, were to become the identifying element of the whole of the Community edifice.[43]

The astuteness shown by the founding fathers – to aim primarily at economic integration in order to circumvent national egoisms and rivalries that were opposed to political integration – was to be paid for dearly by the postponement *sine die* of the objective of creating a political and social Europe.

But the decision to aim for (prevalently) economic integration was not so much a restrictive move, but the sign that Europe was not rising up on the basis of a new political myth *ex nihilo* but rather from an original rethinking and reversal of the

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41 *G. Arrigo*, Il diritto del lavoro, cit., 105 et seqq.

42 *L. Del Pezzo*, L'Europa sociale e l'Europa dei diritti, in: Regionalismo, federalismo, welfare State, Milan, 1997.

43 *U. Allegretti*, La costruzione europea nel nuovo ordine internazionale, in: La transizione italiana. Alternative dell'integrazione sovranazionale dagli anni settanta agli anni novanta, Rome, 1997, 77 et seqq.

meaning of the myth of the nation. Joining the European Economic Community was an essential chapter in relaunching the idea of nationhood, an emblematic testimony to a rebirth that was coming about on totally new foundations compared with the nationalistic foundations of the past: liberal and non-protectionist, through outreach rather than by closing borders.

Breaking down the barriers to the free movement of the factors of production was something that had to do with those ideals of peaceful cooperation, of growth and prosperity, and raising living standards which were proving to be essential to re-legitimise the idea of the nation in Europe. In short, it was an essential component of what might be called *economic neo-nationalism.*

5.

Seen in this way, the decision to work for economic integration was not a reductive choice, a utilitarian tribute paid to the primacy of the economy, or a retrograde step. On the contrary, it was seen as a full and hastened deployment of the universalistic values that had been blurred by the old European nation state, and that had now been taken up again as a means of re-legitimising the new democratic-social state. The takeoff of economic integration, far from sacrificing the political, ethical and social ideals that had driven the construction of European democracies, was expected to hasten a growing awareness of an identity of interests between the peoples of Europe, and their ability to live within a common European society.

It is true that this universalising mission was entrusted by the Treaty of Rome to the affirmation of the principle of an open and freely competing market economy much more than to the enlargement and standardisation of common rules and rights.[44] But it is equally true to say that, historically, neither the governments that negotiated the Rome Treaties nor the Parliaments that ratified them thought that opening up to trade and competition rules might throw into question the economic and social policy decisions that each national State would adopt within their own national borders.

The regional (community) regime of the open and freely competing economy – like the global regime of the international freedom of world trade[45] – had no intention to challenge the autonomy of the democratic-social nation states in deciding their market-correction policies. In the age of bridled capitalism it was perfectly legitimate for each country's national constitution and system to be authorised to work the social purposes and promote collective well-being. The choice of an open and freely competing market economy was not in contradiction with the confidence that European societies – and more particularly their ruling classes –

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[44] *I. Mortellaro*, Dopo Maastricht, Molfetta, 1998, 48.

[45] The need to always take account of both the global and the regional levels at which, in the wake of the Second World War, the reintegration of Europe's national economies took place has been emphasised by *F.W. Scharpf*, Governare l'Europa, Bologna, 1999, 47.

had placed, from the 1950s to the need 1980s, in their domestic public intervention capabilities to remedy market failures and monopolistic capitalism, steer economic growth, and guarantee social well-being and prosperity.

In short, the broadening of community-level trade could certainly be associated with strong public intervention measures at the national level. As someone put it, "Keynes at home, Smith abroad".[46]

At the time, not even democratic-social constitutionalism showed any excessive concern about the economy-based and free trade-oriented philosophy of the Treaties establishing the common market. There was an understanding, never explicitly stated, that social rights would continue to be a matter to be dealt with mainly at the national level, and that the protection afforded by the "social constitutions" of the Member States would never be adversely affected by the Community imperative of market integration.[47]

V. Neo-constitutionalism: social rights versus an economic Constitution?

1.

The need for the constitutionalisation of social rights at the European level has only emerged quite recently, since the adoption of the Single European Act and the adoption of the Maastricht Treaty. It only received the first major acknowledgements in legal-formal terms in the Amsterdam Treaty, and above all in the CFR proclaimed at Nice in December 2000.

The demand to constitutionalise social rights is being fuelled by a variety of causes. The main one (which to a certain extent sums up the others) is that a radical metamorphosis was taking place (and still is) since the 1980s in the Community's economic constitution and the balance between the supranational powers and the national powers that it was creating.

For the original Community economic constitution was based on the assumption, which for a long time proved to be realistic, that Community economic integration, however deep and all-pervasive, would nevertheless leave intact the areas of social sovereignty of the national systems. It would not affect the autonomous capacity of the national systems to guarantee their own citizens high levels of welfare and a wide range of social guarantees.[48]

This original constitutional balance between market demands and the competitive economy and reasons of State and (social) policy, between supranational integration and national welfare, and between Community law and social law, is now

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[46] *R. Gilpin*, Politica ed economia delle relazioni internazionali, Bologna, 1990, 453 et seqq.

[47] *A. Cantaro*, Lavoro e diritti sociali, cit., 1999, 99 et seqq.

[48] *S. Giubboni*, Diritti sociali, cit., 17 et seqq.

being questioned by a variety of legal-institutional and political-constitutional factors.

2.

Among the legal-institutional factors a decisive part is played by what has been called the infiltration of internal market law and competition law into the national systems of the Member States, and in particular the national *droit social* systems. In other words, the fact that the Commission and the ECJ are beginning to construe and 'decline' the Community principles governing the system of economic freedoms in such a radical and intransigent way that they are compromising – perhaps even frustrating – the "national law-making sovereignty" of the national state systems.

Until the mid-eighties, the aim of standardising the economies and creating a common market had mainly been left to the *ex ante harmonisation* of national policies and legislation. For over 20 years, for example, little use had been made of the Treaty provisions against non-tariff barriers to the free movement of goods (technical rules and standards, public procurement policy, and so on), whereas a great deal of room had been left to exceptions provided by the Treaty to safeguard national public interests. Similarly, competition law was interpreted very strictly as far as private enterprises were concerned, while state policies distorting competition attracted few sanctions, because they were almost always judged to be in the general economic interest.

The philosophy permeating the European Single Act (1986) marked a radical change of climate. Economic integration was now expressly entrusted to *liberalisation*, to the principle of maximising competition: in other words, to a paradigm which viewed with suspicion any national power or competence to govern trade and competition on the market.

3.

The 'fundamentalist' acceptance of the liberalisation paradigm is radically changing the relationship between national legislation and Community legislation[49] in every area, including the social field.

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[49] In particular, the introduction of the *mutual recognition* rule – according to which products which are legally admitted to circulate in the country of origin can be freely traded in other Member States – marked a major step forward in the creation of our Community order as one driven by the principle-goal of "maximising competition". The mutual recognition rule became an imperative to apply not only to the market of goods and factors of production, and also to national legislation governing production and commerce as well. If national regulations were not intended to attain a sound public interest objective – as defined by the ECJ – there was no longer any need for harmonisation, because

For the Community institutions any public rules governing labour could be potentially viewed as an obstacle to the free and unrestricted movement of goods and services in the single market, or as unjustified interference with the rules of competition. With regard to monopolies, and in every other area of market regulation, national laws containing social rights and guarantees do not have the same legal-constitutional value as the Community's economic freedoms, but they are built up and represented as an *exception* to the fundamental freedom of movement and competition, and are therefore admitted in very sharply defined cases.[50]

For the Court of Justice, safeguarding the financial equilibrium of a social security system is, as a general rule, a requirement that is worthy of protection under Community law. Nevertheless, an obstacle to the free movement of goods and the free provision of services is only lawful to the extent that it is strictly necessary to prevent a serious threat to financial equilibrium. However, an "insignificant" threat did not merit the same degree of attention.[51]

The social protection of workers can, in principle, be an imperative reason of general interest to the ECJ , to the extent of justifying restrictions on the freedom

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the products legally marketed in one Member State were automatically to be admitted into all the other Member States of the Community.

In this way, competition 'won' for itself a higher constitutional status than all the other legitimate objectives of public policies, in contrast with the principle of the constitutional equality of the value of economic freedom and the other values (rights) enshrined in the constitutional systems of the Member States. This tended to prohibit any measures to correct the market (by, for example, publicly subsidising the corporate system) while the institutions and the rules of the mixed economy in every sphere were subject to the rules of the competitive market economy, including broadcasting, telecommunications, energy supplies and air transport.

As it has been rightly observed, according to this logic no area of *public service* is exempted from the challenge of Europe's competition rules. Considering the great institutional differences between the Member States, it is always possible to maintain that the institutional arrangements discriminate against existing or potential foreign competition: just as the German Employment Recruitment Office – which used to hold the monopoly for job placement – was required to take on competition from private job centres, so the privileged position of the public radio and television broadcasting corporations and the existence of state guarantees for public bank deposits were challenged by private competitors on the grounds that they violated European competition rules. Using the same argument, private universities and schools could ask to be able to compete on an equal footing with the public education system, private medical and health-care organisations could challenge the national health services in the Scandinavian countries or in the United Kingdom, and the compulsory health insurance and compulsory public pension schemes financed out of general taxation or from compulsory insurance premiums in continental Europe could be challenged by private insurance companies (see *F. W. Scharpf*, Governare l'Europa, cit., 66).

50 *O. De Schutter*, La garanzia dei diritti, cit., 2003, 210.

51 ECJ, judgment of 28 March 1998, Case 120/95, *Decher* [1998] ECR 1831 et seqq.

to provide services. But for this restriction to be admissible it must be necessary to guarantee this social objective effectively, and using appropriate means.[52]

But perhaps the strikes called by French farmers and lorry drivers were exemplary in revealing the legal precariousness to which national social rights are exposed in the internal market. After being brought before the ECJ, this case led to the adoption of Regulation 2679/98, and unequivocally demonstrated that the principle of the free movement of goods, as interpreted or "declined" according to the Community institutions, is ultimately imposed vertically as a new community limitation on trade union action inside the national borders.[53] This limitation is made to the measure of economic freedom, and establishes *a skewed balancing* against the right to strike, which is also still formally excluded from the scope of Community competence.

4.

Equally important are the political-constitutional factors that help to weaken national social guarantees and rights.

This is obviously done obliquely and indirectly, but that does not make it any less pervasive. We are referring here, in particular, to the decision taken at Maastricht to elevate the principle of price stability to the role of a Community "*Grundnorm*".

For this principle has been taken on board with the a cogency and mandatory force that is quite unknown even to the German constitutional tradition, which has certainly influenced the fashioning of the rules of Monetary Union. The full autonomy and independence of the European Central Bank has been designed to place restraints and constraints on the budgetary policies of the Member States.

The European Central Bank has thus become the only genuinely sovereign political decision-making authority in the Union. It is not comparable with an authentic form of political economic governance[54] or with a network of social and institutional relations that are only broadly comparable with relations in which the national central banks were immersed, and mainly and even more than the others, the *Bundesbank* itself.[55]

Binding economic policy to the prescriptions laid down in the Treaties, and in particular those set out in the "Stability Pact", the new Community (*recte* Union) Economic Constitution gave juridical form, with the maximum rigour, to a princi-

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[52] ECJ, judgment of 23 November, Joined Cases 369/96 and 376/96, *Arblade* [1999] ECR 8498 et seqq.

[53] *S. Giubboni*, Diritti sociali, cit., 2003, 87 et seqq.

[54] *J.P. Fitoussi*, Il dittatore benevolo, Bologna, 2002.

[55] *S. Giubboni*, Diritti sociali, cit., 2003, 96.

ple of permanent welfare state austerity.[56] With the creation of the Economic and Monetary Union and the stringent macroeconomic conditions that it imposes, state sovereignty over social matters has become a kind of semi-sovereignty, an opportunity and an instrument to adjust each country's competitiveness (an alternative to the forfeited sovereignty over the currency and exchange rates), rather than as an instrument to preserve the specific features of each country's welfare system and the system of social values constitutionally safeguarded by the national constitutions.

5.

In the mind of its advocates, the *constitutionalisation of social rights* at Union level is seen as a kind of antidote to these far-reaching changes to the original 'European economic constitution' – a limitation and barrier against the increasing temptations on the part of the Member States to reduce the level of social protection for macroeconomic reasons and, by reducing safeguards, yield to the blandishments of competitive deregulation in the undeclared hope of attracting resources and investment.

The intentions driving European neo-constitutionalism are certainly ambitious: to restore to the Union system all the *fundamental values* of modern constitutionalism of rights; to structurally break that rule of supremacy of market and competition values forming part of Community constitutionalism, and impose a compatibility rule which is compliant with the autonomy of the values protected by fundamental social rights.

According to the principle of indivisibility and complementarity of fundamental rights, European constitutionalism views the recognition of social rights as a means of achieving the general purpose of achieving the necessary entrenchment of values as one of the dimensions of the Community edifice and the allied affirmation of a clear basis for the social and democratic legitimation of European public power.

It is to be hoped that progress in bringing social rights into the sphere of 'true rights' will generate similar, and if possible more advanced, developments than what old European constitutionalism achieved for the nation states. Indeed, the watchword is explicitly to open up a new age of European constitutionalism.

As *Weiler* said recently, Europe is proud of its tradition of social solidarity which has found its political and juridical expression in the Welfare State, which all governments, whatever their political orientation, have embraced for years as a commitment in terms of ideals and policies: total healthcare coverage, free education for all from kindergarten to higher education, generous help for the less fortunate, and above all support for the unemployed, have all been the distinctive

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[56] *P. Pierson, S. Leibfried*, Semisovereign Welfare States: Social Policy in a Multitiered Europe, in: *S. Leibfried, P. Pierson* (eds.), European Social Policy Between Fragmentation and Integration, Washington, 1995.

features of this commitment. It is not just a matter of a policy choice. Like the rejection of the death penalty, this commitment has become a source of Europe's identity, and also pride, especially when compared with the United States of America.[57]

European neo-constitutionalism, which in reality *Weiler* views problematically and critically, considers it natural to enshrine this commitment and give it visibility in the text of what it is hoped will become the European constitution. Buttressing the social policies of the Community and the Union by strong legal and institutional guarantees, and elevating to the rank of a 'fundamental political decision' the pursuit of social rights, and in more general terms, the so-called European social model.

VI. Social rights in the Nice Charter

1. The constitutionalisation of the European social model

a)

With the proclamation of the Charter of Fundamental Rights of the Union the aims of European neo-constitutionalism seem to have been fully achieved. The social dimension now occupies a front-line position, primarily from a symbolic point of view.

The codification of a catalogue of fundamental rights is presented by its advocates and supporters as an act which, *ipso facto*, marks an historic and epoch-making sea change: from a merchants' Europe to a political Europe, from the Europe of a currency and capital, to a citizens' Europe.[58] In other words, from integration via the market to integration via rights.[59]

It is in acknowledging the fundamental importance of all rights and the rights of all – and in particular the banning of torture and the death penalty, and the full recognition of social rights – that Europe appears to be rediscovering its identity and its own model of civilization, claiming that its social model is also an alternative to other models such as the United States' and Asia's.[60]

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[57] *J.H.H. Weiler*, La Costituzione dell'Europa, Bologna, 2003, 625.

[58] *E. Paciotti*, La Carta: i contenuti e gli autori, in: Riscrivere i diritti in Europa, Bologna, 2001, 11.

[59] *S. Rodotà*, Tra diritti e mercato: una cittadinanza possibile, in: *G. Bonacchi* (ed.), Una Costituzione senza Stato, Bologna, 2001, 451.

[60] *C. Bronzini*, La Carta europea della solidarietà, in: Il manifesto,10 ottobre 2000; *L. Ferrajoli*, Dalla Carta dei diritti alla formazione di una sfera pubblica europea, in: Sfera pubblica e costituzione europea, Rome, 2002, 81 et seqq.

b)

The strength and the originality of this identity and this model is nevertheless hotly contested.[61] The *querelle* regarding the weakness of social Europe is anything but over.

It is the literature, and not only the legal literature, which offers radically different responses to the political and institutional significance of the social principles enshrined in the CFR and to the scope of the statutory protection which the Charter offers for the actual enjoyment of social rights.

The constitutional euro-optimists claim that we are faced with undoubted progress, not only in terms of the rank that social rights have enjoyed so far in the Community system, but also in some respects in comparison with the achievements of European constitutionalism in the latter half of the 20th century.[62]

For the constitutional euro-sceptics, on the other hand, the CFR has done nothing to raise the status of the legal and institutional minority of social rights in the Community system. On the contrary, its promulgation runs the risk of taking Europe a step backwards with regard to the level of protection provided by the constitutional systems of the Member States.[63]

c)

The dispute over social rights is primarily due to a different interpretation of the underlying philosophy of the Charter, its structure, and its inspiration.

The euro-optimists emphasise the radical importance of collective rights (the rights of minorities, the right to strike, and so on), the values and principles of a Community character such as human dignity, sustainable development, and the environment, which are still there in the Treaties as mere objectives of the Union.[64] In the CFR they note a paradigmatic shift (from rights that are functional and instrumental to the market, towards citizenship rights[65]) and a response to those who are concerned about the increasing risks of the "commercialisation" of

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61 *G. Ferrara*, Da Weimar a Maastricht. La Carta europea dei diritti, cit., 24; *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", in: RDPE, 2002, no.s 1-2, 24.

62 *A. Barbera*, La Carta europea dei diritti e la Costituzione italiana, in: Le libertà e i diritti nella prospettiva europea, Atti della giornata di studi in onore di Paolo Barile, Firenze 25 giugno 2001, Padova, 2002, 112 et seqq.; *L. Ferrajoli*, Dalla Carta dei diritti alla formazione di una sfera pubblica europea, cit., 81 et seqq.; *C. Pinelli*, Il momento della scrittura. Contributo al dibattito sulla Costituzione europea, Bologna, 2002.

63 *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., particularly 41 et seqq.; *L. Carlassarre*, Intervento, in: Le libertà e i diritti, cit., particularly 43 et seqq.; *G. Ferrara*, Intervento, in: Le libertà e i diritti, cit., specifically 156 et seqq.

64 *A. Barbera*, La Carta europea dei diritti e la Costituzione italiana, in: Le libertà e i diritti, cit., 113.

65 *A. Manzella*, Dal mercato ai diritti, in: Riscrivere i diritti in Europa, cit., 31 et seqq.

rights.[66] They see the exclusion from the market of such goods as the human body (article II-63), education (article II-74), and employment services (article II-89)[67] as the tangible sign of the will to keep an area that is intrinsically "not to be decided" beyond the reach of "marketisation".[68]

On the other hand, the eurosceptics emphasise the extremely vague and generic nature of the social and collective objectives. Social rights still continue, very largely, to be structured in terms of objectives that are extremely difficult to translate into terms of "obligations to achieve a result" (the purposes and obligations to do something) for the public institutions and in individuals' justiciable subjective legal situations.[69] Most of the social rights and objectives are seen, in this literature, as having been suspended, held in a state of abeyance, as programmatic proposals that do not have the power of true guiding principles or binding criteria for directing social legislation.[70]

For the euro-optimists, the axiological[71] compromise struck between mercantile values and social values ultimately comes down in favour of the latter. For the eurosceptics, on the other hand, it continues to come down in favour of the former, exactly as it does in the Treaties, in secondary Community law, and in the case law of the Court of Justice.

d)

The idea that surfaced at the Brussels Convention to incorporate the Charter of Fundamental Rights into the Constitutional Treaty was greeted by many, at least initially, as a clear demonstration of the will to make even more incisive the decision solemnly proclaimed at Nice to proceed towards integration through rights, and hence to give the European model a constitutional status. This was by no means a foregone conclusion at the outset, considering the opposition from the conservative members and the lack of cohesion among the progressive members (everyone is aware of the diffidence of the British representatives towards the social provisions of the Treaties). There is no doubt that, judging from the general provisions (the principle parts) in the first few articles of the TEC, the social aspects of European integration are, at least formally, further strengthened. In other

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66 *D. Grimm*, Autonomia e libertà - Riflessioni sulla tutela dei diritti fondamentali e la "commercializzazione", in: Nomos, 2001, 9 et seqq.

67 *S. Rodotà*, La Carta come atto politico e documento giuridico, in: Riscrivere i diritti, cit., 86; *A. Barbera*, La Carta europea dei diritti e la Costituzione italiana, in: Le libertà e i diritti, cit., 113.

68 *P. Ridola*, La Carta dei diritti fondamentali dell'Unione europea e lo sviluppo storico del costituzionalismo europeo, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 21.

69 *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 29 et seqq.

70 *D. Grimm*, Diritti sociali fondamentali per l'Europa, in: Sfera pubblica e costituzione europea, cit., 10.

71 *A. Manzella*, Intervento, in: La libertà e i diritti nella prospettiva europea, cit., 166.

words, there has been a significant rebalancing between social objectives and economic objectives.[72]

It is the case that the list of principled provisions takes into accounts the broader set of values set out in the CFR.[73] In addition to the values already enshrined in the current Treaties (freedom, democracy, the rule of law) the rank of founding values has now been acquired by equality and human dignity, which constitute, jointly with the former ones, the common values of the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (article I-2). The Union is also required to pursue a demanding list of objectives, which only partially reflect those enshrined in the Amsterdam Treaty and which, taken as a whole, seem to indicate a prevalence of ethical and social objectives over economic and financial ones.[74]

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[72] *G. Bronzini*, L'Europa politica dopo la Convenzione: tra continuità e rottura, in: Europa, Costituzione e movimenti sociali, Rome, 2003.

[73] *C. Pinelli*, Il Preambolo, i valori, gli obiettivi, in: *F. Bassanini - G. Tiberi* (eds.), Una Costituzione per l'Europa, Bologna, 2003.

[74] As Art. I-3 TEC states "The Union's aim is to promote peace, its values and the well-being of its peoples."
"The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted."
"The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."
"It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."
"It shall promote economic, social and territorial cohesion, and solidarity among Member States."
"It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."
"In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."
"The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution."
Part I also includes social policy "for the aspects defined in Part III" among the areas of shared competence (article I-14), and states that "the Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies (article I-15), and "take initiatives to ensure coordination of Member States' social policies". Part II of the Treaty incorporates the Charter of Fundamental Rights of the Union which, as already stated, includes all the social rights and the classical sense of the term.

Despite this progress, there is still a part of the literature on social Europe which continues to consider the social objectives set out in the principle part of the Treaty to be mere sources of inspiration for the work of Europe's public authorities. Little more, in other words, than a list of fine sentiments, but bound to remain empty rhetoric without the backing of solid policies and feasible decision-making processes, but without that normative and binding character that the social provisions had acquired in the labour-inspired and social democratic constitutions of the 20th century.

The feeling that the European social model[75] is a "virtual reality" was, for some time, fuelled by the long diatribe regarding the legal status of the CFR,[76] and much more recently by the incorporation into the TEC of a number of provisions that seem to give rise, once again, to the whole dispute about the programmatic and preceptive nature of social rights.[77]

2. Equivalence with the other fundamental rights

a)

We shall shortly be examining the reservations expressed in part of the constitutionalist literature regarding the social scope of the Nice Charter and the nature of the social rights and principles enshrined in the TEC.

First of all, however, we have to look at the systematic location of the social rights within the overall economy of the text adopted at Nice, and their specific morphology. What needs to be examined in particular detail is the legal and formal equivalence between social rights and other fundamental rights. This was a novelty that has been welcomed virtually by all observers.

b)

The first, albeit not the most important, aspect equating them is the comprehensive list of fundamental social rights set out in the Charter, even though some civil

Lastly, the three Sections of Chapter III in Part III Section 1 deal with "Employment", "Social policy" and "Economic, social and territorial cohesion", taking up and appropriately adapting the corresponding provisions of the current Treaty on European Union.

75 See in this connection *A. Cantaro*, L'Europa sociale e la costituzione "virtuale" dell'Unione, in: Quad. rass. sind., 2004, 23 et seqq.

76 This is well known, and a great deal has been written about it. The reader is referred to the critical reconstruction in *U. De Siervo*, I diritti fondamentali europei e i diritti costituzionali italiani (a proposito della "Carta dei diritti fondamentali"), in: *G. Zagrebelsky* (ed.), Diritti e costituzione, cit., 258 et seqq.

77 See section VII.3 below.

society organisations have been critical of the failure of the CFR to mention the right to employment, a home and a fair wage.[78]

The social rights that have been codified are mainly governed by Title IV on solidarity, second only in length, with its 12 articles, to the Title on Freedoms.[79] But there are other equally fundamental social rights in the Titles on Freedoms[80] and Equality.[81]

There has certainly been a considerable expansion of social rights compared with the earlier Community instruments (for example, the Charter of Social Rights adopted by the Strasbourg European Council in 1989) and the many directives on individual social rights and objectives. But even more important still is the fact that, firstly, these rights are vested in persons (children, the disabled, the future generations) traditionally ignored by national constitutions and, secondly, they are

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78 *O. De Schutter*, La garanzia dei diritti e dei principi sociali nella «Carta dei diritti fondamentali», in: *G. Zagrebelsky* (ed.), Diritti e Costituzione, cit., 212 et seqq.

79 This Title guarantees, in particular: a) the workers' right to information and consultation within the undertaking (Art. II-87 TEC); b) the workers' and employers' right to negotiate and conclude collective agreements and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action (Art. II-88 TEC); c) the right of access to a free placement service (Art. II-89 TEC); d) the right to protection against unjustified dismissal (Art. II- 90 TEC); e) the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Art. II-91 TEC); f) the prohibition of child labour and protection of young people at work, and protection against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education (Art. II- 92 TEC); g) the protection of the family, the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.(Art. II- 93 TEC); h) the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, and the right to social and housing assistance for those who lack sufficient resources (Art. II-94 TEC); i) the right of access to preventive health care and the right to benefit from medical treatment, and a high level of human health protection (art.II-95 TEC); l) the right of access to services of general economic interest (Art. II-96 TEC); m) the right to a high level of environmental protection and to improved quality of the environment (Art. II-97 TEC); n) a high level of consumer protection (Art. II-98 TEC).

80 Primarily, the right to education and access to vocational and continuing training, including the right to free compulsory education.

81 The right of children to such protection and care as is necessary for their well-being. (Art. II-84 TEC); the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life (Art. II-85 TEC); the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (Art. II-86 TEC).

expressly vested in workers from non-European Union countries who are authorised to work within the territory of the Member States.[82]

It is true that this wide range of rights remains extremely vague, as a generous declaration accompanied by insufficient and inadequate specification.[83] But, paradoxically, it is precisely this which, at least externally, helps to bring the social rights closer to the structure of classical fundamental rights and the freedoms whose formal acknowledgement is already a guarantee that they can be enjoyed, because their exercise depends only on determining the will of the right-holder (freedom of speech, freedom of movement, and so on) and on an obligation on the part of other (public and private) subjects of Community law to refrain from acting.[84]

c)

The second, far more important and substantial, legal and formal equivalence factor stems from the original manner in which rights are grouped together in value categories.

The CFR explicitly and deliberately refrains from drawing a distinction between civil and political, and social and economic rights – the new rights. What it does do, however, is group all these rights together around six fundamental values: dignity, freedom, equality, solidarity, citizenship and justice.

What is new in comparison with the traditional approach is not, according to the intentions of the authors of the Charter, merely a technical question of classification, but deliberately to finally place all the fundamental rights on the same plane with no ontological differences.[85] All equally fundamental, without distinction of rank, emphasising that there is no longer any hierarchical superordinate position for the first and second generation rights (civil and political rights) and the third and fourth generation rights (social rights and the new rights).[86]

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[82] *A. Barbera*, La Carta europea dei diritti e la Costituzione italiana, in: Le libertà e i diritti, cit., 114.

[83] *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 24 et seqq.

[84] *D. Grimm*, Diritti sociali fondamentali per l'Europa, in: Sfera pubblica e costituzione europea, cit., 8 ss.; *G. Zagrebelsky*, Intervento, in: La libertà e i diritti, cit., 64 et seqq.

[85] It has also been said that, "the principle of indivisibility of rights has already been proclaimed in the Vienna declaration on human rights of 1993, as to seal the end of the conflict among the different conceptions of rights which paralised the development of the international community until the end of the cold war and the end of the contrasts, also ideological, between the western and the communist factions" (*C. Pinelli*, La Carta Europea dei diritti e il processo di "costituzionalizzazione" del diritto europeo, Relazione alla Giornata italo-spagnola su Carta europea dei diritti e riflessi sulla giustizia e la giurisprudenza costituzionale: Italia e Spagna a confronto, Taormina 4 ottobre 2002, manuscript, 11).

[86] *A. Barbera, C. Fusaro*, Corso di diritto pubblico, Bologna, 2001, 128.

The principle of the indivisibility of values and rights is by no means neutral, and is perhaps the most significant novelty in the Charter.[87] Once the CFR is established it should put an end, once and for all, to the legal/institutional minority status of social rights, which are now deemed to be fully equivalent to other fundamental rights. The historical priority of liberal rights ceases to be the basis for a scale of legal protection. Freedom is no longer an absolute demand, but the value that has to be set off against other values, all of which are placed on the same plane by the Charter.

The progress made by this decision regarding all social rights is obvious. Potentially, there are no areas in social life from which the demand for solidarity and equality can be excluded. It is the explicit acknowledgement that even the traditional liberal rights entail a social dimension that deserves equal legal consideration.[88]

In strictly legal terms it has been argued that giving social rights the same status as civil and political rights implies quite clearly that social rights are justiciable. Today, thanks to the CFR, social rights also create *negative obligations* which the court can enforce without in any way affecting the distribution of competences between all the parties concerned. These negative obligations consist, at one and the same time, of an obligation not to directly infringe the right in question and, to the extent that the party seeks to avail itself of that right, an obligation to guarantee that right under conditions which respect the principle of non-discrimination.[89]

VII. Critical problems

1. The conflict between rights and standards of protection

a)

Establishing an equivalence between rights has other implications, too, which are far more problematic, and need to be addressed.

Part of the literature has drawn attention to the unprecedented consequences of establishing equivalence between rights in terms of constitutional interpretation, denouncing the psychological, even more than the conceptual, difficulty of deriving elements from the Charter to be used to resolve conflicts between rights, and

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87 *G.G. Floridia*, Nelle intenzioni dell'artista e agli occhi degli abitanti (osservazioni sulla "Dichiarazione dei diritti" di Nizza), in: DPCE, 2001, 163 et seqq.; *A. Pizzorusso*, Il patrimonio costituzionale europeo, Bologna, 2002.

88 *S. Baer*, La Carta europea dei diritti fondamentali, o dell'ambivalenza, in: Dir. pubbl., 2001, 910.

89 *O. De Schutter*, La garanzia dei diritti e dei principi sociali nella «Carta dei diritti fondamentali», in: *G. Zagrebelsky* (ed.), Diritti e Costituzione, cit., 194 et seqq.

then to find a reasoned and reasonable balance[90] between them. In order to resolve conflicts between equally fundamental rights, it has been said, the courts will inevitably proceed to carry out a free[91] balancing between them, detached from the sometimes implicit, but certainly unequivocal, ranking of different principles and different rights enshrined in liberal and democratic constitutions.

This is a controversial stance. Indeed, there are those who consider that, in some respects, the CFR has made exactly the opposite decision to the widespread practice of balancing values and the allied tendency to leave the resolution of conflicts between rights to the subjective and arbitrary preference of the courts as the expert interpreters of the law.

In this connection it has also been pointed out that even though all the rights are equally fundamental, the Charter gives paramountcy to "human dignity", as the only value that is defined as "inviolable", and by that token, "absolute". This means that all the rights that are legally protected under the heading of human dignity may not be abused in terms of their enjoyment or be set off against other rights and values that are recognised by the Charter.[92]

b)

Another indication of the balancing technique can be found in the CFR in the rule establishing the primacy of rules providing the strongest guarantee (article II-113 TEC).

This rule, stated so blandly and simply, seems to been dictated precisely to defuse any potential conflict between the various standards of protection that exist between international, European and national laws. It has been said that the Nice Charter represents an added value to the (possibly even greater) safeguards guaranteed by the constitutions of the Member States[93] and, consistently with the dominant paradigm of the *multi-level protection of fundamental rights*, does not jeopardise the forms of protection that already exist.[94]

However, there are other distinguished writers who have pointed out that even though these things are clear, in principle, they are by no means so simple in reality.

Unlike the ECHR, the CFR enshrines an autonomous legal order which exercises not only judicial power, but also legislative and executive powers. Is it con-

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[90] *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 39 et seqq.

[91] *P. Caretti*, I diritti fondamentali nell'ordinamento nazionale e nell'ordinamento comunitario: due modelli a confronto, in: Dir. pubbl., 2001, 947.

[92] *P. Grossi*, Dignità umana e libertà nella Carta dei diritti fondamentali dell'Unione, in: *M. Siclari* (ed.), Contributi allo studio della Carta dei diritti fondamentali dell' Unione europea, Torino, 2003, 45.

[93] *A. Barbera*, La Carta europea dei diritti e la Costituzione italiana, in: Le libertà e i diritti, cit., 113 et seqq.

[94] *M. Cartabia*, Art.53, in: *R. Bifulco, M. Cartabia, A. Celotto* (eds.), L'Europa dei diritti, Bologna, 2001, 360.

ceivable that the Union's institutions and organs will simultaneously take notice, in their legislative and executive work, of the constraints placed on them by the different constitutional systems of the Member States?

Is it conceivable that when enforcing one of the Union's legal instruments in a specific case simultaneously and mutually involving personal situations relating to a German, British, French, Spanish and Italian national, they will simultaneously take account of the different constitutional status of all these individuals?[95]

Is it more realistic, in reality, to suppose that the rights proclaimed in the Charter – and the standard of protection provided by it – will be the main parameter to which the Union's institutions and organs will refer in the exercise of their legislative, executive and judicial powers when they have to deal with more sensitive and tragic cases?

c)

Let us suppose, for the sake of argument, that things might go differently, that the institutions of the Union really do wish to apply the principle of the supremacy of the provisions that offer the greatest guarantee in a strictly literal sense. In short, that they want every right to enjoy the best protection available according to the different national legal systems.

They may well want this, but what can they actually do about it? *Gustavo Zagrebelsky*, an authoritative advocate of the values-based Constitution and a distinguished exponent of European neo-constitutionalism, harbours serious doubts about this. As he has said, the principle of the best protection runs the risk of remaining mute and without any prescriptive value in cases involving an interplay of potentially conflicting rights.[96] Is the protection better in systems that, in the case of abortion, recognise the woman's right to self-determination? Or conversely, is it better in constitutional systems that protect the incipient life of the future baby and (perhaps also) the expectations of the potential biological father? Is the protection better in systems which recognise the sacrosanct rights of science and business enterprise which exploit the discoveries, or conversely, is it better in systems which protect the 'natural' life of human beings and other living things?

To return to the point we are making here: is the protection better in constitutional systems, such as Italy's, which recognise work as having a privileged status, or is the protection better in systems which recognise corporate freedom?

d)

If there is no answer in all these cases in terms of referring to the best protection (in that each system resolves conflicts between rights on the basis of a world vision which gives pride of place to some rights to the detriment of others which are

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[95] *A. Pace*, Intervento, in: La libertà e i diritti, cit., 84.

[96] *G. Zagrebelsky*, Intervento, in: La libertà e i diritti, cit., 65.

privileged by other legal systems) the argument must necessarily refer to the form, the structure and the substance of the rights proclaimed in the Charter.

Now, as we have repeatedly pointed out, the CFR has created an equivalence between all the different fundamental rights. And it has created this equivalence because it expressly presupposes and prescribes that rights are, first and foremost, values, and that it is not lawful to set up abstract normative hierarchies of values.

Indeed, the Charter has radicalised and, as it were, positivised (by putting it into writing) this postulate of neo-constitutionalism. Most of the provisions of the CFR, particularly those relating to social rights (see sections 7.2-7.3 and 8 below, where this is addressed in greater detail) merely generically proclaim the existence of a right and the need to safeguard it, but seem to be totally lacking with regard to the boundaries and specific limits on each right.[97] This, according to one of the most convinced and coherent Italian advocates of the value-based Constitution, means that, since Nice, the practical configuration of subjective legal situations will depend increasingly on case law-determined applications of vague legal formulae.[98]

For this reason, recourse to the technique of setting-off or balancing rights, albeit wholly inadequate and a source of arbitrary solutions,[99] is not so much a her-

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97 *G.U. Rescigno*, La Carta dei diritti come documento, in: Contributi, cit., 11. Conversely, "if we examine modern constitutions, it is easy to acknowledge that this is the crucial and determining issue: not only the general proclaim of the protection of a right, but also the specifical provisions about who is able to impose limitations, which limits may be imposed and which acts and procedures are to be used". Similarly, *A. Pace*, Intervento, in: La libertà e i diritti, cit., 85.

98 *G. Silvestri*, Intervento in: La libertà e i diritti, cit. 138. This Italian legal writer holds that the post-Nice "sovereignty of values" has a much wider axiological basis that it had had previously, and can therefore be established both through the national courts and through the ECJ. European constitutional law has so far had a "strong pretorial imprint" (*forte impronta Pretoria*), and this is bound to increase in future. Since the legal force of the Nice Charter does not stem from "determined detailed norms" (*norme di dettaglio determinate*), but on the contrary refers to "a complex of principles, rules, case-law, political and social thoughts, and semantic potentialities as well (...). The producing strength of principles, as much as their eternal assiological surplus related to any type of execution, come from the fact that principles are a constantly renewing manifestation of a residue of civilisation, which cannot be constrained by a positive definition and poses itself every day as a normative *acquis* and an ermeneutical instrument".

99 This is the opinion, as we have seen above, of *Gustavo Zagrebelsky*. However, even though he emphasises the inconsistencies in the Charter, he is quite aware of the potential contradictions to which this critical interpretation could give rise, in terms of the new constitutionalist approach of which he is one of the most authoritative advocates in Italy today (see among his numerous writings above all, Il diritto mite, Torino, 1992). But for *Zagrebelsky* this is only an apparent contradiction. For his position is that "what it is being observed about the Charter is not different from what happens for the declaration of rights enshrined in national Constitutions. On a national scale, it seems very likely that the cultural background on which those formulas are based and from which they gain their meaning, is at least a little more clear and shared. And, moreover, there

meneutic option but is likely to become an (almost) obligatory method of interpretation. And the 'prophecy' (mentioned at the beginning of this section) that the CFR might eventually open up the way to absolutely unrestricted balancing could prove to be an extremely realistic scenario. Indeed, the catalogue of rights listed in the Charter might well be legitimately used by the Community institutions, and above all by the ECJ, as a rhetorical expedient rather than as a binding constitutional text, [100] a kind of logical tool to affirm the highest level of protection in the light of the free interpretation of what, in case law, appear subjectively and contingently to be the true values of the Union.

For if all rights are considered to be values of equal rank, if all rights are equally fundamental, and if they are couched in normative language made up of generic and vague proclamations about the need to ensure that all rights are protected, no right, from a logical point of view, is truly fundamental. If the right to employment and free enterprise, striking and closed shops are all placed on exactly the same plane, it is not possible to configure the norms which govern them as a right of superior rank, as guiding principles that are imposed on the legislator and on the courts when enforcing and interpreting them.

Seen from this point of view it is less bizarre and paradoxical than it might seem at first sight[101] to predict that the CFR might – as *Weiler* fears – provide support for a kind of "deconstitutionalisation" of rights, or at least certain rights.

The second critical issue on which we shall be focusing in the next section provides further arguments in favour of this concern.

2. The relationship between fundamental social rights and the law

a)

The supremacy of fundamental rights which, in principle, is being pursued by constitutionalising them is also threatened by the technique used by the drafters of the Charter to positivise them. This applies in particular to social rights[102] which

exist institutions of constitutional guarantee in the jurisdictional framework, which grants coherent and non-contradictory decisions, whose function is to define, in regards to other political powers, the characteristics of the rights we're discussing of, their connection with other rights and duties which necessary follow." (*G. Zagrebelsky*, Intervento, in: La libertà e i diritti, cit., 67).

[100] *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 37 et seqq.

[101] *J.H.H. Weiler*, Introduzione. Diritti umani, costituzionalismo e integrazione: iconografia e feticismo, in: *M.E. Comba* (ed.), Diritti e confini. Dalle costituzioni nazionali alla Carta di Nizza, Torino, 2002, XXII.

[102] *G. Ferrara*, Da Weimar a Maastricht. La Carta europea dei diritti, loc. cit; *D. Grimm*, Diritti sociali fondamentali per l'Europa, in: Sfera pubblica e costituzione europea, cit., 15; *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 31

are generally guaranteed in accordance with Community law and national legislation and practice.

In this case of course, the risk of "deconstitutionalisation" stems not so much, at first sight, from an excess of receptiveness to judge-made law but rather from the broad scope of the delegated powers vested in "the law" (community law, and the laws of the Member States) in defining the substance of rights. The formula that is frequently used, namely, rights that are "guaranteed according to national law which governs their exercise" may – as *Weiler* has pointed out – prove to be extremely damaging for the protection of human rights, because even though it is possible to develop case law which will separate the existence of rights from the exercise of rights, in the particular circumstances of the European Community it would be very difficult to claim that a Community provision (let alone a provision of the law of the Member State) is unconstitutional when it replicates a right already existing in one or other Member State.[103]

b)

As far as social rights in particular are concerned, it has been said that in the countries that have taken constitutionalism (in other words, the constraints that it imposes on state power) seriously, the rights which are not merely desires without any binding power, but which claim to be juridically binding acting, as a legal rule and a limitation on statutory rights, are fundamental.

It is on this point that, with the formula mentioned above, the CFR seems to have taken a step backwards, introducing the idea – typical of the Liberal State – that the essence of rights does not supersede the law, and that the guarantees that are provided may not exceed what is already guaranteed by law.[104]

This contradicts the specific claim inherent in the idea of social rights as they have developed during the 20th century. In other words, the idea that there exists a constitutional obligation on society – albeit subject to available resources – not so much to abstain from undue interference but rather to play an active part in achieving certain results in terms of social equality, incomes distribution and opportunities in life.

It is true that the existence of this constitutional obligation has never been seen as a specific guarantee of what is promised in the law. It is also true that the proclamation set out, for example, in the Italian Constitution that all citizens have a right to work does not imply that everybody must have a job. And it is also true that the legal value of social rights does not even imply that government intervention between the precept enshrined in the law and its concrete implementation, must be predetermined exhaustively in the rights themselves (such as refraining from acting, in the case of the rights to freedom). And yet in the national constitutions, the existence of fundamental social rights means that the legislator is not

[103] *J.H.H. Weiler*, Introduzione. Diritti umani, costituzionalismo, cit., XXIII.

[104] *D. Grimm*, Diritti sociali fondamentali per l'Europa, in: Sfera pubblica e costituzione europea, cit., 15;

free to decide whether or not to keep the promises made in those rights. The legislator has to do something, and that something has to be adequate and sufficient.[105]

c)

This primacy of social rights cannot, in general terms, be traced back to the Nice Charter. The fact of recognising and respecting them in accordance with Community law and national legislation and practice leaves the definition of the substance of those rights to the legislator (and subsequently to the judiciary). Notwithstanding the fact that is unlawful to completely abrogate them, the function of the fundamental social right to act as a criterion to guide the legislator is removed altogether, leaving the legislator with the maximum discretion.

It has been said, with a degree of understatement, that all of this represents a major backward step from the fundamental laws that impose directives and limitations on the legislator. And it is true that there does exist a real risk, from this point of view, that the constitutional character of social rights may be sacrificed.[106]

At all events, the fact remains that the social principles and objectives enshrined in the CFR – and in the Union order in general – are very rarely translated into subjective legal situations[107] and in "obligations to achieve a result" on the part of the public institutions. This is true even if one examines the general limitations in articles II-112 and II-114[108] to find an indirect indication that the fundamental rights the citizens of the Union have the nature of *higher law*[109] or at least the sign that there exists some ideal standard below which it is not possible to go.[110]

The excessive margin of discretion that these limitations leave the legislators and the courts,[111] particularly in respect of social rights, eventually sheds doubt on one of the main features of modern fundamental rights. Or rather, it challenges the principle of the supremacy of (constitutionally guaranteed) fundamental rights over the law.

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[105] *ivi*, pp. 11 et seqq.

[106] *D. Grimm*, Il significato della stesura di un catalogo europeo dei diritti fondamentali nell'ottica della critica dell'ipotesi di una Costituzione europea, in: *G. Zagrebelsky* (ed.), Diritti e Costituzione nell'Unione Europea, cit., 11 et seqq.

[107] *P. Ridola*, Le libertà e il mercato nella "costituzione europea", in: Quad. cost., 2000, 19 et seqq.

[108] The limitations must *a*) be provided for by law, *b*) respect the the principle of proportionality and the essence of rights and freedoms, *c*) be made only if necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others, and *d*) be interpreted narrowly.

[109] *G. Silvestri*, Intervento, in: La libertà e i diritti, cit., 133.

[110] *S. Mangiameli*, La Carta dei diritti fondamentali dell'Unione europea, in: Nuovi studi politici, 2002, 96.

[111] *P. Caretti*, I diritti fondamentali nell'ordinamento nazionale e nell'ordinamento comunitario: due modelli a confronto, cit., 947; *G. Azzariti*, La Carta dei diritti fondamentali dell'Unione europea nel "processo costituente europeo", cit., 35.

3. The distinction between justiciable social rights and programmatic rights

a)

The historic achievement by European social rights of a 'preceptive' character is also seriously challenged by this excessively broad discretion attributed to the legislator and to the courts. It has a sort of boomerang effect.

The CFR in the version approved at Nice seemed to put an end to the argument once and for all, at least from the legal-formal and legal-systematic point of view. The indivisibility and universality of rights that was so emphatically stated in that Charter seemed, to the majority of observers, to be incompatible with the old idea that some rights – social rights – corresponded to principles that were freely made available by the legislator (programmatic rights). Above all, the CFR drew no distinction between principles and rights, "except very discreetly".[112] In article 51(1) it simply says that the institutions of the Union and the Member States shall "therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers", and even more indirectly still in the notes prepared by the Convention *Praesidium* which drafted the Charter, commenting on some of the provisions regarding social rights (for example, it speaks of "principles" in the note to article 36 on social security and protection).

b)

The fact is that the deliberations of the Convention reopened the whole issue.[113] In the Group II working paper of October 2002, the distinction between "rights" and "principles" was emphatically underlined, linked to the statement that principles differ from subjective rights (in that they may call for implementation through legislative or executive acts, particularly in the field of social rights) both according to ECJ case law and in the experience of the Member States' own constitutional systems.[114]

The objections to this attempt to resuscitate the purely programmatic nature of social rights was, firstly, that the word 'principle' in Community case law did not stand in opposition to 'subjective right' as it was intended to indicate here, and secondly, not even in the most recent experience of the Member States has the distinction between rights and principles maintained a similar opposition between these terms.[115] At all events, as someone has said, once they have been constitutionally enshrined, fundamental "social principles" must necessarily be respected and observed *at all times and under all circumstances* when being construed by a

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[112] To use the words of *O. De Schutter*, La garanzia dei diritti, cit., 193.

[113] *C. Pinelli, F. Barazzoni*, La Carta dei diritti, la cittadinanza e la vita dell'Unione, in: *F. Bassanini, G. Tiberi* (eds.), Una Costituzione per l'Europa, cit., 39.

[114] *The European Convention - The Secretariat*, Brussels, 4 October 2002, Working Group II, Working document 23.

[115] *C. Pinelli, F. Barazzoni*, La Carta dei diritti, cit., 39.

court before which they have been invoked.[116] Otherwise, an unwarranted equivalence would be created between the question of "the *ability to raise them in the course of a court case*", and the quite different and additional question of "*direct effect*".[117]

c)

Regardless of the technical implications, this diatribe has now become highly politicised. The most ardent advocates (the representatives of the British government) of the distinction between (programmatic) "social principles" and (preceptive) "social rights" achieved a number of significant successes at the Convention. First and foremost, they managed to have incorporated into the *Preamble* to the CFR the provision that "the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter".

The incorporation of this provision was considered by most commentators as "amazing" and "paradoxical", because it seems to authorise "constitutional provisions" to be interpreted in the light of a technical text (drafted by officials) which the two Conventions have never been asked to approve.[118]

Obviously this has been judged to be "reckless" by the advocates of "case law creativity".[119] It has been said, somewhat more elegantly, that it will probably prove to be ineffective in the end "because it neglects the development the case law of the national courts, and even more so the case law of the European courts which have increasingly based their identity on a rejection of passive deference to the legislator".[120]

The attempt to dictate rules for the interpretation of normative texts on the courts may certainly be deemed "bizarre",[121] as the mark of a frightened and culturally backward legislator.[122] But the political and institutional message that it sends out leaves no doubt whatsoever: weaken the significance of fundamental social rights and drive them, almost in their entirety, to the purgatory of purely programmatic principles.

This is the direction taken when partially rewriting the so-called "horizontal clauses" of the CFR, and in particular the incorporation into article 52 (which

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[116] *S. Giubboni*, Diritti e politiche sociali nella "crisi europea", in: Quad. rass. sind., 2004, 5.

[117] *O. De Schutter*, La garanzia dei diritti, cit., 193, who said that it is perfectly possible for a guarantee not to have a direct effect for its beneficiary, but nevertheless be usefully raised within the framework of a court case relevant to it.

[118] *F. Petrangeli*, Le prospettive dei diritti fondamentali, in: *E. Paciotti* (ed.), La Costituzione europea. Luci e ombre, Rome, 2003, 117.

[119] *G. Bronzini*, Il "modello sociale europeo", in: *E. Paciotti* (ed.), La Costituzione europea, cit., 98.

[120] *C. Pinelli, F. Barazzoni*, La Carta dei diritti, cit., 40.

[121] *J. Ziller*, La nuova Costituzione europea, Bologna, 2003.

[122] *C. Pinelli, F. Barazzoni*, La Carta dei diritti, cit., 40.

subsequently became article II-112 TEC) of the words: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

This "rewriting" of the CFR also attracted bitter criticism where it alludes to the possibility of "constitutionalising" the programmatic nature of social rights, and when it suggests that the interpreters and implement as of the Charter should not raise the question of its applicability before courts of law.

At all events, the whole issue is very instructive, for at least two reasons which are only apparently in contradiction with one another.

The first is that there is an obvious attempt to "deconstitutionalise" European social rights that some legal writers had feared would happen (although for other reasons, see sections 7 and 8 above).

The second is that the response of the "neo-constitutionalists" ends up, paradoxically – but not excessively so – fuelling and legitimising this very outcome. For where does the irritated retort of those who say that it will at all events the ECJ and the Community courts that ultimately decide where immediately justiciable social rights end and social principles begin[123] ultimately get us?

VIII. The "desocialisation" of social rights

1.

The prospect of a further expansion of the discretionary power of judges in defining the substance of rights (and their guarantees) stems from other sources and reasoning that are no less important than those referred to above.

The overall philosophy running throughout the CFR regarding the identity of rights-holders also contributes to this expansion of case law. The meaning and the normative scope of the provisions setting out the rights are widely influenced by the general cultural background against which these provisions are to operate,[124] and in particular the social and institutional status of the parties making legal claims against the community and the legal system.

2.

Who is the Charter addressing, and in whose name? Who does the Charter intend to 'mobilise'? To whom is the effectiveness of the Charter entrusted?

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[123] *S. Giubboni*, Diritti e politiche sociali nella "crisi europea", cit., 59.

[124] *G. Zagrebelsky*, Intervento, in: La libertà e i diritti nella prospettiva europea, cit., 67.

The statutory formulae say laconically that the authors and the beneficiaries are the peoples of Europe and the citizens of the Union, and sometimes simply speak of people and individuals *tout court*.[125] The universalistic and Enlightenment ethos underlying the principle of provisions introduces us to the 'truth' of the Charter, but still fails to tell us the whole truth. A much closer analysis is needed of the key passages.

3.

Joseph Weiler maintains that what the European citizen needs is power, not rights. Inflation of rights is a "deception", a "fraud", because we are led to consider the "the individual merely as a consumer, instead of as a citizen or as a person".[126]

This polemic against the very widespread rhetoric about rights is probably rather exaggerated, to the point of being a caricature. Yet it does help us to understand one of the features of the CFR, as well. For there is no doubt that the persons privileged by the CFR are not the collective entities and institutions, the communities and the social groupings which, in one capacity or another, have led to the "struggle for rights" in the modern constitutions[127] and the beneficiaries of provisions that have fostered or promoted their role, powers, and competences.[128]

Whereas modern and contemporary constitutionalism finds the basis of rights and the privileged beneficiaries of those rights in collective entities and magnitudes – the nation, the people, citizens and their representatives, workers and their labour organisations, people as members of associations, family and religious communities – the Charter generally refers to "people without a particular social status": individuals, consumers, or users, and sometimes to ethically and rhetorically strong subjectivities (the human person, the future generations, children, etc) but socially neutral, politically non-conflictual, without roots and without particular allegiances.

It has been said that this is a rich and significant universe of values, sensitive to the new demands for freedom and to the unprecedented fault-lines that are emerg-

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[125] *G.G. Floridia*, Nelle intenzioni dell'artista e agli occhi degli abitanti, cit., 163; *A. Bourlot, V.E. Parsi*, Il "racconto" della cittadinanza europea nella Carta dei diritti fondamentali, in: *V.E. Parsi* (ed.), Cittadinanza e identità costituzionale europea, Bologna, 2001, 105 et seqq..; *A. Spadaro*, La carta europea dei diritti fra identità e diversità e fra tradizione e secolarizzazione, in: *P. Costanzo* (ed.), La carta europea dei diritti, cit., 28 et seqq.

[126] "Che cosa si vende a questo consumatore? Diritti. Non sei soddisfatto? Acquista più diritti" (*J.H.H. Weiler* (interview), I rischi dell'integrazione: deficit politico e fine della diversità, in: *A. Loretoni* (ed.), Interviste sull'Europa. Integrazione e identità nella globalizzazione, Rome, 2001, 66.

[127] *P. Costa*, La cittadinanza fra Stati nazionali e ordine giuridico europeo: una comparazione diacronica, in: *G. Bonacchi* (ed.), Una Costituzione senza Stato, cit., 318.

[128] *E. Rossi*, Tutela individuale e tutela collettiva dei diritti fondamentali europei, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 170 et seqq.

ing in "post-modern modernisation". But there is no doubt that it is far distant from those post-war European constitutions which, even when run through by natural law considerations, always interpret "human dignity" in terms of the people's real living conditions and their "social bonds" within the context in which the personality develops.[129]

4.

In this 'desocialisation' of rights, not even social rights are spared, despite the fact that their vocation has (or ought to have) a powerfully collective, communitarian basis and substance, linked precisely to different forms of social belonging.

This 'desocialisation' of social rights, like equating them with other fundamental rights, naturally has two sides to it.

One is the "progressive" face of universalistic citizenship. This is the ownership of social rights emancipated from every reference to the economic status of the migrant worker, the producer, the consumer, that has hitherto formed the legal basis in the Community system for eligibility in the Member States to welfare entitlement.[130]

Then there is the much more controversial and problematic face of individualistic citizenship, of a "juridicalisation" of rights and their safeguards, pushed to extremes; the idea that the effectiveness of rights (and in particular of social rights) can only be left "to a judge or to a procedure",[131] without all that apparatus of principles of solidarity and the network of institutional powers able to claim them and ensure that they are applied.

5.

Recognition of the principle of solidarity, the function of social groupings and in particular of the trade union organisations (and the recognition of the "right to work" vested in every citizen of the Union, see below in section 9) cannot belie the "desocialising" philosophy of the Charter.

From the legal point of view, solidarity is set out as one of the values around which various rights enshrined in the CFR gravitate. But the concept is expressed in very reductive terms.[132] For the solemn enunciation is not followed by adequate provisions of principle, or of detail, to shore up the rights enshrined there.

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[129] *P. Ridola*, La Carta dei diritti fondamentali dell'Unione europea e lo sviluppo del costituzionalismo europeo, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 21.

[130] *S. Giubboni*, Libertà di circolazione, cit., 81 et seqq.

[131] *M. Luciani*, Riflessioni minime sulla Carta europea dei diritti fondamentali, in: DPCE, 2001, 172 et seqq.

[132] *E. Rossi*, Tutela individuale e tutela collettiva dei diritti fondamentali europei, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 185 et seqq.

The most obvious uncertainties, which were also raised at the Convention itself, in relation to the role that policies can play when applying the rights governed by the Charter, and even more so for resolving the tension between the social policies of the Member States and the social policies of the Union in subsidiary synergism.[133]

But no less significant are the silences regarding the specific duties required by the Union to create tangible and real European solidarity. But solidarity without the requirement of a duty is 'disarmed' solidarity: according to the classical principle, which is far less frequently borne in mind today, rights never stand alone, and even in the most individualistic framework limitations, positive duties and responsibilities are inherently linked to them.[134]

When one right comes into collision with another right (for example the freedom of the entrepreneur and the rights of the workers, or the right of the workers to strike and the writer of users to be able to use the public service) to remain silent about duties leaves the rights largely undefined, capable 'only' of fighting among themselves.[135]

For situations in conflict can only be resolved within a system of balances made possible by legal institutions and principles, with objective rights prior to subjective rights, in which rights are necessarily associated with duties, an association which is the *condicio sine qua non* for rights to coexist.[136]

The CFR is totally silent on this point, armed with fine sounding sentiments only in the Preamble – l the only place where it feels the need to emphasise the fact that "enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations".

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[133] "On this field, the Charter leaves room for two possible interpretations of that tension. According to the first solution, the CFR could represent the beginning of the constitutionalisation, at the European level, of the pretenses and expectations for the fulfilment of elementary social needs, already present in the legal systems of the Member States, and now completely acknowledged as 'functions' of the Union; the stress should be put on the mainly propulsive function of the Charter, as a basis for a "policy of rights" of the EU. According to the second interpretative solution, in the rights recognised in the Charter we'll be able to identify only plain clauses of protection from the acts of the EU which would reduce the protection standard which they are already granted in the Member States. In this perspective, social rights of the Charter (related to right of access to placement services, Art. 29 CFR; protection in the event of unjustified dismissal, Art. 30 CFR; social security, social assistance and health care, artt. 34 and 35 CFR) seem capable of operating as a limit to any probable development of European social policies which could invest, for instance, national labour or social security law; the principles of the Charter will play an essential defensive role, as a means of safeguarding the aims of Member States' social policies" (*P. Ridola*, La Carta dei diritti fondamentali dell'Unione europea e lo sviluppo storico del costituzionalismo europeo, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 22 et seqq.

[134] *U. Allegretti*, Diritti e Stato nella mondializzazione, Torino, 2002, 127 et seqq.

[135] *G. Zagrebelsky*, Intervento, in: La libertà e i diritti , cit., 66.

[136] *Ibid.*

6.

The assessment of the function and role that social groupings, particularly the trade unions, occupy in the overall economy of the Charter, is more complex.

It is not without significance that the CFR begins with "the list of rights and solidarity with collective rights rather than individual social rights, recognising the central role played by the exercise of the former to safeguard the latter".[137]

And yet the Charter refers to a number of significant collective rights by recognising in general "the right of everyone to form and to join trade unions for the protection of his or her interests" (Art. II-72 TEC), when it gives workers "or their representatives" guaranteed information and consultation in good time (Art. II-87 TEC); when it recognises that workers and employers, or their "respective organisations", have "the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action" (Art. II-88 TEC).

However, the inclusion of these albeit important provisions cannot be interpreted, as has been proposed, as the symptom of a favour done by the CFR to the trade unions.[138] Trade unions, like all other social formations (political parties, the family, linguistic minorities, religious confessions and denominations) are not favoured and fostered as such. They are not considered just because of some positive assessment of their role in economic and social life, but rather as collective projections of rights that are conceived as purely individual rights.[139]

IX. Work: de Tocqueville beyond the Union

1.

The distance from the of the 20th century social-democratic constitutions is even more evident with reference to work.

The absence of a "right to employment", which is the most famous of all the fundamental social rights,[140] and the presence of a "right to engage in work" (and the "freedom to seek employment") (Art. II-75 TEC) among the provisions under the title dedicated to freedoms, is by no means a coincidence.[141]

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[137] *J. Luther*, Riscrivere i diritti e rileggere le carte, intervention at the Congress in Turin on: Un percorso costituente per l'Europa? La Carta dei diritti, 1-2 December 2000 (typescript).

[138] *E. Rossi*, Tutela individuale e tutela collettiva dei diritti fondamentali europei, in: *P. Costanzo* (ed.), La Carta europea dei diritti, cit., 181 et seqq.

[139] *R. Bifulco, M. Cartaria, A. Celotto*, Introduzione, in L'Europa dei diritti, cit., 15.

[140] *D. Grimm*, Diritti sociali fondamentali per l'Europa, in: Sfera pubblica e costituzione europea, cit., 13.

[141] *G. Ferrara*, Da Weimar a Maastricht. La Carta europea dei diritti, loc.cit.

These are an "absence" and a "presence" which codify an increasingly emerging, and as it were, distinctive school of thought in Community case law and in the Union system.[142]

The "right to employment" is absent, but not only because it is considered a political objective (European Commission, 559, of 13.09.2000) which, at most, falls within the sphere of competence of national policies,[143] but above all because it is considered to be one of those social demands which is only recognised as being lawful in so far as they are compatible with the principle of the market economy sanctioned by the "European economic constitution".[144]

Conversely, the "right to engage in work" is present, because this is the Community's translation in the Charter of a) the objective of employability,[145] b) the promotion of a skilled, competent, flexible labour force, and labour markets that are able to respond to changes in the economy, c) the affirmation (not of subjective rights, but) of economic policies that can guarantee the form of protection for those who are seeking, or are trying to keep, a job, an equal start, but not an equal finish.[146]

2.

The Amsterdam Treaty is emblematic from this point of view. It is the most attentive to the "social" dimension, as can be seen from the fact that it contains the first constitutional recognition of social rights and a new demanding title dedicated to employment.[147]

And yet even the Amsterdam Treaty itself deliberately and consciously refrained from giving Europe's citizens the political and legal right to require Europe's governments to be constitutionally committed to promoting conditions to make the right to work effective for everybody (article 4 of the Italian Constitution). The objectives of the Union do not include the objective of promoting an economic and social policy to maximise employment, and to guarantee everyone the possibility of engaging in an occupation to permit them to live a "dignified" existence.

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142 *G. Demuro*, Art.15, in: *R. Bifulco, M. Cartaria, A. Celotto* (eds.), L'Europa dei diritti, cit., 125 et seqq.

143 *G. Arrigo*, La nuova Carta europea dei diritti fondamentali, in: Lav. inf., 2000, 13.

144 *G. Amato*, Intervento, in: La libertà e i diritti, cit., 161.

145 *S. Sciarra*, Parole vecchie e nuove: diritto del lavoro e occupazione, in: Scritti in onore di Gino Giugni, vol II, Bari, 1999, 1151 et seqq.

146 *M. D'Antona*, Il diritto al lavoro nella Costituzione e nell'ordinamento comunitario, in: *M. D'Antona* (ed.), Opere, Milan, 2000, 272 et seqq.

147 *A. Cantaro*, Lavoro e diritti sociali, cit., 97 et seqq.

3.

There is therefore no "right to work" in the Union order, either in the legal sense of a right which creates a preceptive and justiciable situation, which is common in all the constitutional systems of the Member States, or in a political sense of a fundamental constitutional value from which a programme, a commitment, a constitutional directive stems which is binding on the government authorities in relation to employment.

In the Community order, employment is not a subjective condition which is qualified by the value of work, in the sense of independence or belonging to the life of the community which every citizen relates to the opportunity (the "duty") "according to their possibilities and individual choice, to carry out an activity or function which contributes to the material or spiritual progress of society" (article 4(2) of the Italian Constitution).

In the Community system, employment is something to be striven for in itself, without giving it any anthropological or social significance, but it ceases to be that as soon as there emerges the "suspicion" that pursuing it is likely to enter into conflict with the "value of all values": the "competitiveness" of businesses and of the economy – and, as the Treaty puts it – a "highly competitive" economy, at that.

From this point of view, the literal wording leaves no room for doubt. It is embarrassed even by the use of the rather non-committal notion of "full employment", preferring the more innocuous and woolly formula of promoting "a high level of employment".

4.

Combating 'socialist' demands for the right to work, nineteenth century liberals and conservatives actually granted more than that, to a certain extent.[148] At all events they expressed the hope that the State would "assist workers in times of unemployment". Even de Tocqueville, a bitter enemy of the "right to work", would maintain that although there was nothing that could force the State to take the place of private provisions for the future, the economy, or individual honesty, it was nevertheless legitimate to impose a broader, and more sacred, duty on the State than had been the case in the past.[149]

The order and the policies of the European Community and the European Union are still in their infancy from this point of view, and still very far away from the values and deep-seated culture of European society. It is not so much a problem of finding adequate wording for the "democratic clause", the "social clause" or the "citizenship clause". In order to feel that we are citizens participating in a

[148] *L. Ferry*, I diritti dell'uomo, in: *F. Furet* (ed.), L'eredità della rivoluzione francese, Bari, 1989, 287 et seqq.

[149] *A. de Tocqueville*, Scritti politici, Torino, 1969, 281 et seqq.

community, "ready to take care of the city", people have to feel that the city itself is ready to take care of the fundamental needs of its citizens.[150]

X. Neo-constitutionalism and the "market society"

1.

Over the past few years, impassioned praise has certainly been lavished on the virtue of the so-called European social model, and a sincere 'struggle' has been waged to constitutionalise social rights.

It is not the courage of social rhetoric which is lacking in neo-constitutionalism. One of its authoritative advocates has even gone so far as to envisage "fundamentality" as a structural feature of social rights, giving them equivalence to "all the subjective rights belonging vested in every human being as beings endowed with the status of persons, or of citizens, or of persons capable of acting".[151]

But neither the rhetoric about the social Europe, nor the innovative theoretical constructions of neo-constitutionalism have so far been framed in terms of normative provisions with an evocative capacity that is even remotely comparable with that possessed by 20th century labour-inspired or social-democratic constitutions. And even when one does find generously worded provisions in this regard, it is the overall cultural and institutional environment to which they apply that takes charge of emptying them of effectiveness and mandatory force.

2.

Indeed, there is an increasingly more widespread feeling that the multiplication of rights might, paradoxically, end up by actually weakening the cause of rights, and their effective protection.[152]

Very careful thought should therefore be given to the concerns of those who have denounced the predominance, in the contemporary debate on rights, of the "engineering" component over the symbolic and communicative component. As the historian *Pietro Costa* has pointed out, it is not only proving difficult to find a clear-cut legal positioning for the CFR in the hierarchy of sources, but above all "to find for it an important position in today's legal thinking"[153]

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[150] *A. Barbera*, Le basi filosofiche del costituzionalismo, Bologna, 1997, 34.

[151] *L. Ferrajoli*, in: *Ermanno Vitale* (ed.), Diritti fondamentali. Un dibattito teorico, Bari, 2001, 5.

[152] In this regard see the comments by *L. Favoreu*, I garanti dei diritti fondamentali europei, in: *G. Zagrebelsky* (ed.), Diritti e costituzione, cit., 254.

[153] *P. Costa*, La cittadinanza fra Stati nazionali e ordine giuridico europeo, in: *G. Bonacchi* (ed.), Una Costituzione senza Stato, cit., 320.

This applies, *a fortiori*, to social rights. Invoking and demanding them can never be credible so long as there is no explicit understanding of the reasons that, in recent decades, have undermined their fascination and capacity to mobilise people in the collective mindset.

After the Second World War, the establishment and expansion of social rights were fuelled by *the myth of the mixed economy and the welfare state.* This economic/social myth was challenged and ultimately replaced in the European juridical and institutional mindset by the unassailable principle of *"an open market economy with free competition"*.

This principle, as stated earlier in section 5, has itself become an authentic "myth" in its own right. It is no longer just another rule among so many others, to facilitate the creation of the common market, but a beacon and a *norma agenda* of the Community and the Union systems, as highlighted from the constant and repeated references to it in all the Treaties and now in the TEC.

It is a founding myth in the dominant legal mindset, which sees it as a "systemic decision", a decision which makes it necessary to revise the national Constitutions which, like Italy's, are still formally anchored to the other "systemic decision" in favour of the mixed economy (article 41).[154]

It is a founding myth, but it is above all part of the collective consciousness and mindset which has now introduced the idea (the imperative) that the community (the citizens) have a *right* to have all their demands met, not by a service provided by the public authorities (a social right), but by a competitive "market",[155] because it is through the market that it is possible not only to increase general economic well-being but also to more satisfactorily cater for the people's needs.

3.

This turns health care and educational needs into rights to receive a wide range of offerings from health service or cultural centres, competing against one another, in order to make it possible for the citizen to have real "freedom of choice". The "need" for welfare services (general assistance to receive essential services) has become a right of access to markets, which make it possible for individuals to choose what they require from a range of different service providers.

This is a triumph, not so much of neo-liberalism and policies to privatise social rights and public services, but much more of the very essence of *the market society:* in other words, of the mindset that sees social life as a market area, even when no trading is actually taking place.

It has been said that the question of schooling is extremely emblematic in this regard. It is here that the market society is operating, not because widespread privatisation is taking place, but because in social terms, the school is being increasingly seen as a service-based society itself which is required to prepare young

[154] *N. Irti*, L'ordine giuridico di mercato, Bari, 1988.

[155] *A. Carullo*, Lezioni di diritto pubblico dell'economia, Padova, 1999, p. 169.

people to live an active life. Education is being increasingly identified in the guise of a service-provider. This being so, it matters little whether education is legally in public or private hands. This mindset is all the stronger with regard to proprietorship, because the school can be imagined as a market, without necessarily being a market for which a charge is made.[156]

4.

This – typically American (United States) – mindset also finds its advocates in Europe, a long time ago. All of them urge Europe to see itself not as a different model from that of the United States, but as a relic of the past which will not go away, an earlier stage in Europe's history, characterised by a system of superseded guarantees and social protection, which is evidently inconsistent with the demands of the new modernity.[157]

It is a mindset that has encroached on a substantial part of European society. In order to be able to combat it effectively, a mindset "counter-revolution" needs to be staged to give back to Europe the sense of its own originality and modernity. What is needed now is a disenchanted reading of the recent past, and a renewed determination to give the demands for justice and solidarity, equality and democratic participation a new relevance for today, based on real people and social groups and entities, giving up the Enlightenment-inspired and natural law-based demand of European neo-constitutionalism for rights vested in some abstract and disembodied *homo juridicus*, and unaware, not to say nonexistent, "hard-working citizens".[158]

Only in this way can the social Europe gain back the centre stage. Only in this way can the most important social rights – beginning with the most famous of all, namely, the right to work – be elevated to the status of systemic principles, similar in constitutional power to the fundamental decision that is still enshrined in the Treaties to create "an open market economy with free competition".[159]

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156 *Z. Laidi*, La società di mercato, in: La rivista del manifesto, n. 9, 2000, 225.

157 *F. Cassano*, Un altro Occidente. Riflessioni sull'Europa, in: Dem. e dir., 2003, 27.

158 *G. Bronzini*, L'Europa politica dopo la Convenzione: tra continuità e rottura, in: Europa, Costituzione e movimenti sociali, Rome, 2003, 131.

159 "In order to pose itself in an original way in the changing world, Europe must acquire security, gaining back the feeling of its originality. This European identity should be made of, in the first place, of equality and social protection for every human being, as an essential feature – and not temporary or accidental – of modern democracy. A human right defence which does not comprehend health care, right of access to placement services and a minimum degree of security does not correspond to the European modern model. The original characteristic of Europe lies in the fact that social protecion is extended to everyone, not at the expense of freedom; Europe has been able to balance freedom and social protection, avoiding that one would prevail on the other. In other words, Europe has dealt well with the tension among equality and freedom, the two poles of western tradition, keeping the distance from any radical approach. Obviously

we don't have to go back to the past, but it's a matter of building new kinds of balances. The very same notion of equality was enriched with aspects which cannot be brought back to the classical parameters of the golden age of the *welfare State*. Many of the necessary goods for the quality of progress have a complex structure, and they require for their production new thoughts on development, besides leaving the process to itself, in order to follow its course and collect bonus for social uses" (*F. Cassano*, Un altro Occidente, cit., 30).

The Common Law System in a constitutionalised European Union – An analysis in the light of the principle of Equality

Margot Horspool

The European Constitution which was approved in June 2004 in Thessaloniki poses a different set of problems and calls for a different analysis in the United Kingdom in respect of certain issues than in other Member States of the European Union. Does the United Kingdom want a European Constitution? Is it true that the particular situation in the United Kingdom would make it difficult to ensure general acceptance? The following essay examines some of the elements which are peculiar to developments in the United Kingdom, and, in particular, with reference to English law. Some of these elements may, rightly or wrongly, be regarded as creating difficulties in accepting the terms of the European Constitution. Others, on the other hand, could, in fact, constitute a positive contribution to a more general acceptance of the Constitution's terms.

I. The political perspective

The position of the United Kingdom in the European Union is a peculiar one. There is no doubt that it constitutes an important force within the Union, its contribution in terms of trade, law, financial expertise, and in many other fields, is such that without it the Union would be very much the poorer. However, the island position of the country predisposes it to look in two directions, and to look across the Atlantic as frequently as it looks towards Continental Europe. In some periods of history the balance between the two directions has more than once been severely upset. At the present time, the political situation, with the difficulties arising from the war in Iraq still far from resolved, has led to the balance tilting again in the direction of the United States more than that of Europe, with assertions of Britain wishing to be "at the heart of Europe" being taken far from seriously by other Member States.

At the time of writing, this does not bode well for the chances of a positive outcome of the referendum on the European Constitution which has been announced by the British Prime Minister. Arguments advanced from the time of UK accession to the European Communities in 1973 in favour of cooperation for the sake of the avoidance of war, the need for the liberalisation of trade, and self-sufficiency in terms of agricultural production, are no longer regarded as persuasive and the need for a global approach exceeding the boundaries of the European Union is felt to be more urgent. The Constitution is seen, rightly or wrongly, as consolidating a "straightjacket" of outmoded social and economic practices, and, although weak in

terms of foreign and defence policy, trying to enforce a role for the Union in foreign policy and defence for which, for the time being at least, it is ill-suited.

II. The historical perspective

The United Kingdom is the only country in the now 25 member State European Union which does not have a written Constitution. Most of the Member States have a Constitution which consists of a single document. Sweden has a collection of constitutional documents rather than a single Constitution, but they are all written texts. It is not, strictly speaking, correct, to say that the United Kingdom does not have a written Constitution. The UK Constitution does contain a number of written texts which are generally regarded as constitutional documents. Scholars generally agree that the Constitution includes from earlier days the Magna Carta, 1215, the Bill of Rights of 1689, the Acts of Union, 1707 Scotland, 1801 Ireland, the Act of Settlement settling the Succession, 1701 and banning monarchs from marrying Catholics, and the Statute of Westminster, 1931 enshrining the independent status of the dominions, such as of Canada and Australia. They also include the Act of Supremacy, 1534 which provides for the "establishment" of the Church of England as the State religion and made the King, Henry VIII, the Head of the Church of England. More recently there are the Acts on Devolution of Scotland, Wales and Northern Ireland and, lastly, the Human Rights Act, adopted in 1998, which came into force in 2000.

Views differ as to whether the European Communities Act, 1972, incorporating the Paris ECSC Treaty of 1952 and Rome Treaties of 1957 into English law, and its subsequent amendments which incorporated the Maastricht, Amsterdam and Nice Treaties, should be regarded as constitutional documents. S 2(4) of the European Communities Act, 1972, which in effect requires all legislation to have effect subject to the rules of Community law, is the basis for the acceptance of the Community doctrine of supremacy of Community law, although the Act itself is capable of being repealed.[1] The Parliament Acts 1911-49 are also generally considered to be such constitutional documents. They provide for the possibility of enacting legislation which has not been approved by the House of Lords. They are only invoked when a bill has been rejected twice by the House of Lords. So far, they have only been invoked to push through what were mostly regarded to be very important bills. Between 1911 and 2003; six Acts were passed under the Parliament Act procedure: the Government of Ireland Act 1914, the Welsh Church Act 1914, the second Parliament Act 1949, the War Crimes Act 1991, the European Parliamentary Elections Act 1999, and the Sexual Offences (Amendment) Act 2000.

At the present time, however, a Bill which would not seem to be of vital national importance, the "Anti-Hunting" Bill, which prohibits fox-hunting with dogs completely, was rejected twice by the House of Lords and the government have made

[1] See *M. Horspool*, European Union Law, 3rd ed. Butterworth 2003, Chapter 8.

use of the Parliament Act, thus ensuring that the Bill was passed in November 2004, making hunting a crime by February 2005. This would seem to many to be a constitutional abomination, as the Act has never been used up to the present for a bill which, objectively, viewed, is a comparatively trivial measure. However, it was a very controversial one with a vociferous minority of the population opposed, and it remains to be seen how the Act can effectively be enforced in the face of a determined campaign of civil disobedience. The British Prime Minister has already indicated that no enforcement measures will be taken until a number of human rights challenges in the courts have been resolved.

Uniquely, however, a large part of the UK Constitution remains unwritten. Many matters normally regulated by a written Constitution, such as the procedure on a finance bill, or a vote of no confidence, are entirely governed by custom, convention, or Standing Orders of the House (the Parliament). The main part of the unwritten Constitution consists of Constitutional Conventions. These Conventions are the most difficult parts of the British Constitution to fathom from the point of view of Civil lawyers. These are rules of conduct and procedure which are not justiciable and not incorporated in law, but which are considered to be binding. Breach of these Conventions would have a serious effect on the functioning of the Constitution and would be regarded as an attack on the essential principles of the British Constitutional order. The unwritten Conventions are derived from the common law, which is developed and interpreted in the Courts; the case law is still regarded as the main source of law which applies in the absence of statute, but of course much more statute law has come and is coming in.

The constitutional principles contained in the Conventions are generally accepted and known and include the sovereignty of Parliament, probably the most important Convention, a number of Royal Prerogatives, (e.g. appointment of ministers, the appointment of the leader of the majority party in Parliament as Prime Minister), the membership of Parliament of all ministers, Parliamentary responsibility of ministers, resignation of the government after a vote of no confidence has been passed in the House of Commons, the dissolution of Parliament at the request of the Prime Minister, the signing of international treaties, declaration of war, pardons and awards of honours) the exercise of the Royal Prerogative only on the recommendation of the minister concerned, the royal assent to all acts passed by Parliament (now partly regulated by the Royal Assent Act 1967, which regulates a simplified procedure for the acquiring of the Royal Assent). Thus it is by Convention that international treaties can be concluded by the Prime Minister without a vote being taken in Parliament.

This is also the case for a declaration of war. The Prime Minister may, therefore, decide to go to war, without having obtained the consent of Parliament. Before the declaration of war on Iraq in 2003, the Prime Minister did consult the House of Commons and would probably have accepted a negative vote in deciding not to go to war, but, constitutionally speaking, he was not bound to follow this procedure. One of the major elements which distinguishes the unwritten UK Constitution from other, written ones, is that its provisions are flexible, not "entrenched" or unchangeable and that any of the above-named documents may be repealed at any time by a simple majority in Parliament. The UK does not have

special "organic" laws of greater hierarchical importance than others which require special majorities to pass them. Thus, the present Parliament could vote to end its own sovereignty, but a subsequent Parliament would be able to reverse such a decision.

Nevertheless, the constitutional documents referred to above are considered for all practical purposes to be "entrenched". Theoretically, it is still possible for a UK Parliament to repeal the Statute of Westminster, but it is inconceivable that this would happen as it could have no effect on Canadian or Australian sovereignty. Euro-sceptics would point out here a difference with the European Communities Act, which could be repealed and would have as its consequence that the UK would have to leave the European Union, unlikely but not inconceivable.

Nevertheless it was acceptable for an English court, the highest court in the land (the House of Lords), when instructed by the European Court of Justice to set aside an Act of Parliament, to do so. This happened in the *Factortame* case,[2] although it had never happened before as it was thought that this could not be done and that there is no English court which can declare an Act of Parliament unconstitutional.

The UK Constitution, in the view of the majority of the inhabitants of the UK, has served the country well throughout the centuries. Nevertheless, it is clear that this situation is not one entirely adapted to modern times. A system of administrative law has come into existence in the United Kingdom, generally considered to have started in 1964 with the case of *Ridge v Baldwin*[3] and the need for a single written Constitutional document is considered by many to be urgent. There is a well-regarded Constitution Unit in London which successfully prepared the Human Rights Act, Devolution and the Reform proposals for the House of Lords and whose proposals are viewed with interest by the Government. The proposals for devolution and the Human Rights Act were largely incorporated in subsequent legislation and there is an ongoing debate about the need for a written Constitution adapted to modern times. In a country which has not known revolution for a very long time and where the constitutional law, therefore, has been able to develop gradually, the concept of a written, inflexible European Constitution, however, is more difficult to accept than in other Member States. That is not to say that it cannot be achieved, but the arguments raised in the explanation and defence of the proposed European Constitution have to be very persuasive. After the two negative votes in the referendums in France and the Netherlands, a referendum in the UK has been postponed 'for the time being', but in the eyes of most commentators, this may best be translated as 'sine die'. At the time of writing, it appears highly improbable that such a vote will take place.

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2 Case C-213/89, *R v Secretary of State for Transport (ex p Factortame)(No 2)* [1990] ECR I-2433, Appld sub Nom *R v Secretary of State for Transport, ex p Factortame Ltd (no 2)* [1991] 1 AC 603, HL.

3 [1964] AC 40.

III. The textual perspective

A second difficulty is the language and general tenor of the text. If one looks at the preamble alone, it is clear that this is a text which, to be sure, results from a compromise reached by the members of the Convention, but to English readers, this is a text which is practically incomprehensible and not user-friendly. Far from adapting the texts from previous preambles and simplifying them, this preamble is seen as even more derived from the French text than the previous ones. Besides, this is meant to be a Constitution, not a Treaty, where such "foreign sounding" texts were perhaps seen as more acceptable. An attempt was made in 2003 by a group of distinguished academics from a number of Member States, including Germany, Italy, Spain, Portugal, Belgium, the Netherlands, Greece, the UK, but admittedly not France, to simplify the text of the preamble of the original proposal which was rejected in Brussels in December 2003.

This proposal proposed, for example to unite the preambles of the Constitution and the Charter of Fundamental Rights of the Union and replace the paragraphs "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the people of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment"[4] by: "Desiring to found the Union upon the indivisible, universal values of human dignity, freedom, equality and solidarity, constitutional democracy and the rule of law. Determined to contribute to the preservation and to the development of these common values while respecting the diversity of cultures and traditions of the peoples and States of Europe."[5]

The proposal contained many other useful suggestions, and some of them do seem to have been heeded in the final text. For example, the Greek quotation by Thucydides which had seemed somewhat inappropriate has been removed in the revised text. The language of the revised preamble constitutes a clear improvement on the previous version, and is clearer, more concise, and introduces just one additional paragraph concerning the continuity of the Community *acquis* (something which is, however, incomprehensible to the ordinary reader who is not French, or even many who are). The words of thanks to the members of the Convention for preparing the draft also seemed somewhat inappropriate here, but this paragraph has been preserved.

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4 Cf. Preamble of the Charter of Fundamental Rights of the Union (Part II)

5 Cf the proposal: http://www.umich.edu/~iinet/euc/PDFs/2004%20Papers/Making%20It%20Our%20Own%20(1.1)%201.pdf

Furthermore, it does seem somewhat strange that there have to be two preambles in the same text. Title II of the Constitution, which contains the largely unrevised text of the Charter of Fundamental Rights proclaimed in Nice in 2000, now to become a legally binding part of the Constitution, also contains a preamble, which is similar to, but nevertheless different from the first preamble. For example: The first preamble refers to the "cultural, religious and humanist inheritance of Europe"[6], whereas the preamble to Title II speaks of its "spiritual and moral heritage"[7]. Thus, at least in the French and English texts, the word "religious" appears in the first, but not in the second, preamble. In the second preamble "spiritual and moral" is conveyed by "*geistig-religiös*" in German. As far as I am aware, this is the only text where this appears. Even the Dutch text, which perhaps could be thought to be the closest to the German, speaks of "*geestelijke en morele erfgoed*" and does not contain the word "religious". It would appear, therefore, that the decision to render the texts in this way was a political, rather than a linguistic one.

The same difficulty, which is a prominent one in countries such as Poland, Germany and Italy, occurs in the preamble to the Constitution itself. There is a reference to religion, thus going further than the preamble to the Charter and presumably an indication that the more pro-religious views did prevail here, but there is no reference to Christianity, which clearly constituted a step too far for most Member States. However, this has led to considerable debate in countries with particularly strong religious traditions, whereas, on the other hand, France took the position that such reference would be out of place for a country with a strict secular tradition enshrined in its own Constitution.[8] This debate has been, and is, largely absent in the United Kingdom. Perhaps this is due to the different and earlier development of racial equality laws, and, perhaps, therefore, an earlier tolerance of other religions, to which I refer below.

All this goes perhaps some way towards explaining why the attitude towards any written Constitution is quite different in the UK compared to that in other countries. The concept is an alien one, just as the spirit, shape and form of the EU legal system is one which is much more easily understood by Continental lawyers as it was, of course, originally conceived as a system for six member States which were governed by the Civil law system. However, to carry on the parallel, just as Community law has found a much more ready acceptance on the whole in the UK than one might have supposed, as demonstrated in the *Factortame* case,[9] in the same way a written Constitution might also be acceptable. As described above, the English Constitution is flexible and is, "if you like, what ever you like it to be". It may be changed at any time. Thus, it is theoretically perfectly acceptable to have a written document laying down justiciable rights which claims to have primacy over all other legislation. This will be accepted as long as it seen as right to do so.

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6 Para 1 of the Preamble.

7 Para 2 of the Preamble to Part II.

8 Article 2 of the 1958 Constitution: "France is a Republic, indivisible, *secular* (my italics), democratic and social".

9 See supra note 2.

If, however, one day it is decided that the document should no longer have this value, in theory it could be repealed. Thus, the appearance of supremacy of European Community Law in Article I-6 of the draft Constitution would still not mean absolute supremacy as in the rulings of the European Court of Justice,[10] but would be subject to the, admittedly increasingly improbable, eventuality of a future Parliament repealing the Act incorporating the Constitution, if and when adopted. This situation exists also, of course, in respect of most other Member States, which mostly would not accept total supremacy either. In the case of Germany this would presumably apply to entrenched clauses in the German Constitution and to situations referred to in, for example the "Maastricht" judgment.[11]

This is the theory. The practice is, of course, that some laws at the present simply could not be repealed, or, if they were, they would create a politically impossible situation. Much has been written in this respect concerning the Statute of Westminster. Where, therefore, the view of lawyers and politicians differ, is in accepting (or not) the political reality of an "entrenched" Treaty or Constitution, but it would be unlikely that the UK could be persuaded to accept clauses of perpetuity aiming at such entrenchment.

General principles of law are enshrined in many Constitutions in the form of a declaration or a catalogue. How does the Common law deal with a "constitutional" principle? General principles in the Common law system are developed gradually, by case law inductively developing a principle through a series of cases, and consolidated by legislation. The European Court of Justice has tended to follow the same practice, if we look for example at the development of a general principle of protection of Human Rights, now laid down in the TEU and in the Charter of Fundamental Rights, or at the development of *locus standi* of the European Parliament, confirmed in the amendments to Articles 230 and 232 of the EC-Treaty.

IV. The principle of Equality

The principle of equality is not one which is enshrined in the UK in a written constitution as a fundamental human right.[12] However, it is and always has been part of the Common law as an "implied constitutional principle" and one which is inherent in the notion of the rule of law. Over the past 40 years a considerable body of case law has grown up in English law on one of the most difficult problems of the unwritten Constitution: the extent to which the exercise of governmental power is subject to the constraints of legal principle. English case law has shown that such constraints do undoubtedly exist and that individuals have the

[10] For example in Case 16/62 *van Gend en Loos v Nederlandsche Administratie der Belastingen* [1963] ECR1 and Case 6/64 Costa v ENEL [1964] ECR 585.

[11] *Brunner v European Union Treaty* [1994] 1 CMLR 57.

[12] Much of the introduction is based on Professor Jeffrey Jowell QC, *Is Equality a Constitutional Principle?* (1994) Current Legal Problems pp. 1-18.

right to be treated fairly, legally, and, at least, not unreasonably. This is illustrated in *Derbyshire County Council v Times Newspapers*[13] where a libel action by a public authority was struck down as, in the words of the House of Lords, a democratic institution should be open to public criticism. The threat of a civil action for defamation must inevitably have an effect on free speech. In Dicey's words[14]:

> "With us, every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen"

In English law, Dicey still has an enormous influence, although the advent of the Human Rights Act 1998, which came into force in 2000, is leading to an articulation and interpretation of general principles by the domestic courts which would sometimes be inconsistent with Dicey's views.

In Dicey's view, constitutional principles exist in the form of unwritten conventions. These *enable* governments to exercise power and specify the manner of its exercise. The same principles, however, also *disable* governments from abusing their power. The main disabling principle is the Rule of Law. This requires laws to be faithfully executed by officials, giving individuals access (does this mean, equal access?) to courts, no one should be condemned unheard (right to a fair hearing?), power should not be exercised arbitrarily. The Rule of Law implies also, in particular, legal certainty and, consequently, non-retrospectivity. This principle can be specifically overridden by an Act of Parliament and courts will always interpret an Act of Parliament as being in conformity with the principle, if there is any doubt. This satisfies the concept of formal equality, but not that of substantive equality. It is solely concerned with the enforcement and application of the law and thus does not prevent laws which in themselves promote inequality.

Under the Common law substantive inequality has generally been judged under the *Wednesbury* principle. In the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [15] Lord Greene said that a decision by the administration should only be struck down if it was "so unreasonable that no reasonable decision-maker would so act". This was later refined by Lord Diplock in the *GCHQ* case[16] defining irrationality[17]as applying to

> "...a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The principle of proportionality, which resembles that of irrationality, but is applied differently, has not done away with the principle of irrationality and the two exist side by side. Proportionality was originally only applied in cases with a European dimension, but the principle has now penetrated into English law and is

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[13] (1993) AC 534.

[14] Dicey, The Law of the Constitution, 1885.

[15] [1948] 1 KB 223.

[16] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[17] Which he prefers to the term "unreasonableness".

of general application. The courts apply both principles, although proportionality is taking the upper hand. There appears to have been little problem to adapt to the different way in which proportionality is interpreted.

However, developments both in domestic statute law and in the law of the ECHR and the European Union, have led to an articulation of the principle of equality in respect of particular kinds of discrimination, latterly developing into a general principle of equal treatment and subject to legislation which has raised fears (probably largely unjustified) for example of problems concerning direct and indirect discrimination, affirmative action and the margin of appreciation allowed to the decision-makers. Until the Human Rights Act (HRA) came into force, case law on general equality was very sparse; there are some specific cases on, for example, the right to life, and books on "Civil Liberties" deal with the law on equality mostly in respect of race and sex discrimination. With the application of the HRA the courts are developing a body of interpretation which is adapted to the different way in which the Act is applied and thus, gradually, the move towards a general principle of equality is taking place.

1. Towards a general principle of equality?

The development of this principle, which has been piecemeal and disparate according to which part of the principle was concerned, is an illustration of the specific way in which such a principle has gradually emerged in the United Kingdom, rather than having been laid down in definite and clear terms in written law, as has been the case in most of the Member States.

2. The history of equality in the UK

The first development of equality rights concerned the equality of women. Women had inferior rights in marriage and property law, Suffrage, Employment and Welfare legislation

Marriage and Property law: Married women were excluded from the category of "individuals" by Dicey and were characterised by the principle of "coverture" which stated that: "The very being or legal existence of the wife is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything. This control extended to all legal dealings. They had no contractual or tortious capacity. It also impeded them from obtaining voting rights as they were legally incapacitated. Nevertheless, marriage was considered to be a Civil contract. Before 1857, a marriage could only be annulled by ecclesiastical annulment or by Act of Parliament. Adultery was the sole ground, any adultery for the woman, but "aggravated" by bigamy, incest or unnatural vice for the man, although under Canon law, separation could be obtained on wider grounds. The custody laws also favoured the father; he had rights to the child in nearly all circumstances. Some of this situation continued to exist until well into the twentieth century. A number of reforms then

took place. The Married Women's Property Act 1882 did much to achieve formal equality. The wife had complete power "to acquire, hold and dispose by will or otherwise of all real and personal property". She could enter into contracts in respect of such property and could sue and be sued separately from her husband. However, this did not go the whole way. Husband and wife did not achieve full separation as two units until 1962[18], and, in 1982 Lord Denning stated: "Nowadays, both in law and in fact, husband and wife are two persons, not one..."

Parental equality in matters of custody was achieved in the Guardianship of Minors Act 1925 (reforming the Guardianship of Infants Act 1886), which is now the Guardianship Act 1973. The welfare of the child was to be considered paramount and neither parent had more rights than the other.

The first possibility to obtain a divorce was given by the Matrimonial Causes Act 1857. There was a double standard: simple adultery by the wife was sufficient, whereas the husband's adultery had to be aggravated. The Act created a Divorce Court to deal with divorce petitions, in an effort to make divorce accessible to the not so rich. In 1923 formal equality of husband and wife was recognised in the Matrimonial Causes Act 1923. Still, adultery was the only ground. In 1937 the grounds were broadened to three years' desertion and cruelty. Only in the Divorce Reform Act 1969 were other grounds introduced.

On marital violence, the offence of rape did not apply to husband and wife and only in 1989 in Scotland and in 1991 in England in Common law the High Court of Justiciary and the House of Lords recognised that marital rape could no longer be regarded as a statutory exception.

In 1903, the campaign for women's suffrage was intensified, with as its main protagonist Sylvia Pankhurst and her daughters Christabelle and Sylvia. The story of their courage and suffering is known world-wide.

In the 1914-18 war, the women kept the war economy going at home, working in the factories, the fields and the army. At the end of the war, women aged over 30 received the right to vote, this age was then lowered to 21 in 1928. However, the proportion of married women actually in paid employment declined in the period between 1851 and 1921 from 25% to 8.7%[19], women were excluded from certain jobs, such as night work, and were often asked to leave a job upon marriage.[20] In my own experience, it still happens that married couples are not accepted for employment in the same company.

Meanwhile, however, the rights of other races and of homosexuals were not recognised for a long time. Racism and homophobia were endemic. As late as the early 1950's the police were actively enforcing the prosecution of homosexual men. The first race relations act was introduced in 1965. In 1976, there were race riots at the Notting Hill Carnival, but at the same time the Race Relations Act was amended to ban indirect racial discrimination.

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[18] In the Law Reform (Husband and Wife) Act 1962.

[19] S.Atkins and B. Hogget, Eds, Women and the Law, 1984, Oxford:Robertson: pp 18 and 19.

[20] S. Fredman, Women and the Law, 1997 OUP pp 67-74.

Meanwhile, homosexuals were still in a precarious position. In 1977, a gay paper called Oz was found guilty of blasphemy. An amendment to the Criminal Justice and Public order Bill to lower the age of consent for consenting homosexual adults was proposed by the Conservative MP Edwina Currie which would have brought it in line with the age of consent of 16 for heterosexual relations. This bill was defeated. Meanwhile, the Anglican Church assisted in fighting the ordination of homosexual priests and dividing the Anglican community as to whether this should be permitted, just as had happened a decade before in respect of the ordination of women. This battle still has not been resolved, although a homosexual bishop was appointed in August 2003. The Sexual Orientation Employment Discrimination Act was introduced in 2003 in implementation of Directive 2000/78 and the Disability Discrimination Act was adopted in 1995.

The Religion or Belief Regulations were passed at the start of 2004. They deal with all aspects of employment. Employers may not violate the dignity of people or faith, nor may they create intimidating, hostile, degrading or offensive environments for them. It is unlawful to treat an applicant or employee less favourably because of their religion or belief, whether intentionally or not. Employers' practices and policies must not put those of a particular faith at a disadvantage. In some cases it is illegal to discriminate against former employees after the end of their working relationship.

3. UK law and EC law (mostly covering sex discrimination law at this stage)

There have sometimes been difficulties in the interpretation of sex discrimination law by English courts. The House of Lords gave a "*communautaire*" interpretation of Community law in the EOC case[21], but in other cases the national court did not always find it possible to construe domestic law in the light of Community law[22]. In *Duke v GEC Reliance* (1988)[23] the House of Lords held that as s 6(4) of the Sex Discrimination Act 1975 was intended to preserve discriminatory retirement ages, it was not possible to construe it in a manner which gave effect to EEC Equal Treatment Directive 76/207 as interpreted by the European Court of Justice in the first Marshall decision. In *Finnegan v Clowney Youth Training Programme Ltd* (1990)[24] the exclusion of complaints relating to retirement in Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976 was indistinguishable from the exclusion in s 6(4) of the Sex Discrimination Act 1975 which the House of Lords, in *Duke v GEC Reliance*, held was not to be construed so as to conform to the Equal Treatment Directive 76/207.

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21 *R v Equal Opportunities Commission* [1994] All ER 910.

22 See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR 4135.

23 [1988] AC 618; [1988] IRLR 118, HL.

24 [1990] 2 AC 407 HL.

4. Anti-discrimination legislation in the UK

As stated above, anti-discrimination law in the UK, like much of its legislation, had come into being piecemeal and originates from different sources. This difference, therefore, is visible in the different types of legislation, the different styles and the different status accorded to the legal instruments. Domestic legislation which antedates most of the EC discrimination legislation is mainly contained in the following three Acts:

- The Equal Pay Act (EqPA) 1970
- The Sex Discrimination Act (SDA) 1975 and
- The Race Relations Act 1976. (Replacing an earlier Act of 1968).

These Acts have been amended frequently in most cases. They have as a common factor the negative prohibition of discrimination rather than the positive duty to promote equality.

The Disability Discrimination Act (DDA) then came into force in 1995, modelled on the three earlier Acts, but made much weaker by the fact that it added a defence of justification of direct discrimination and did not contain a clause on indirect discrimination.

As a result of these Acts, separate Commissions were set up, The Equal Opportunities Commission (EOC) the Commission for Racial Equality (CRE) and the Disability Rights Commission (2000). There are no Commissions yet under the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003, but the SDA 1975 has been amended to bring discrimination on grounds of gender reassignment under the aegis of the EOC. However, the CRE has no such competence for matters which exclusively deal with religion, there always has to be a racial element in the discrimination for the Commission to be able to deal with the issue. So, for example, if the matter concerns Jehovah's Witnesses or any minority religion which is not racially predominant, the Commission has no competence. These Commissions are the instruments for the implementation of policy and enforcement of legislation generally.

In addition, there is the legislation deriving from Community law, mainly contained in statutory instruments implementing the following Community legislation[25]:

Article 39 EC-Treaty (no discrimination as to nationality in employment), Article 141 EC-Treaty (Pay); Directive 76/207 (Equal Treatment Directive); Directive 2000/43 (Race Directive) and Directive 2000/78 (Equal Treatment in Employment), covering religion and belief, disability, age and sexual orientation (based on Article 13 EC-Treaty). Most discrimination covered is thus confined to employment, except for race and sex discrimination which also cover the provision of services, housing and education.

Finally, there is the major impact of the Human Rights Act (HRA) 1998, which came into force in January 2000. It incorporates most of the ECHR, with the

[25] See Townshend-Smith, on Discrimination Law; Cases and Materials, Michael Connolly (Ed), 2nd Edition Cavendish, 2004, Chapter 5.

exception of Articles 13 (the right to an effective remedy before a national authority) and Article 15 (derogation in time of emergency). This Act comes as close as it is possible to do to give domestic courts the power to influence legislation, without actually giving them the powers to amend or create new legislation, something which cannot be done without affecting the principle of Parliamentary Sovereignty. However, it does give the courts the option to issue a certificate of incompatibility if it finds that national legislation is in conflict with the HRA 1998. At the legislative stage all legislation must be tested for compatibility against the provisions of the HRA. In how far is this compatible with Dicey's Rule of Law?

A recent example demonstrates the tension created between the constitutional principles of Parliamentary Sovereignty and non-discrimination. This appeared in *A and Others v Secretary of State for the Home Department* [2004].[26] This case concerned the imprisonment without trial of suspected terrorists under the derogation from the HRA 1998. In a judgment of the full House of Lords the Lords ruled by 8-1 that such detention was unlawful as it discriminated against international terrorists detained without trial, on grounds of nationality. Alleged terrorists who were UK nationals were subject to the system of criminal justice and were put on trial (and mostly released due to lack of evidence). Non-British alleged terrorists were detained without trial, and they were "given a choice" in that it was stated that they were free to accept to be deported back to their country of origin, but not to remain in the UK if and after they were released.

This was, however, an impossible choice, as for most this would effectively have constituted a death sentence. The House of Lords made a Declaration of Incompatibility under Section 4 HRA that section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with articles 5 and 14 ECHR. Sections 21 and 23 of the Act provided for the detention of non-nationals whom the Home Secretary certified as a risk to national security and suspected of being or supporting international terrorists but whom he was unable to deport. The European Court of Human Rights had ruled[27] that the absolute prohibition of torture or inhuman treatment in Article 3 ECHR applied in deportation cases so that, irrespective of an individual's dangerousness or undesirability, he could not be deported to a state where there was a real risk of his being subjected to such treatment. The Law Lords used such words as "unjustifiably discriminate" and "draconian measures" which were unacceptable. However, the British government was quick to react and the Home Secretary announced that the complainants would remain in jail for the time being and that he would look at the available options for a possible review of the law in the New Year. "It is ultimately for Parliament to decide whether and how we should amend the law."[28] Thus, the principle of Parliamentary Sovereignty which might seem to have been called into question by the judges was strongly affirmed by the Home Secretary.

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[26] Times Law Report 17 December 2004 pp 78 and 79.

[27] In *Chahal v United Kingdom* (Application No. 22414/93) [1996] EHRR 413.

[28] The Times Report 17 December 2004, p.1.

5. Developments of specific types of discrimination

a) Sex discrimination

As we can see from the history, sex discrimination was one of the forms of discrimination which was recognised early and was covered in early domestic legislation. The subsequent plethora of legislation in the EC, and particularly the Directives, most of which have been found to have direct effect, have been litigated to a considerable extent in the UK, sometimes the English courts have been more "*communautaire*" in their interpretation of Community law than the ECJ would have been.[29] This paper will confine itself to some examples of the "newer" forms of discrimination in terms of EC law.

b) Religious and racial discrimination

In "The Muslim Lawyer"[30] Mr. Ajmalul Hossain Queen's Counsel looks at religious discrimination in a wider context, making the point that most issues apply to discrimination of all types, not even just religious. In the period before the HRA and Community law-based legislation the general position was that under English law all actions were lawful unless they had been specifically made unlawful. Specific discrimination was prohibited by specific Acts; the RRA, the SDA and the EqPA[31] thus leaving considerable gaps. In particular, religious discrimination was only covered insofar as there was a racial element. In the early case of *Ealing London Borough Council v Race Relations Board*[32] the House of Lords commented on the Race Relations Acts 1965 and 1968 saying that they did not provide for any religious discrimination unconnected with race. In *Mandla v Dowell Lee*[33] Lord Denning M.R. said (in the Court of Appeal):

> "...You can discriminate for or against Roman Catholics as much as you like without being in breach of the law. You can discriminate against Communists as much as you like without being in breach of the law..."

The same, Lord Denning said, applied to "Hippies".

In the House of Lords, the definition of "ethnic origins" was given slightly differently by the different Law Lords. The case concerned the rule of a private school according to which boys should wear their hair "so as not to touch the collar". A Sikh pupil argued he was not obliged to cut his hair as this was against his religion, and that he had to wear a turban so that he could not wear a school cap. The issue was whether Sikhs were an "ethnic group" within the meaning of the RRA 1976. In the Court of Appeal, it had been held that they were not as they could not show any common biological characteristics and that "ethnic" meant

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29 See infra UK law and EC law.
30 Issue 4.1, May 2003.
31 See supra p.10.
32 [1972]AC 342.
33 [1983] QB 1.

"race". This decision was reversed by the House of Lords. Lord Fraser's definition is the one which is now most commonly followed. He referred to groups which have a) a common history b) a specific cultural tradition. These were "essential" characteristics. A number of others were "relevant": c) either a common geographical origin, or descent from a small number of common ancestors, d) a common language, not necessarily peculiar to the group; e) a common heritage peculiar to the group; f) a common religion and g) being a minority, or being an oppressed or dominant group within a larger community.

Thus, he concluded, the religious factor was not the decisive one as the community was no longer purely religious in character. Nor were they not biologically distinguishable from the other peoples living in the Punjab. What was decisive was what the county court judge described as follows:

> "...The evidence in my judgment shows that Sikhs are a distinctive and self-conscious community. They have history going back to the fifteenth century. They have a language which a small percentage of Sikhs can read but which can be read by a much higher proportion of Sikhs than of Hindus."

However, a Rastafarian who refused to cut his dreadlocks because of his faith was not held to be a member of an ethnic group.[34] Applying Lord Fraser's test the Court of Appeal held that in the absence of a long shared group history they could not be considered a racial or ethnic group.

Since the Employment Equality (Religion or Belief) Regulations 2003, which only cover employment (thus presumably not covering the *Mandla* case) the position of Muslims at least should be easier to litigate. In English cases decided in industrial tribunals and the Employment Appeal Tribunal it has been held that Muslims are a religious group, not an ethnic group. Thus, they would fall outside the *Mandla* criteria as they do not have a shared history, language or culture and belong to different racial groups.

c) Indirect discrimination

The development of the concept of indirect discrimination clearly shows the differences in approach in the drafting of legislative texts in UK and in EC law covering such discrimination. The Race Relations Act 1976 has the following definition of indirect discrimination:

> "A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if (...).he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but
>
> which is such that the proportion of persons of the same racial group as that other who can comply with it, is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

[34] *Crown Suppliers v Dawkins* [1993] ICR 517.

which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

which is to the detriment of that other because he cannot comply with it."

The new definition is given in s 1 (1A) of the act as amended in July 2003:

"A person ....discriminates against another if.....he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons

(b) which puts that other at a disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim"

Compare this wording with the Race Discrimination Directive - Art 2:

"Indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

This test of "disparate impact" is much wider: no proof of statistical disadvantage is needed, as is the case under the RRA definition. The framework directive 2000/78 has a similar wording.

d) Age discrimination

By way of preface, I would refer to two recent age discrimination cases brought against one of the Institutions, the European Parliament. These are Cases T-275 and T-276 *Alvarez and Garroni v European Parliament*.[35] These judgments annul the decisions by the Parliament in January and July 2001 no longer to recruit freelance interpreters having reached the age of 65. The claim for compensation was rejected, however. The same sort of decision had been taken by the Commission, with even less justification than that of the Parliament and, therefore, one may assume that decision, too, no longer applies. However, the decision, which is being appealed, is on technical grounds, and carefully avoids any reference to Article II - 81 of the Charter in the draft Constitution. It would seem that the European Institutions themselves, to whom the Charter is addressed, are not necessarily always more "*communautaire*" than the Member States in applying general principles of law contained in Community texts.

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[35] Judgment of the Court of First Instance (5th Chamber) of 10 June 2004, www.curia.eu.int.

As regards the Age Discrimination Regulations in the UK, these have received an extension for application until 1 January 2006, and at the present time consultations have been concluded and much comment has been received. Although the drawing up of the detailed Regulations has encountered major problems the draft legislation is now in place and is going through Parliament.

One recent case on age discrimination in the UK *Harvest Town Circle Ltd v Rutherford*[36] was litigated on the basis of sex discrimination: Were a greater number of men over 65 affected by the absence of compensation when made redundant? The Court's decision was based on sex discrimination rather than age discrimination.

6. Enforcement

The individual enforcement of the legislation is essentially the same for all the forms of discrimination: Tribunals will deal with all employment cases, whereas other cases of discrimination will be dealt with in the County Courts. An exception is the enforcement in the Sexual Orientation Regulations. Mostly, enforcement of those regulations will take place before Tribunals, but a distinction is made in enforcement specifically for Institutions of Higher Education, where cases have to be brought before the County Court.

Equal pay claims are confusing. The Equal Pay Act and the SDA took effect on the same day in 1975; they were meant to complement each other and be construed as one code,[37] but the courts have not always found it easy to apply this principle. Particularly in respect of indirect discrimination, the courts have applied different approaches.

The EqPA covers all matters related to pay such as hours, holidays, fringe benefits, whereas the SDA covers all matters not regulated by the employment contract, such as dismissals and promotions. The distinction may be crucial, as for example the SDA considers how a man was or "would have been" treated, whereas under the EqPA there has to be an actual male comparator. English cases have thus differed in their interpretation, for example in *Bhudi v IMI Refiners Ltd*[38] where the claimant had to establish that a requirement or condition was applied, in contrast to the ECJ's attitude in *Enderby v Frenchay AHA and Secretary of State for Health*[39] and it would seem logical to merge the two pieces of legislation.

An authoritative report in 2000[40] recommends

1. That there should be a Single Equality Act in Britain, supplemented by regulations and by regularly up-dated codes of practice on certain subjects, written in plain language

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36 [2001] IRLR 599, [2002] ICR 123, EAT.

37 See Townshend-Smith on Discrimination Law, supra note 25, Ch. 14.

38 [1994] IRLR 204 EAT.

39 Case C-127/92 [1993] ECR I-5535.

40 Hepple, Coussey and Coudhury, *Equality, a new Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, [2000] Hart Publishing.

2. The framework should be based on five principles:
   a. The goal of legislation and other measures is to eliminate unlawful discrimination and to promote equality regardless of sex, race, colour, ethnic or national origin, religion or belief, disability, age, sexual orientation, or other status
   b. There must be clear, consistent and easily intelligible standards
   c. The regulatory framework must be effective, efficient and equitable, aimed at encouraging personal responsibility and self-generating efforts to promote equality
   d. There must be opportunities for those directly affected to participate, through information, consultation and engagement in the process of change
   e. Individuals should be free to seek redress for the harm they have suffered as a result of unlawful discrimination, through procedures which are fair, inexpensive and expeditious, and the remedies should be effective.

Many of these recommendations are being implemented in one way or another, some spurred on by domestic judgments, others by regulatory measures taken partly, but not entirely, in compliance with new measures adopted by the European Union.

V. Conclusions

The above has tried to demonstrate some of the differences in approach to the shaping of the law between the Common law and the Civil law systems. On the whole, these differences would not seem to constitute an impediment in the United Kingdom in terms of law to the adoption of a written Constitution. In some ways, with a more flexible approach to the law, it should be easier rather than more difficult to accept such a Constitution. The legal arguments against the Constitution concern more matters of form than of substance, and political points are often made in contending that, for example, supremacy, now put into the text of the Constitution, should not be accepted, ignoring the fact that supremacy was asserted by the ECJ[41] and was accepted a long time ago in the UK, as expressed in the *Factortame* case[42]. Another example is the list of exclusive and shared competences, now more clearly defined in the Constitution, but always present in earlier Community law.

Another difficulty is undoubtedly the fact that the envisaged European Constitution would have federal elements. This is easy to accept for a federal country such as Germany or the US, but less so by the UK or France, countries with an extremely centralised make-up. The irony, as far as the UK is concerned is, of course, that it has now a more devolved structure than before since the devolution of Scotland and Wales. However, the concept of a devolved structure is not some-

[41] In Case 6/64 Costa v ENEL [1964] ECR 585 and in numerous subsequent cases.

[42] See supra note 2.

thing which is yet being quite understood; we only need to look at the eternal problems with the Northern Irish situation; towards the end of 2002 Stormont (the Northern Irish Assembly) was again suspended and the UK Government took back power. Even during the time that the Northern Irish Assembly was functioning the leaders of the political parties would be seen frequently in Downing Street to consult with the PM and with the Northern Ireland Secretary.

It would not seem that differences of approach in the making and the interpretation of law should in themselves create an insurmountable obstacle to the acceptance of the Constitution, and the conclusion must be that the real unease and opposition to the Constitution in the UK is based on political, rather than legal, considerations.

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Fundamental Rights in Central and Eastern Europe: A Basic Analysis

Rainer Arnold

I. Growing constitutionalism in Europe

The last decade of the Twentieth Century has been significantly marked by the emergence of constitutionalism in the countries belonging to the former Soviet Union. This new orientation after the fall of communism is reflected in the creation of democratic, liberal constitutional orders. These orders have a clear anthropocentric concept[1] which is evident through a coherent system of fundamental rights. In most of these countries politics follow the ideas of these texts, so that where divergences become evident, constitutional concepts will not fail, in the course of time, to affect political reality.

The second half of the Twentieth Century is characterised by a manifest progress in constitutionalism, starting, after the end of the Second World War, with the German Constitution in 1949. The "Grundgesetz" contained the far reaching concept of protecting the dignity and liberty of the individual, demonstrating Germany's new orientation. This development had an influence on the new democratic constitutions in the seventies, created in Spain, Portugal and Greece, after the end of authoritarian regimes. This progression continued with its most vigorous phase at the end of the eighties and the beginning of the nineties, when the newly emerging democracies in Central and Eastern Europe built up their own constitutional orders on the advanced standards already developed in Europe.[2]

This solution has undoubtedly been strongly promoted by developments in the international field: by the fact that the international community has established human and fundamental rights protection of the individual as a primary aim. This has found its expression in a variety of international treaties, as well as through supranational integration constituting a multinational, constitutional order.

With the enlargement of the European Union the question arose as to whether these new democracies fulfil the constitutional requirements of the Union, as laid down in Article 6(1) of the Treaty of the European Union. In particular whether there are common values of democracy, the rule of law and fundamental rights

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1 As to this action see *R. Arnold*, Interdependenz im Europäischen Verfassungsrecht, Essays in Honour of *Georgios I. Kassimatis*, Athens, 2004, pp. 737 – 739.

2 *R. Arnold*, La contribución de los países de la Europea central y oriental al desarrollo de una cultura constitucional europea, in: Derecho constitucional y cultura, Estudios en Homenaje a *Peter Häberle*, *F. Balaguer Callejón* (ed.), Madrid, 2002, pp. 57 – 65.

protection. For the new members of the European Union the answer is affirmative as the following short analysis will demonstrate. As in such short space it is only possible to deal with some aspects of this complex matter, attention shall be focussed on fundamental rights.

II. The criteria for the evaluation of the standards of protection

There are two main criteria which can be employed: formal and material or substantial. The *formal criteria* refer to the question as to whether fundamental rights are written, unwritten or in a hybrid form of both written and unwritten guarantees. This reflects on judicial interpretation, which has to be more creative in unwritten systems in order to develop judicially an adequate level of fundamental rights protection, which is indispensable in any constitutional order, with or without written guarantees. In this context the question of how to establish "new" fundamental rights able to protect against newly emerging threats against freedom and personality of the individual is also raised.[3]

A further formal criterion to be discussed is whether the fundamental rights protection is embodied in a formal constitution having higher rank than ordinary legislation and binding force on all branches of public power. Ordinary laws can also contain fundamental rights guarantees but with a weaker protection standard. Of course, even in constitution guaranteed fundamental rights systems the role of legislator is important and shall also be considered in this context.

Other formal aspects ask the questions: Is there one constitutional document or a number of them, as in Austria with its many constitutional Acts? Are fundamental rights placed at the head of a constitution to emphasise their importance? These aspects are not of decisive importance but can give an additional impression of the modalities of fundamental rights protection.

It seems to be of more significance to examine whether the texts of the fundamental rights are formulated in a subjective, individual related manner, or in a merely objective way which indicates a more institution related character of this norm, perhaps being a norm with a merely programmatic content. But the formulation is not conclusive of the character of the guarantee as a subjective fundamental right or an objective guarantee. Only the interpretation of this norm can finally reveal the true nature. Thus, in constitutional practice objectively formulated norms can be interpreted in a more individual related form and it is even possible that some formulations with reference to the individual can only be conceived as objective programmes.

In addition to that, it can be important whether there is a wide or narrow, precise, formulation of the fundamental rights. This has an effect on the role of the legislator to establish the details and for the judiciary to interpret wide terms referring to their own concepts. Thus the discretionary power of the non-constitutional

[3] See *F. Modugno*, I "nuovi diritti" nella giurisprudenza costituzionale, Torino, 1995.

actors is more far reaching than with precise constitutional formulations, and the government has a greater margin for manoeuvre and political activity. Wider terms, through their flexibility, give more leeway to constitutional change without politically difficult formal reform of the constitution.

Material criteria refer to four aspects: 1. The range of the fundamental rights protection, the field of application of the rights, that is the dimensions and scope of the protection. 2. The functions of fundamental rights - do they have only a defence character against interventions by public power or do they also cover positive claims by the individual for positive actions by the state to protect or to further their rights? The functional side also includes the question of whether fundamental rights contain values which are constitutive of the state and society, giving them their basic orientation. 3. Of greatest importance in this context is the question how far fundamental rights can be limited. The key question is that on the limits of these limitations, especially if it is constitutionally prohibited to change the very essence of a fundamental right or there is a requirement to respect proportionality. 4. Also of interest is the interconnection between fundamental rights protection and the rule of law. An advance of the elements of the rule of law in a constitution fortifies the protection of fundamental rights protection of the individual. Furthermore the existence of an efficient system of constitutional jurisdiction in a country which assures the priority of the constitution over legislation and helps to realise fundamental guarantees is very significant.

III. Formal criteria in Central and Eastern European constitutional orders

1. The constitution making process in Central and Eastern Europe is characterised by written constitutions which contain a comprehensive and detailed catalogue of fundamental rights. This does not hinder the fact that legislation itself formulates and expands fundamental rights, as this is principally with the aim of establishing the complementary details which help to apply the rights in practice. The "expansion function" the legislation plays in detailing the constitutional guarantees is necessary in a constitutional order and has to correspond to the general principles laid down in the constitution itself.

Generally in written systems a very important function of the judge is to interpret the wide, indeterminate, wording of the constitutional guarantees. This is also the case in these countries. They all, except Estonia,[4] have their own constitutional courts for this function. Thus, also in Central and Eastern Europe, where constitutional courts are about to develop an intensive constitutional jurisprudence, the judicial function as well as the legislative function is a necessary complement to

[4] In Estonia a specific chamber of the Supreme Court is competent for control of legislation, see *R. Arnold*, Constitutional Courts of Central and Eastern European Countries as a dynamic source of modern legal ideas, Tulane European & Civil Law Forum, New Orleans, Vol. 18 (2003), pp. 99 – 115.

the constitution. It is worth noting that in all new democracies the role of legislator is clearly subordinated to the Constitution which is undoubtedly conceived as having the highest rank in the normative hierarchy. Concepts stressing the sovereignty of Parliament and therefore of a supreme rank of legislation have been abolished. Thus, in the 1997 Constitution of Poland the possibility of Parliament prevailing over a Constitutional Court's decision, declaring a piece of legislation as unconstitutional was eliminated as outdated and no longer reflective of the new concept of strict primacy of the Constitution. Now the Polish Constitution expressly attributes to the Constitution the highest rank in the legal order, an approach shared by the other constitutions in Central and Eastern Europe.[5]

2. On this basis the notion of a *formal constitution* is a familiar concept in these countries. This is linked to a notion of the primacy of the constitution[6] as well as to qualified requirements for a constitutional reform.[7] The constitution is held as a fundamental legal order. Fundamental in the sense that it contains the basic rules for state and society which must prevail over more detailed rules adopted by Parliament. Furthermore, as a basic order, the constitution is designed to be a stable, long lasting, document which should only be reformed with the consent of the major forces of the society.

Material or substantial constitutional law is legislation which embodies general rules of importance but which does not share the substantial and temporal elements of stability: it can be repealed by another ordinary law and is not bound by qualified reform requirements.[8]

3. Most fundamental right guarantees in Central and Eastern European countries are codified in their constitutional document. An exception can be found in the "Listina" of fundamental rights of the Czech Republic which has the same rank as the Constitution and must be interpreted in conformity with it.[9] Thus there is no difference between a system of strict codification of constitutional provisions in one charter and the existence of two or several constitutional documents. If fundamental rights guarantees are dispersed in a variety of constitutional acts dating from different historical phases, as in Austria,[10] interpretation can differ

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5 See *G. Brunner*, in: *G. Brunner/L. Garlicki* (eds.), Verfassungsgerichtsbarkeit in Polen, Baden-Baden, 1999, p. 18.

6 See for example Article 8 (1) of the Polish Constitution, Article 153 (1) of the Slovenian Constitution, Article 77 (2) of the Hungarian Constitution or Article 7 of the Lithuanian Constitution. Even if not explicitly laid down in the Constitution, the primacy of the Constitution is the basis of the Constitutional Courts' control over legislation. This principle is inherent in a modern Constitution.

7 See for example Article 235 of the Polish Constitution or Articles 168 - 171 of the Slovenian Constitution.

8 See in particular Article 15 (2) of the Slovenian Constitution and Article 41 of the Czech Fundamental Rights Charter.

9 See *V. Pavlíček* a kolektiv, Ústava a ústavní řád České republiky, Komentář, 2. díl, 2nd. edn., 1999, pp. 32 - 33; *Z. Koudelka/V. Šimíček*, K právní povaze Listiny základních práv a svobod, Právník 2/1996.

10 See *R. Walter/H. Meyer*, Bundesverfassungsrecht, 9th edn., Vienna, 2000, pp. 49 – 50.

significantly and problems as to coherence, could arise. The situation will not manifest itself in Central and Eastern Europe.

4. Fundamental rights are regarded as constitutional norms of particular importance embodying values, in part recognised as inherent in human beings and recognised by national constitutional law, in part conceived as being attributed by the state to the individuals.[11] If a constitution places fundamental rights at its head, this demonstrates particular respect of these rights. However, normally in these countries constitutions fundamental provisions of a general content are placed ahead of fundamental rights[12] and it must be said that there is no legal difference between either approach. The high esteem which is paid by the new democracies to the anthropocentric orientation of the constitution, is evidently mainly expressed by the system of fundamental rights. The constitution, conceived as a coherent basic order, must be interpreted in its normative interconnection as a set of formally equal constitutional provisions, so that it is of no relevance if fundamental rights are placed at the top or in another part of the constitution.

5. A further formal aspect is the formulation of the text of fundamental rights in the constitution. This will be discussed shortly. There is no significant divergence in this respect with regard to other constitutions. In the field of fundamental rights, the European Convention of Human Rights has clearly influenced the texts and also had an effect on the formulation.[13] It has already been mentioned that the legislator often has to complement imprecise terms of the constitution, as is also the case in other constitutions.

More difficult is the question as to whether a formulation gives information about the character, as a subjective right or merely an objective norm. As pointed out, formulation is not conclusive but gives some hints. The constitutions combine both structures. Programmatic norms formulated in an objective way are not normally separated from rights which the individual can directly invoke. Many examples of this combined method, which is more familiar to western constitutions than the German model of limiting fundamental rights strictly to subjective rights and eliminating objective programmatic norms, can be found. Examples are: article 19 of the Slovenian Constitution on the one hand gives an "individual right to personal liberty" and on the other hand article 38 on the other establishes the "guarantee of the protection of personal data". In addition, article 19 of the Slovak Constitution embodies "the individual right to maintain his or her dignity" on the one hand and article 41 speaks of the "protection of matrimony, parenthood and family". Furthermore, article 6 of the Czech Fundamental Rights Charter lays down the "individual right to life" on the one hand and the "protection of parenthood

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[11] See for example Article 30 of the Polish Constitution and *L. Garlicki*, Polskie prawo konstytucyjne, 5th edn., Warszaw, 2001, pp. 90 – 93.

[12] See for example Articles 1 - 29 of the Polish Constitution or Articles 1 - 10 of the Slovak Constitution.

[13] *R. Arnold*, The European Convention of Human Rights and its influence on the Central and Eastern European Countries, in: Russia and the Council of Europe: Perspectives of Cooperation (ed. by the Institute for Law and Public Policy), Moscow, 2001, pp. 60 – 68.

and family" by article 32 on the other hand. These are but few of the many possible examples.

IV. Material criteria for the evaluation of the fundamental rights protection system

In substantial respects a fifth question arises: does the constitution protect against all threats to the individual's freedom? Are all fields with potential risks for the individual included? What about the newly emerging risks?

1. Generally, traditional freedoms are expressly established in the fundamental rights parts of constitutions. The intention of the constitution maker is to protect the individual efficiently. This means that the comprehensiveness of this protection was always in mind when the constitution was drafted. In the case of the lack of a specific right or freedom this gap would be filled up by judicial interpretation. In addition, the European Convention of Human Rights, highly appreciated by the new democracies, was very influential and furthered the idea of a complete protection system.

The character of an all inclusive protection system is also demonstrated by the tendency of these constitutions to establish expressly guarantees against the new risks: for example, there are data protection clauses in article 38 of the Slovenian Constitution and in article 10(3) of the Czech Fundamental Rights Charter. Guarantees in the field of bio-medicine can be found in article 18 of the Slovenian Constitution, Paragraph 18 of the Estonian Constitution and article 21(4) of the Lithuanian Constitution. Environmental protection is embodied for example in article 72 of the Slovenian Constitution, article 35 of the Czech Fundamental Rights Charter, Articles 44 and 45 of the Slovak Constitution and article 53 of the Lithuanian Constitution formulated as an "obligation of state and each individual to protect the environment from harmful influences".

2. Furthermore, the new constitutions explicitly contain a guarantee of *human dignity* which is conceived as a basic value of all constitutional orders. In an anthropocentric order, human dignity is the most basic and highest value from which all other fundamental rights are derived. In traditional constitutions, an explicit guarantee is not employed, however the example of the German Constitution with its article 1 (1) seems to have influenced the major developments in the seventies and in particular in the new democracies. Human dignity is embodied in Articles 1 and 10 (1) of the Czech Fundamental Rights Charter[14], article 34 of the Slovenian Constitution, article 19 of the Slovak Constitution, article 54 of the Hungarian Constitution and article 21 (2) of the Lithuanian Constitution. The basic character is clearly recognised in the doctrine, even if dignity is not always placed at the very top of the fundamental rights part of the constitution. Furthermore, even in constitutions where no explicit mention of this value is found, it is inherent in the

[14] *K. Klíma*, Ústavní Právo, 2002, p. 292, referring to subjective and objective elements of this notion.

constitutional order because of its primacy in protecting the individual. This fact is ideologically based on the recognition of human dignity as the very source of rights and freedoms of the individual. Also, beside that, the jurisprudence of constitutional courts does not hesitate from referring to the guarantee of dignity as in Hungary, for example, with an extensive interpretation.[15]

3. The constitutions have also adopted social rights provisions. Examples are Chapter 4 of the Czech Fundamental Rights Charter or Articles 70B to 70F of the Hungarian Constitution. These provisions are rather similar to those contained in older constitutions but reflect contemporary society. It is mainly the legislator who realises this social right, which seems to be a characteristic inherent to this type of guarantee.[16]

V. The Function of Fundamental Rights

The traditional function of fundamental rights is that of protection against state intervention. This negative aspect is clearly recognised as the main aspect of fundamental rights. There is no essential difference between the concept of these constitutions and traditional ones. However, further aspects seem to be more interesting: for example, can the individual claim support from the state on the basis of fundamental rights, especially financial support? The transformation of fundamental rights into active claims for such support has, as yet, not been extensively debated in the new democracies. It appears, however, that this is not recognised in these countries as being a real problem. A further development, visible within a constitutional order, such as within the German order, has been adopted by the constitutional jurisprudence: for example, the concept of an obligation of public power to promote and protect the values incorporated in fundamental rights by active measures, especially by legislation. The Hungarian Constitutional Court has adopted this concept, after much debate surrounding the decision on abortion.[17] The discussion of the function of fundamental rights has, as yet, not been developed in these countries. However, it seems likely that the concept of the obligation dimension of fundamental rights will be promoted in the jurisprudence of the European Convention of Human Rights.

Fundamental rights do have a specific function, namely the institutional function. The values which are contained in fundamental rights form an order of values which constitutes an orientation for state and society. Therefore, this is institu-

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[15] The decision on the death penalty, 23/1990.(X.31.) and further decisions 8/1990.(IV.23.) and 46/1991.(IX.10.); *R. Arnold/O. Salát*, Grundrechte in der Rechtsprechung des Ungarischen Verfassungsgerichts, Regensburg, 2003, pp. 3 – 22.

[16] For social rights see the interesting decision of the Hungarian Constitutional Court 26/1993.(IV.29.), text in *Arnold/Salát*, op. cit., pp. 313 - 331, as well as the decision of the Latvian Constitutional Court 2000-08-0109 of 13/03/2001, text in *R. Arnold/M. Hussner*, Rechtsstaat und Grundrechtsschutz in der Verfassungsrechtsprechung Lettlands, Regensburg, 2003, pp. XXVIII and 140 – 146.

[17] 64/1991.(XII.17.), *Arnold/Salát*, op. cit., pp. 26 – 27.

tional because these orientations are principally applicable to state institutions. Institutions need competences and also value orientations. It is a necessary aspect of institution making, to establish a value order which should observed by the institutions. Therefore, fundamental rights must also be seen from this institutional side. This is also evident in the jurisprudence of the Constitutional Courts of the new democracies. The Czech conception maintained by the Constitutional Court can be cited as an example.[18] The institutional dimension of fundamental rights is also reflected in areas of private and public law, such as the concepts of property and matrimony or the autonomy of local authorities. This objective dimension, evident in German Constitutional Law, can also be found in the Constitutional orders of Central and Eastern European countries. The guarantee of freedom through these concepts is complementary to the direct protection of the individual by fundamental rights. In addition, a horizontal effect of fundamental rights is also recognisable, therefore, resulting in an impact of these rights within private law relations. Consequently, fundamental rights have a specific function which is becoming increasingly important, especially with the growing recognition of personality rights.[19] The obligation of the state to adopt efficient laws protecting the individual against other individuals with regards to their fundamental rights has already been mentioned. It is however questionable, whether fundamental rights have a direct or indirect effect on these horizontal relations. On the one hand, the civil law instruments are interpreted in light of fundamental rights as this corresponds to the indirect impact concept, as demonstrated for example, in Germany. However, on the other hand there are also tendencies to accept a more direct approach. Until now a commonly accepted concept has not been developed.[20] Consequently, it can be said that, the function of fundamental rights is conceived in a very similar way to that which has been developed in the traditional constitutional orders. A visible conceptional diversity, existing in traditional systems, in the field of horizontal effects of fundamental rights is also recognisable within the new democratic orders.

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[18] Constitutional Court Vol. 1, n°. 1 and *R. Arnold/V. Kovařik*, Die Konzeption des Grundrechtsschutzes in der Tschechischen Republik unter besonderer Berücksichtigung der Rechtsprechung des Verfassungsgerichts, Entwicklungen im Europäischen Recht, Vol. 7, Regensburg, 2003, pp. 20 – 21.

[19] As to the institutional dimension of fundamental rights see for example the decision 30/1992.(V.26) of the Hungarian Court. Personality rights are often developed in jurisprudence but also explicitly recognised in constitutional provisions as in Article 35 of the Slovenian Constitution.

[20] *J. Filip*, Vybrané kapitoly ke studia ústavního práva, 2nd edn., 2001, pp. 68 - 69; *R. Arnold/V. Kovařik*, op.cit., pp. 30 - 33; Czech Constitutional Court, No. 139/98; No. 4/97; No. 315/99.

VI. The Principle of Legality

This principle means that the intervention of public power into individual freedom must be permitted by law. The basic idea of legality requires that the representatives of the people consent to an Act of Parliament for this intervention, as an act of self-determination. It is commonly acknowledged in Central and Eastern European constitutional orders that a legal basis is indispensable for such an intervention. This is expressed, both in constitutional provisions and jurisprudence.[21] Therefore, the constitution itself must contain permission to restrict a constitutional freedom. Thus, as it is clear from traditional systems, the constitutional permission to restrict a fundamental right must be obtained by the legislator from the Constitution or such restrictions must be inherent in the constitution itself.[22] The second type is that of an unlimited fundamental right, over which the legislator can not establish a limit but which may be limited by other values of constitutional ranking. As the constitution is a coherent normative order, all provisions of a constitution must be reconciled with each other.[23] As already mentioned above, the legislator not only has the role to limit fundamental rights if the constitution allows this, but also has a positive function insofar as it is the task of the legislator to ensure and improve the efficiency of fundamental rights. Similarly, the legislator promulgates the detailed laws which are necessary to give full effect to the protection of fundamental rights. This role of the legislator is fully recognised in the jurisprudence of the Constitutional Court in these countries.[24]

VII. Defining the essence of a Fundamental Right as the limit on its restriction

The guarantee of the very essence of a fundamental right, manifested in German Constitutional Law through the "Wesensgehaltsgarantie" (article 19 (2) of the Constitution), is also a well recognised principle in the constitutional orders of the

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[21] See for example Article 31 (3) of the Polish Constitution or Estonian Supreme Court, decision 3-4-1-7-01 of 11/10/01.

[22] For example the constitutional permission given to the legislator to limit fundamental rights in Article 31 (3) of the Polish Constitution and *L. Garlicki*, op. cit, p. 104; *Arnold/Hussner/Land*, Rechtsstaat und Grundrechtsschutz in der Verfassungsrechtsprechung Estlands, Entwicklungen im Europäischen Recht, Vol. 14, Regensburg, 2003, pp. XXIV - XXV and 11 - 15; *R. Arnold/V. Kovařik*, op. cit. pp. 38 - 39 and 45 - 47; Hungarian Constitutional Court, 55/2001.(XI.29.), in *R. Arnold/O. Salát*, op. cit. pp. 228 – 251.

[23] For example Czech Constitutional Court, Vol. 13. number 25 Az.Pl. ÚS 16/98 and, for the Polish Constitution, *L. Garlicki*, op. cit., pp. 105 – 106.

[24] For example the Polish Constitutional Court, TK, 2.3.1994, W 3/93; see also Articles 41 of the Czech Charter, 51 (1) of the Slovak Constitution, Article 15 (1) of the Slovenian Constitution and *Arnold/Hussner/Land*, op. cit., pp. XXIV – XXV.

new democracies. Within these constitutions, there are explicit provisions laying down this limit on the restriction of fundamental rights. It is often viewed as a common feature of the constitutional jurisprudence of these countries, that they refer to such a guarantee. The jurisprudence meets the same difficulties as in the traditional systems in defining the very essence of a fundamental right. There is a strong tendency to view a number of core elements as constituting the essence of a fundamental right. This is often combined with the other approach, which is the principle of proportionality.[25]

VIII. The principle of Proportionality as a frequently used criterion

The principle of proportionality is frequently used by the Constitutional Courts in Central and Eastern Europe. Its formulation is the same as that in German Constitutional law: an intervention of public power into individual freedoms must be realised or at least formulated to further a legitimate aim. It must be interpreted to be necessary and proportional in a narrow sense, which means that the instruments applied must be appropriate in relation to the aim pursued. An invasive instrument may only be applied in cases where aims of high importance are pursued.[26] The principle of proportionality is also influenced by the European Convention of Human Rights which emphasises that the necessity of an intervention into individual freedom must conform to the needs of a democratic society.[27] It seems that the instrument of proportionality is highly appreciated by the court, due to its flexibility.

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[25] See Articles 4 (4) of the Czech Fundamental Rights Charter, 13 (4) of the Slovak Constitution and 11 of the Estonian Constitution; see also Hungarian Constitutional Court, decision 23/1990.(X.31.) concerning death penalty; decision 55/2001.(XI.29.) AB; decision 66/1991.(XII.21.) AB; Estonian Supreme Court 3-4-1-1-99 of 17/03/1999; see also Czech Constitutional Court, Vol. 2, no. 46 Az. Pl. ÚS 4/94; see *L. Garlicki*, op. cit., pp. 104 - 105; for the Czech law see *Arnold/Kovařik*, op. cit., pp. 39 – 41.

[26] See Article 11 of the Estonian Constitution and Article 116 of the Latvian Constitution; Supreme Court of Estonia: 2001-04-0103 of 21/12/01; 3-4-1-2-01 of 05/03/01; 3-4-1-6-2000 of 28/04/2000; 3-4-1-6-01 of 03/05/2001 (17); Latvia Constitutional Court: 2001-09-01 of 21/01/02; 2002-01-03 of 20/05/02; 2002-04-03 of 22/10/02; Czech Constitutional Court, Vol. 1, number 16; Vol. 2, number 46; Vol. 6, number 99; Vol. 13, number 25; Polish Constitutional Court, U. 27/05/02, K 20/01; U. 19/12/02, K 33/02; US. 43/93, 12/04/94.

[27] Expressly Article 31 (3) of the Polish Constitution.

IX. Conclusion

It is submitted that the standard of fundamental rights protection in Central and Eastern European constitutional orders is comparable to that existing in the old Member States of the European Union. It conforms to the international law requirements, especially of the European Convention of Human Rights. Constitution-making and judicial interpretation in these countries are based on a modern level of European Constitutionalism. The main instruments developed in Western Constitutional law are the principle of proportionality and the guarantee of the very essence of fundamental rights. This is also familiar to and apparent in legal thinking in these countries. The high standard of fundamental rights protection is linked to an advanced concept of the rule of law, which is comprised of the values expressed by fundamental rights. The approach of constitutionalism in these countries can be classified as being anthropocentric.

Therefore, it can be stated that within the field of fundamental rights, the requirements of Article 6 (1) of the Treaty of the European Union, are clearly fulfilled.

Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg

Hermann-Josef Blanke

"It is virtually impossible to speak of a pressure of infringements of fundamental rights coming from the reality of the experience of integration. Right up to recent times, lengthy tracts have been produced which emphatically bemoan, in a style full of pathos, the fact that the German Market citizen lacks protection in the form of fundamental rights from the public powers of the Community, and which draw from this situation blanket conclusions in terms of dogma and legal policy, without even considering, let alone examining with any degree of discrimination, which rules of Community law could even touch upon German positions in relation to fundamental rights, either directly or in the event of their application under a Community legal act. ... 'It must first be noted that no serious problem associated with the protection of human rights has so far arisen in practice within the Community. Although discussions on this question were consequently purely theoretical, the fact alone that such discussions are conducted threatens to undermine the effectiveness of Community law'."

These are the first lines of the analysis of "fundamental rights" as an expression of the "legal position of the Market citizen" by *H.-P. Ipsen,* which dates from 1972 and in which he quotes *P. Pescatore.*[1] The focus of his critique, which mentions *H. H. Rupp* by name, is "the German discussion of fundamental rights, which seeks to have Community power restricted and bound, within the meaning of Art. 1-19 GG (Basic Law), by virtue of German constitutional law." A discussion of fundamental rights with reference to the need for homogeneity, obscures "vision in relation to the question of whether the establishment of a community in functional terms in fact (requires) different constitutional structures for securing personal freedom." He discards the proposition that adequate protection of fundamental rights is only conceivable along the lines of the list set out in the Grundgesetz, with reference to the objectives of integration and structures of integrated law.[2]

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1 Cf. *H.-P. Ipsen*, Europäisches Gemeinschaftsrecht, 1972, p. 716 et seqq.; *P. Pescatore*, Die Menschenrechte und die europäische Integration, Integration 1969, 103 (109, 126), cited.

2 Op. cit. note 1, p. 719, 731.

I. Change of paradigm

Around twenty years later, *I. Pernice, M. Hilf* and *H.-W. Rengeling* saw the advantages of a list of fundamental rights "in the gain in transparency for the protection of fundamental rights, in the associated commitment to the protection of fundamental rights, in the increase in legal certainty and direction, in the documentation of a base of values for the Community and not least in relation to the legitimation of Community sovereign power".[3] This change of paradigm can only be explained by the gradual development of the supranational alliance into a political union, from "functionally integrated administrative alliances" (*H.-P. Ipsen*) into a European constitutionally-based commonwealth. However, when making this leap in qualitative terms, we must not overlook the fact that the case law of the ECJ in relation to fundamental rights began with the "Stauder" case in 1970,[4] so that it covers a period of almost 35 years. As early as the case "Algera et al. v. Common Assembly of the European Coal and Steel Community" dating from 1957, the Court of Justice, with succinct articulation, based its judgment with respect to the reversal of an administrative act based on the plaintiff's "vested rights" on its obligation to develop and apply constitutional procedural guarantees, since it would otherwise expose itself to the accusation of refusal of justice (Art. 4 French Civil Code: "deni de justice")[5]. He later refers to the fact that without the development of Community fundamental rights, Common Market citizens would seek legal protection in the individual constitutions of Member States, thereby putting at risk the unity of Community law, which no provision of any kind could override.[6]

In dogmatic terms, this reasoning is not considered in the literature to be particularly sustainable and (prior to the introduction of Art. 6(2) TEU), was corrected by a reference to the guardianship role of the ECJ "in the interpretation and application of the Treaty" (Art. 220 EC-Treaty). The self-legitimation of the European Court of Justice points towards several possible sites of fraction between Community and the fundamental rights protection of Member States, which became evident later, in particular in the relationship of the ECJ with the German Federal Constitutional Court. These relate firstly to the equivalence of fundamental rights protection within a multi-level system and secondly to the incorporation of the topic of fundamental rights into considerations related to priority and conflict of law. Well before the highly controversial rulings of the German Federal Constitutional Court, known in brief as "Solange I"[7] and the "Maastricht Treaty",[8] *Ipsen* also acknowledged "in principle" the priority of application

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3 See summary by *H.-W. Rengeling*, Grundrechtsschutz in der Europäischen Union, 1993, p. 169, fn. 23 to 25.

4 Case 29/69 ECJ Stauder v City of Ulm [1969] ECR 419 para. 7.

5 Cases 7/56 and 3-7/57 ECJ Algera v Common Assembly [1957] ECR 87, 117 et seqq.

6 Case 11/70 ECJ Internationale Handelsgesellschaft mbH [1970] ECR 1125 para. 3 et seq.

7 BVerfGE 37, 271 (280 et seqq.).

8 BVerfGE 89, 155 (174 et seq.).

of Community law in connection with the relationship of Community law to national fundamental rights, and set no limits on the basis of Art. 79(3) to the effects of the priority rule in terms of priority of application.[9]

The invariable interpretation of Community law as *lex superior* does not even allow for any competition between fundamental rights. According to the Banana Market order of the German Federal Constitutional Court,[10] a fundamental conflict between the protection of fundamental rights under German and Community law had also become increasingly less likely in Germany. The circumstances hypothesised by the German Federal Constitutional Court, according to which the ECJ does not safeguard the inalienable standard of fundamental rights, is of a purely theoretical nature. However, this inalienable standard of fundamental rights is not necessarily a level of protection which corresponds to the national law, namely that under the Grundgesetz. Therefore, the critical inquiries as to whether the Union power which is arising is curbed as a result of structurally adequate fundamental rights protection, are justified. However, sceptics should not ignore the fact that the constitutionally appropriate European level of protection cannot be distilled exclusively out of the sublime German dogma in relation to fundamental rights and the finely honed case law of the German Federal Constitutional Court. European fundamental rights protection represents the fruits of a compromise, albeit still a "legal policy" compromise.

II. The methodology of the judicial development of fundamental rights

The causes célèbres which enlighten the process of the determination of general legal principals with the context of Community fundamental rights, are the cases "Stauder" (1969), "Internationale Handelsgesellschaft" (1970) and "Nold" (1974). The European Court of Justice has incorporated fundamental rights into Community law through the general legal principles apostrophised in Art. 288(2) EC-Treaty (in a different context), and has used for the source of its conclusions the constitutions of the Member States and the international treaties on the protection of human rights; in the latter case, inasmuch as the Member States are signatories, which applies in the case of the ECHR. General legal principles which are common to the legal systems of Member States form an element of unwritten primary Community law. Their binding "determination" is primarily the responsibility of the case law of the Court of Justice. In order to prevent these being in any way "multi-faceted" or "nebulous", the Court has avowed that it will effect a "value-based" legal comparison.[11] Therefore, the national constitutions and the international treaties represent the pool out of which are developed those legal principles which will consequently serve as sources of legal perception. *R. Streinz* empha-

9 *Ipsen* (fn. 1), p. 289, 720.

10 BVerfGE 102, 147.

11 *Th. Oppermann*, Europarecht, 2nd edn.. 1999, para. 483.

sises the development of the legal principles on an autonomous Community basis, whilst the legal comparison is intended instead to offer proposals for solution of the cases brought before the ECJ.[12] This simply means that the ECJ examines whether any position on fundamental rights which is adopted fits into the structure and aims of the Community.

In the meantime, reference has been made on many occasions by the Advocates General to the Charter of Fundamental Rights as an additional source of legal perception, and it has been given various shades of meaning and has been cited by the ECJ in the "Mannesmann Röhrenwerke" and "max.mobil Telecommunication Service" cases. In the "Hatton" case, judges *Costa et al.* of the ECtHR referred to Art. 37 European Charter of Fundamental rights.[13] However, the ECJ has so far avoided explicitly citing the Charter of Fundamental Rights as an additional source of evidence of valid (or evolving) legal principles. Perhaps it does not wish to be overly hasty in the establishment of precedent.[14]

A situation of conflict and competition has been seen to exist between the constitutional traditions common to the Member States and the human rights guaranteed by the European Convention. Since the beginning of the Nineties, the fundamental rights arguments of the ECJ have focused unequivocally on the Convention rights. Although general legal principles are still mentioned, they are not developed on a comparative legal basis in case law.[15] It is not clear whether it is therefore possible to conclude their tacit waiver, because the ECJ seeks to avoid "the unnecessary repetition of work undertaken by the ECtHR"[16]. There is nothing to indicate this in what has been said by the judges at the European Court of Justice in Luxembourg, specifically its last President *G. C. Rodriguez Iglesias.*[17] The ECJ unquestionably seeks to avoid conflicts with national fundamental rights in the "mission situation", i.e. during the implementation of Community law by Member States, by focusing on the safe ground of the ECHR. In contrast to the constitutional traditions common to the Member States, the Convention rights are guaranteed by Member States in the treaties.

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12 *R Streinz*, Europarecht, 6th edn. 2003, para. 361.

13 ECtHR Hatton v UK, judgment of 08/07/2003, Rec. 2003, VIII – dissenting opinion.

14 Cf. *A. Weber*, Einheit und Vielfalt der europäischen Grundrechtsordnung(en), DVBl. 2003, 220 (221).

15 Cf. Case C-112/00 Schmidberger [2003] ECR I-1 para. 71 et seqq.

16 Cf. *J. Wolf*, Vom Grundrechtsschutz „in Europa" zu allgemeinverbindlich geltenden europäischen Grundrechten – Wege der Grundrechtssicherung unterhalb der Ebene europäischer Verfassungsgebung, in: *J Bröhmer* (ed.), Der Grundrechtsschutz in Europa, 2002, p. 9 (19).

17 G. C. Rodríguez Iglesias, Gedanken zum Entstehen einer Europäischen Rechtsordnung, NJW 1999, 1 et seqq.

III. Fundamental rights topics

In accordance with its mission as a judicial institution, the ECJ has developed Community fundamental rights on the basis of case law, according to their relevance in each particular case. Therefore, the present legal situation in the European Union is characterised by the praeter legem solution of the problem of fundamental rights. The fundamental rights thus developed "alongside the law" relate to human dignity, protection of private life, home and postal communications, the principle of equality within the meaning of equality of opportunity, religious freedom, freedom of association, freedom of trade, professional freedom, freedom of possession, prohibition on discrimination on the basis of sex (not on the basis of nationality; what is involved is the "injustice" of a manner of treatment, for which a simple technical mechanism of legal integration is not sufficient!), the general principle of equality, freedom of opinion and publication, the prohibition on retroactivity and the fundamental rights in relation to court proceedings. According to the case law of the ECJ, they apply "when the treaty applies". The current wording in Art. 51 European Charter of Fundamental Rights, which states that they apply "to Member States only when they are implementing Union law", corresponds to a narrow formulation used by the ECJ in the "Karlsson" judgment.[18]

From a general examination of this case law, a comprehensive "almost complete"[19] list of individual fundamental rights has been concluded. This achievement by the ECJ has rightly been recognised as a "contribution towards the European community of fundamental rights".[20] In their interpretation by the ECJ, the market freedoms, which are distinguished from the fundamental rights, have also risen to become rights having the nature of fundamental rights. As an example, in the "Bosman" case in 1995, the ECJ disallowed a football transfer rule which was applicable without distinction both to nationals and foreigners, as disproportionate and incompatible with freedom of movement of workers, because it was capable of restricting the freedom of movement of players who wish to pursue their activity in another Member State.[21] As a result, the freedom of movement of workers transformed from a separate prohibition on discrimination into a freedom right within the meaning of a prohibition on prevention or restriction, which develops *direct* horizontal effect towards the football associations which are organised under private law.

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[18] Case C-292/97 ECJ Karlsson [2000] ECR I-2737 para. 27.

[19] *Th. Kingreen*, in: *Chr. Calliees/M. Ruffert*, Kommentar zum EU-Vertrag und zum EG-Vertrag, 2nd edn. 2002, Art. 6 para. 90.

[20] Cf. *U. Everling*, Der Beitrag des EuGH zur europäischen Grundrechtsgemeinschaft, 1995.

[21] Case C-415/93 ECJ Union Royal Belge des Sociétés de Football Association ASBL and others v Jean-Marc Bosman [1995] ECR I-4921 para. 92 et seqq.

IV. Results and developments

However, within the context of the protection of individual fundamental rights, the ECJ has only acknowledged violations of fundamental rights on extremely rare occasions. The most far-reaching successes achieved by parties before the ECJ by relying on Community fundamental rights within the meaning of the constitutional traditions common to the Member States, have been interpretations of Community legal acts which were key to decisions in individual cases and which were in conformity with fundamental rights, as in the "Stauder" case. However, this alone does not represent a shortcoming in the supranational protection of fundamental rights. It has rightly been found that "the sum of the fundamental rights of Member States does not (produce) a monolithic block of European fundamental rights".[22]

The Court of Justice has clearly for some time considered itself directly bound by the ECHR, as developed by the case law of the European Court of Human Rights. Doubts in this respect, which were brought about by the ruling in the "Bosman" case, have been eliminated by a series of rulings, including that in the "Joachim Steffensen"[23], "RTL"[24], "Gerhard Köbler"[25] cases, and above all by the examination of the Austrian remuneration limitation statute on the basis of the fundamental right of data protection (Art. 8 ECHR)[26] and the interpretation of the principle of equality under Art. 141 EC-Treaty on the basis of Art. 12 ECHR in the case of a claim for a surviving dependent's pension by a partner in a transsexual couple.[27] In the "Roquette Frères" case, the ECJ developed actual standards for the protection of fundamental rights and for the Commission's duty of information towards national courts, with consideration to the "case-law of the European Court of Human Rights" in relation to Art. 8 ECHR "subsequent to the judgment in Hoechst",[28] on the basis of the Commission's powers of investigation under antitrust law (for example by gaining access to business premises and demanding documents). In 1974, in its "Nold" ruling, the ECJ made its first direct reference to the ECHR as part of the international treaties for the protection of human rights, without however accepting any directly binding effect. Instead it initially referred only to "indications" which it had been able to draw from the international treaties when determining the requisite fundamental rights protec-

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22 *Kirchhof/Frick*, Werbeverbot und Etikettierungszwang für Tabakwaren, AfP 1991, 677 (682).

23 Case C-276/01 ECJ Joachim Steffensen [2003] ECR I-3735, para. 69 et seqq. on Art. 6 ECHR.

24 Case C-245/01 ECJ RTL [2003], judgment of 23/10/2003, para. 73, on Art. 10(2) ECHR.

25 Case C-224/01 ECJ [2003] ECR I-10290 para. 49.

26 Case C-465/00 ECJ [2003] ECR I-4989 para. 73 et seqq.

27 Case C-117/01 ECJ K.B. [2004] ECR I– ... para. 33, which considers there is a contradiction with the right to marriage according to Art. 12 ECHR.

28 Case C-94/00 ECJ [2002] ECR I-9011 para. 29.

tion.[29] This was also able to be interpreted to mean that the Convention rights initially only produced "inspirational effects" within the case law of the ECJ, with the consequence that even the subjective Convention rights of the ECHR became "objectivised".[30]

Art. 6 (Right to a fair trial) and Art. 13 (Right to an effective remedy) ECHR, and the case law of the ECtHR in relation to the procedural guarantees within the Community principle of effective legal protection, constitute the most important normative points of reference of this adoption. However, even the right to the respect of private and family life and the political fundamental rights (arts. 8-11 ECHR) and the protection of possession (Protocol 1) have been included in the Community rules. *Chr. Grabenwarter* speaks of "normative effects ... in most cases in a weakened indirect form".[31] As a result the requirement for the Community to accede to the ECtHR became temporarily eclipsed. However, in the past the case law has frequently been criticised on the basis that the ECJ has not accepted the grounds for restriction of the ECHR (arts. 15 to 18 ECHR) as an unconditional minimum standard in relation to invasions of fundamental rights under Community law. The standards set by the ECJ, which, since the Maastricht Treaty, demand respect of the ECHR, under the terms of Art. 6(2) TEU, were overtaken by the subsequent case law of the ECtHR in Strasbourg in the "Hoechst case, on which a judgment was given in 1989,[32]. The ECJ first restricted the fundamental rights protection in relation to the home only to the private area, because Art. 8 ECHR solely relates to the free development of the personality.[33] A few years later the ECtHR explicitly incorporated all business premises into protection of the private life in accordance with Art. 8 ECHR, thereby developing earlier approaches.[34]

V. Assessment

1. Shortcomings of the examination system

Designation of the sources, the methods of legal perception and standards of protection deduced therefrom are frequently not reproducible in the case law of the ECJ in a manner which makes it possible to attest to their transparency, integrity and the rationality of the arguments used. This is also due to the "fundamental rights rhetoric" of this case law, in particular the succinct wording of the judg-

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29 Case 4/73 ECJ Nold v Commission [1974] ECR 491 para. 12 et seqq.

30 Cf. *Wolf* (fn. 14), p. 34 et seq.

31 *Chr. Grabenwarter*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), p. 290 (332).

32 Case 227/88 ECJ (see Case 46/87 Hoechst v Commission) [1989] ECR 2859 para. 17 et seq.

33 Links Case 46/87 and 227/88 [1989] ECR 2859 para. 17.

34 ECtHR Niemietz v Germany, judgment of 17/12/1992, Ser. A 256, p. 23 para. 27 et seqq.

ments, in which the ECJ copies the tradition adopted by French case law. The system of examining the rights of defence as a core constituent of the freedom rights has only been developed to a minimum extent. Is it even more flimsy in the case of the other types of fundamental rights, with the exception of the principle of equality. Extensive ECJ case law, based on Art. 141 and 12 EC-Treaty, exists in relation to the principle of equality. These equality rules represent embodiments of the general principle of equality which is recognised by the ECJ. The question of the protection or the normative area covered by a fundamental right, the question of the invasion into such an area and the question of the admissible restriction and consequently the justification for such invasion needs to be made clearer and dealt with more extensively by the ECJ. In those cases in which there is no targeted invasion, then the possibility of a de facto or indirect invasion, which may also lead to a violation of fundamental rights, should be examined.

2. Scope of protection of fundamental rights

Considerable uncertainty exists with respect to the protection of individual fundamental rights, as regards which fundamental rights, which have to date not yet become the subject of case law, the ECJ will recognise in the event of litigation. Even if the Charter of Fundamental Rights acquires legal significance as part of the Treaty establishing a Constitution for Europe, it will not include any guarantee of the general freedom of action in parallel to Art. 2(1) GG. There is no harm in this from the point of view of legal dogma, since the Member States may grant more extensive fundamental rights than the European Union.[35] However, as *H.-W. Rengeling* has pointed out, there remain "gaps" in the sphere of the protection of fundamental rights. This also implies the uncertainty associated with the fact that contrary fundamental rights, for example the protection of health in relation to freedom of opinion, remain entirely undefined. It must clearly be acknowledged that a list of fundamental rights offers no comprehensive relief in this respect. Even the standards of protection of the European Charter of Fundamental Rights must be judicially moulded in order to lead to effective protection of fundamental rights. However, the fundamental rights topics which the Court of Justice is required to address are predetermined, this being a significant feature in relation to social fundamental rights. Quite specifically, the list of fundamental rights within the Charter forces the Court of Justice into the role of an institution which must be understood less as a motive force towards integration than as a founder of legal peace and legal certainty within a European commonwealth. Its main tasks therefore involve jurisdiction relating to competence which is compelled by the

[35] Cf. *G. Hirsch*, Die Aufnahme der Grundrechtecharta in den Verfassungsvertrag, in: *J. Schwarze* (ed.), Der Verfassungsentwurf des Europäischen Konvents, 2004, p. 111 (120), which argues that the absence of a parallel norm to Art. 2 (1) GG in the TEC should not give rise to the revival of the 'reserve competence' of the Federal Constitutional Court.

multi-level system and by subsidiarity, and in a case law on fundamental rights which seeks to afford the highest possible level of protection.

3. Guaranteed essence

The guaranteed essence embodied in Art. 52(1) sentence 1 European Charter of Fundamental rights (Art. II-112.1.1 TEC), remains blurred in the case law of the ECJ. It would appear that its violation has not yet been accepted by the ECJ in any case brought before it. Specifically this limit on limitation, which leads a shadowy existence within German law, in view of the pre-eminent measure of proportionality in the case law of the German Federal Constitutional Court, is of decisive importance in order to ensure effective legal protection at European level. During the development of the European standard of fundamental rights, it must direct the European Court of Justice towards the development of minimum standards. In this way, the functional content of the guaranteed essence is extended during the comparative law discourse of the judges in Luxembourg, which would not be abolished, but rather spurred on if the Charter of Fundamental Rights were to acquire normative validity in the future. The standards of fundamental rights developed by the Court of Human Rights in Strasbourg are therefore significant as a benchmark. However, the direct commitment of the ECJ to the Convention rights as interpreted by the Court of Human Rights is essential. This commitment effect has been highlighted in Art. I-9(3) TEC in that the fundamental rights, even inasmuch as they are "guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... shall constitute general principles of the Union's law." According to Art. I-29(1) TEC, the Court of Justice is required to "ensure" respect for these principles, as constituents of "the law ... in the interpretation and application of the Constitution". Art. 52(3) of the European Charter of Fundamental Rights (Art. II-112.3 TEC) then unequivocally states that in the event that Charter rights and ECHR rights are equivalent, then the "meaning and scope" of the Charter rights "shall be the same as those laid down by the said Convention". In the light of the case law of the ECtHR, the ECJ is required to effect absolute objective monitoring of the guaranteed essence. This consequently also describes the route which leads from the fragmentation of fundamental rights to the structural standardisation of rights. The simple protection of fundamental rights "in Europe" is transformed under these normative requirements into generally binding valid European fundamental rights.

4. Examination of proportionality

The inadequate examination of proportionality within the case law of the ECJ on fundamental rights also harbours potential for conflict. The second ("necessity") and third (appropriateness: "limitations [must] meet objectives of general interest ... or ... the rights and freedoms of others") elements of the principle of proportionality have found mention in Art. 52(1) sentence 2 European Charter of

Fundamental Rights (Art. 112.1.2 TEC). The withdrawal of concentrated control which we have seen in relation to fundamental rights during the examination of proportionality relates specifically to economic fundamental rights. With respect to the reservations in relation to the limitation of fundamental rights set out in general legal principles, the ECJ consistently uses the following wording in its case law, in relation to the principle of proportionality: "However, those principles do not constitute an unfettered prerogative, but must be viewed in the light of their social function. Consequently, the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, as regards the aim pursued, a disproportionate and intolerable interference which infringes upon the very essence of the rights thus guaranteed."[36] In the case "Schmidberger" the ECJ qualified fundamental rights, guaranteed by Art. 10 and 11 of the ECHR, "as justification for a restriction" of the fundamental freedoms guaranteed by the EC-Treaty such as the free movement of goods.[37] Striving for reconciliation of the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the EC-Treaty the ECJ relates especially to the restrictions for reasons laid down in Art. 36 EC-Treaty (proportionality; "'emergency brake' in Community Law") and in general to the principle of proportionality.[38]

Suitability, necessity and appropriateness constitute individual elements of the ECJ's examination of proportionality in relation to fundamental rights. A co-ordinated method of application, such as is a feature of German constitutional doctrine and case law, is entirely absent from the ECJ's examination of fundamental rights. The situation is quite different in relation to the control of the proportionality of the reservation clauses of Member States, which restrict market freedoms. The examination of justification with regard to the limitation of fundamental rights, however, frequently only involves determination of the objective which legitimises the invasion and the finding that the measures taken to achieve this were not obviously unsuitable.[39] An examination of necessity and appropriateness is hardly ever found in the case law because, according to the ECJ, it "cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted by the Community legislature".[40]

Similarly to the fundamental rights themselves, there are no bounds to their system of limitation and consequently to the handling of the principle of proportionality. The consequence of this is that reliance on professional freedom and property against Community measures has not been successful on a single occasion. However, the ECJ does recognise the need for hardship and transition clauses, in order

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[36] Case 265/87 ECJ Schräder [1989] ECR 2237 para. 15.

[37] Case C-112/00 ECJ [2003] ECR 1 para. 74, 77.

[38] Case C-112/00, cit. para. 78 et seqq.

[39] Case 280/93 ECJ Germany v Council [1994] ECR I-4973 para. 64 et seqq. (90 et seqq.) – Banana Market.

[40] Case 280/93, cit. note 39, para. 94.

to protect "in the case of some traders", the "fundamental rights protected by Community law".[41]

The concept of the "margin of appreciation" has been proposed for the purposes of determining the appropriate balance of private interests inter se or of private interests against public interests.[42] Based on this concept, the ECtHR has developed areas in which extensive development of pan-European standards is guaranteed and the Convention states are afforded little scope for assessment in this respect. Whereas such a common tradition is absent, the Convention states do have considerable scope. However, even within the Charter of Fundamental Rights, the margin of appreciation could also enable distinction by subject areas in terms of topic or timing during the structuring of codified fundamental rights, which takes adequate account of the fact that common views have gained strength in the meantime. It is possible that the problem of the formation of judicial standards in relation to the protocols to the ECHR which are not ratified by all EU Member States, and in the event of reservations by individual Member States in relation to certain Convention provisions, could be dealt with under such a margin of appreciation.

VI. The case law in relation to the Banana Market Regulation as a paradigm of deficient case law by the ECJ in the area of fundamental rights

In the view of its critics, the shortcomings of the fundamental rights case law of the ECJ are glaringly obvious. They may therefore also be described as a "querelle allemande" (argument about nothing) in the sphere of fundamental rights. In the case involving the German Federal Republic versus the Council in relation to the EC Banana Market Regulation, in which Germany alleged a violation of the rights to property and professional freedom of the distributors of third-country bananas, the ECJ failed to examine the question of fundamental rights. In his opinion on the subject of "The guarantee of inalienable fundamental rights standards by the ECJ" *P. Selmer* saw the focus of the denial of substantive legal protection by the ECJ in the inalienable standard of protection of the examination of proportionality of the invasion into professional freedom.[43] The proportionality of the invasion as a key criterion in determining whether the burden being imposed is in conformity with fundamental rights receives absolutely no mention. Exclusively approaches involving an examination of suitability and necessity are found in the grounds of the judgment under "proportionality", which is linked to the "broad discretion" of the

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41 Case 68/95 ECJ T.Port [1996] ECR I-6065 para. 40 – Banana Market.

42 Cf. *J. Kühling*, Grundrechte, in: *A. v. Bogdandy* (ed.), Europäisches Verfassungsrecht, 2003, 583 (621 et seq.).

43 *P. Selmer*, Die Gewährleistung der unabdingbaren Grundrechtsstandards durch den EuGH: zum „Kooperationsverhältnis" zwischen BVerfG und EuGH am Beispiel des Rechtsschutzes gegen die Bananenmarkt-Verordnung, 1998.

Community legislator. Not even the protective content of the affected professional freedom is elucidated. The means, depth and seriousness of the invasion of fundamental rights associated with the Regulation are not assessed or weighted in any way. The apodictic finding of the ECJ, that the "essence" of the right of those affected to exercise a profession is not touched, has itself no cognitive value and significance, because it is not explained.

Therefore, the German Federal Constitutional Court did not accept the assessment that the shortcomings in examination which it maintained in relation to the banana market judgments "do not (represent) singular exceptions ('mavericks'), but (are) ... consistently .. an expression of general fundamental rights shortcomings within the meaning of the Maastricht judgment".[44] The German Federal Constitutional Court considered the need for a protection of fundamental rights by EC law, based on the judgments of the ECJ in relation to the Banana Market Regulation, which fundamentally equally observes the Grundgesetz and guarantees the essence of fundamental rights in general, to have been met, because the case law of the ECJ "generally guarantees effective protection of fundamental rights against the jurisdiction power of the Communities (which matches this standard)".[45] However, the German Federal Constitutional Court failed to refer to the evident shortcoming associated with the examination of proportionality in the case law of the ECJ in relation to fundamental rights. It could thereby have made a substantial contribution within the context of the "relationship of cooperation" without the need to threaten the reserve control function which it claims to have.

VII. Result

On the basis of the above analysis of the situation, the principal shortcomings of the guarantee of fundamental rights by the ECJ may be summarised in three points:

1. There are significant shortcomings in the ECJ's arguments, which mean that it is frequently impossible to reproduce its methods of examining fundamental rights. Therefore, the ECJ needs to extend its dogma in relation to fundamental rights, with recourse to the fundamental rights doctrines of Member States.
2. For some time, the ECJ appeared to apply significantly stricter measures to the adherence to fundamental rights of national legislative acts and of executive measures of Member States than to the control of the conformity with fundamental rights of Community legislative acts and implementing measures by Community institutions. However, this impression has now been relativised by the "Roquette Frères" judgment.
3. Although in its case law in relation to the general legal principles of Community law, the ECJ increasingly has recourse to Convention rights under the

[44] *Selmer*, op. cit. note 43, p. 172.
[45] BVerfGE 102, 147 (164).

ECHR and the case law of the ECtHR, it has never proved itself to be a precursor in relation to the establishment of a high level of protection. As judgments subsequent to the "Hoechst" judgment demonstrate, it has "only" compliantly followed the raising of the level of protection which has taken place "externally".

The plurality of legal areas, some of which overlap and supplement one another, necessitates the interweaving of the various systems of fundamental rights. This has not yet been achieved via the entry into force of the European Charter of Fundamental Rights or the accession of the Union to the ECHR. As a result, a great deal depends on a culture of case law, which develops a fund of dogma for the interpretation and application of European fundamental rights within a climate of cooperation. In order to achieve this, the European Court of Justice is dependent on the support of the academic world.

The legal relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights

Georg Ress

I. The present relationship between the ECtHR and the ECJ according to the case law of both Courts[1]

1. The European Court of Human Rights (ECtHR) is called upon to supervise the obligations of the Contracting States as to whether they «secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention» (Art. 1 of the European Convention on Human Rights – the Convention). It exercises its jurisdiction not only in relation to Member States of the European Union, but to 45 European States at the present time. As an international regional court, the ECtHR has compulsory jurisdiction with respect to all Contracting States, according to the 11th Protocol to the Convention of 1 November 1998. In the context of the development of international jurisdiction, this Court is a unique example not only in so far as it has been entrusted, for the first time in history of international law, with a compulsory jurisdiction but furthermore with procedures giving the individual a subjective right to introduce individual complaints about alleged violations of their rights and freedoms set out in the Convention. The ECtHR can declare that a State has violated the Convention after the individual applicant has exhausted domestic remedies. Such a declaratory judgment can contain an order to the State to pay just satisfaction to the applicant and the States have a duty not only to immediately refrain from any further violations in that case but also to see that similar violations are prevented generally, for instance, by making any necessary changes to the domestic legal order. Judgments do not have

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[1] As regards the situation previous to the 11th Protocol see various articles of the author: Menschenrechte, Europäisches Gemeinschaftsrecht und nationales Verfassungsrecht, in: *Haller/Ress et. al.* (eds.), Staat und Recht, Festschrift für Günther Winkler, 1997, p 897 et seqq.; Die EMRK und das Europäische Gemeinschaftsrecht, ZeUS, 1999, 471 et seqq.; Die Europäische Grundrechtscharta und das Verhältnis zwischen EGMR, EuGH und den nationalen Verfassungsgerichten, in: *Duschanek/Griller*, Grundrechte für Europa, Die Europäische Union nach Nizza, 2002, S. 183 et seqq. See also the article of *Johan Callewaert*, Die EMRK und die EU-Grundrechtscharta – Bestandsaufnahme einer Harmonisierung auf halbem Weg, EuGRZ, 2003, p. 198 et seqq.

immediate effect within the legal order of the Contracting States, unless the internal legal order so provides. It is the task of the Committee of Ministers, which has to supervise the execution of the final judgments (Art. 46 § 2 of the Convention), to ensure that the States abide by the final judgment of the Court in any case to which they are parties (Art. 46 § 1 of the Convention). I am of the view that where acts of the State, for instance administrative acts or judgments, are concerned, there should be a procedure for reopening administrative or court procedures, if the outcome, that is the final decision or judgment, was dependent on or influenced by the violation of the Convention. There is no *erga omnes*-effect of the judgments for other States; the judgment only has an *inter partes*-effect. It is nevertheless a ruling on the obligations of the States in relation to Art. 1 of the Convention and one may therefore say that every judgment of the Court has a value of precedent or an effect of orientation for all States, not just those parties to the procedure.

2. The role of the Court of Justice of the European Communities (ECJ) is quite different. This Court is entrusted with the task of reviewing the legality of EC law in relation to the primary law provisions (Treaties) and even to decide conflicts between some provisions of primary law (Art. 220 EC-Treaty[2]). It is also entrusted with supervising the duties of Member States in executing EC law and fulfilling the duties arising from EC law. The power to interprete and to review the application of EC law is divided between the courts of the Member States and the Court of Justice, even if the latter has the last word in this domain. Simplifying the matter one can say that the ECJ is exercising the judicial power of a constitutional court or supreme court in relation to matters that the Member States have transferred to the European Communities. Or, to put it otherwise, on matters in relation to which the Member States have waived their right to exercise in the future any authority.[3]

Since, according to the interpretation given by the ECJ in the case *Costa v. Enel*[4], EC law has superiority in relation to the internal law of the Member States. Every interpretation of a provision of Community law by the ECJ may have a direct impact on the validity or scope of application of internal law rules. This direct effect gives the ECJ to a greater degree the status of a constitutional court in relation to the Member States of the European Union and indicates a clear difference with the European Court of Human Rights.[5]

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2 See Art. I-29 TEC.

3 The Constitution of the EU approves this character of a constitutional court. Article I-29 § 1 TEC says: «The Court of Justice....shall ensure respect for the law in the interpretation and application of the Constitution...».

4 Judgment of 15/07/1964, case 6/64, ECR 1964, p 585.

5 On the quality of this judicial protection, see *Georg Ress*, Die Europäische Grundrechtskonzeption. Brauchen wir eine verbindliche Europäische Grundrechtscharta?, in: *Roman Herzog/Stephan Hobe* (eds.), Die Europäische Union auf dem Weg zum verfassten Staatenverbund: Perspektiven der europäischen Verfassungsordnung, 2004, p 82 (86 et seqq.).

3. The relations between the two courts have up to now not been settled in a definite manner. The question whether acts of the European Community or of the European Union can be attacked directly before the ECtHR awaits an answer and was also not decided in the case of *Senator Lines v. 15 Member States of the European Union*[6]. But there are other cases pending[7]. Up to now, the Court has only in a decision of inadmissibility in the case of *SEGI v. 15 Member States of the European Union*[8] decided that a common standpoint of the European Union is in principle not excluded from the scrutiny of the Court because it can be held as a common action of the Member States and not (only) as an act of the European Union or of the European Council itself. In the case of *Matthews v. The UK*[9], which concerns the question whether the European Parliament can be considered a legislature in the sense of Art. 3 of the 1st Protocol to the Convention, the ECtHR found a violation of this provision because of the exclusion of the inhabitants of Gibraltar from the elections to the European Parliament. The Court stated that the Contracting States while transferring competences to international bodies or organisations cannot avoid their responsibility under the Convention and that they remain responsible even after such a transfer.[10] The ECtHR has not so far seen fit to apply the theory of functional succession[11] to the relations between Contracting States and the European Union, probably because of the difficulties which would arise when considering the European Union indirectly as a member of the Council of Europe.

The same position as in the *Matthews* judgment was held in the cases *Beer and Regan* and *Waite and Kennedy v. Germany*[12], concerning the question whether States can exclude the access to their national courts by granting immunity to international organisations that operate on their territory.[13] The transfer of competences or more precisely: the exclusion of the competence of national courts and the conferral of exclusive authority over monopolising the decision on certain legal questions to international organisations may only be agreed upon if the responsibility of the Contracting States under the Convention is fulfilled. States have to ensure that proper judicial procedures and safeguards are available within

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6 Application n. 56672/00; by a decision of 10/03/2004 the Grand Chamber has declared the application inadmissible because the Court of first instance of the EC has annulled the decisions (sanctions) of the European Commission.

7 In particular *Bosphorus Hava Yollari Turizm v. Ireland*, n° 45036/98, decision from 13/09/2001. The hearing before the Grand Chamber took place on 29 September 2004.

8 Decision of 16/05 and 23/05/2002, case 6422/02 and 9916/02, ECtHR 2002-V.

9 Judgment of 18/02/99, (GC) n° 24833/94, ECtHR 1999-I.

10 Para 32 of the judgment.

11 The ECJ has applied this concept in the case International Fruit Company et al., judgment of 12/12/72, joined cases 21 to 24/72, 1972 II, ECR 1219.

12 Judgments of 18/02/99, cases [GC] 28934/95 and 26083/94, ECHR 1999-I.

13 The cases were preceded by labour law proceedings against the European Space Agency before German courts.

the international organisation. As the ECtHR has stated, alternative means of adequate (or equivalent) protection must exist.[14]

If one transfers this line of reasoning to the European Communities, then the responsibility of the Contracting States for ensuring the correct interpretation and application of the Convention within the EC/EU, to which powers have been transferred, seems to be the necessary conclusion. This is of course a rather remote responsibility of Member States for all acts and omissions of the European Communities via this responsibility of Contracting Convention States by the act of transfer of powers. It may well be the question whether there do not exist a presumption in favour of judgments of the ECJ that its interpretation given to the rights and freedoms are in conformity with the Convention.

It is more obvious and more direct to address the responsibilities of Contracting States when they *execute* acts like regulations or directives or individual penalties of the European Communities in their domestic order. In all these cases, the *direct link* between State action or omission and the law of the European Community can be established. That was the case in the procedure *M. & Co. v. Germany*[15] before the Commission and the case of *Cantoni v. France*[16], where the Court held that the question whether the French law was *verbatim replica* of provisions of the European directive does not exclude the responsibility of France for its own laws and regulations.[17]

4. This situation may be understood as a call for accession of the EC/EU to the European Convention on Human Rights.[18] Later on we shall have a deeper look at the ongoing development in this regard. But apart from this question how to arrange an accession there are still many other problems to overcome. According to Art. 6 § 1 TEU, the Union has been established on the basis of the principles of freedom, democracy and respect for human rights and fundamental freedoms as well as the rule of law. Article 6 § 2 TEU states that the Union has to respect not only fundamental rights as they are guaranteed in the European Convention on Human Rights but also as they emerge from the common constitutional principles of the Member States and the general principles of Community law. The consequence of this reference in dogmatic legal way is that the Convention is only applied indirectly within the common principles of Community law as it has been established by the ECJ in its decision of *Internationale Handelsgesellschaft / Ein-*

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[14] See para 68 of the judgment *Waite and Kennedy v. Germany* (supra note 12).

[15] Decision of the Commission n. 13258/87 of 09/02/1990, (D. R. 64, p 138), endorsed in *Heinz v. Contracting Parties*, also parties to the European Patent Convention (Decision of 10/01/1994, D. R. 76-A, p 125).

[16] Judgment of 15/11/1996, n° 17862/91. Rep. 1996-V.

[17] See para 30 of the case *Cantoni v. France* (note 16).

[18] See *Ch. Krüger / Polakiewicz*, Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa – Europäische Menschenrechtskonvention und EU- Grundrechtscharta, EuGRZ 2001, 92 et seqq.

fuhr und Vorratsstelle Getreide.[19] The standard established by the common constitutional principles may well go beyond the level of protection of the Convention (Art. 53 ECHR[20]) and may, in particular, have its own value in fields where the Convention does not contain any specific right. The Convention is, not only in relation to the Contracting States but also in relation to the European Union, a minimum standard of protection of fundamental rights and freedoms, an instrument of European public order, as the ECtHR characterised the standard in the *Loizidou* judgment.[21] Since not all additional protocols of the Convention have been ratified by the Member States of the European Union, the question may arise whether the additional protocols can and may be part of the common principles of Community law (or whether they are part of the reference in Art. 6 § 2 TEU). This may, in particular, be true for the rights and freedoms of the 1st and 6th additional protocols. But these and also those in the other additional protocols may indicate whether a common value in the sense of Art. 6 § 1 TEU exists (*Indizwirkung*).[22]

5. The actual situation between the ECtHR and the ECJ according to the case law of both courts leads to the conclusion that the divergences between the two courts may increase. The European Union gets more competences in fields which are particularly important for human rights, such as the right of asylum, immigration policy and co-operation in the field of internal affairs and justice.[23] Also the existence of a binding European Charter of fundamental rights may ultimately exacerbate this problem.[24] Because the ECJ then disposes of its own legal basis for the judicial review of fundamental rights and freedoms which may - despite the horizontal clauses[25] - induce it to depart from the interpretation of the Convention by the ECtHR. It has nevertheless to be noted that the ECJ has always tried to follow the jurisprudence of the Strasbourg Court (decisions on business premises according to Art. 8 of the Convention[26]), even if some discrepancies can be noted in the

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19 Judgment of 17/12/1970 case 11/70, Rec. 1970, p 1125, para 4 and the famous *Nold KG/Commission* judgment of 14/5/1974, case 4/73, Rec. 1974, p 491, para 13.

20 See also Art. II-112 § 3 TEC which establishes that the Union Law may provide more extensive protection of human rights and fundamental freedoms than the Convention.

21 Case of *Loizidou v. Turkey*, judgment (Preliminary Objections) of 23/03/1995, application no. 15318/89, para 75 and 93. See the explanations to the Charter of Fundamental Rights given by The European Convention, Document: CONV 828/1/03 REV 1 (to find under: http://european-convention.eu.int), where it is said in relation to Art. 52 § 3 of the Charter (Art. II-112 § 3 TEC): "In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECtHR."

22 According to the explanations to the Charter (see note 20) the reference in Art. II-112 § 3 covers both, the Convention and the Protocols to it.

23 See Part III, Chapter IV TEC, especially Art. III-265 et seqq.

24 The Charter of Fundamental Rights has been included as Part II in the TEC and will thus acquire legal force.

25 See Art. II-112 § 3 TEC.

26 First the ECJ held that business premises aren't included in the Art. 8 of the Convention (judgment, 21/09/1989, *Hoechst v. Commission*, Cases 46/87 and 227/88, ECR. 2859), then the ECHR decided to the contrary (judgment of 16/12/1992, *Niemietz v.*

application of Art. 10 of the Convention (TV monopoly[27]) or in relation to the equality of arms in Art. 6 § 1 (right to response to the final conclusions of the advocate general before the ECJ[28]), or the right not to be forced to incriminate oneself. In this field the European Court of First Instance has confirmed its position in a judgment of 20/02/2001 that this does not relate to the area of custom law,[29] disregarding a contrary decision of the ECtHR of 25/02/1993.[30]

The sometimes different interpretation of the Convention is an expression of the different perspective of both courts. While the ECJ is more focused on the efficiency of the internal market and legality of the acts of the European Communities, the Strasbourg Court is more focused on individual rights and freedoms.[31]

6. These diverse perspectives give reason to assume that there will be no complete conformity in the jurisdiction of both courts after the Charter of fundamental rights of the European Union has gained binding force. In cases where an established jurisprudence of the Strasbourg Court exists, the horizontal clauses in Art. II-112 § 3 TEC may lead to rather clear conformity. But for those fields where there is not yet an established jurisprudence, there is still no guarantee and no procedure to overcome possible divergences.

In relation to the national constitutional or supreme courts which apply catalogues of fundamental rights similar to those written in the Convention, an external control by an impartial court that stands outside the national constitutional

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Germany). After this latter decision the ECJ followed the interpretation of the ECtHR (see lately judgment of 22/10/2002, C-94/00 *Roquette Frères SA*, para 29).

27 The ECJ reached the conclusion, that the television monopoly conferred by the Greek state does not violate Community law (judgment of 18/06/1991, C-260/89, *Elliniki Radiofonia Tileorasi Anonymi Etairia v. Dimotiki Etairia Pliroforisis and Kouvelas*) while the ECtHR held later that the Austrian television monopoly was not in conformity with Art. 10 of the Convention (judgment of 24/11/1993, *Informationsverein Lentia and Others v. Austria*), REC 276.

28 The ECtHR states that Art. 6 § I of the Convention guarantees the right to reply in civil cases as well as in criminal cases to every statement given to the court in writing or orally, also when those come from an impartial and objective organ of the jurisdiction (judgment of 20/02/1996, *Vermeulen v. Belgium*). Still the ECJ abnegates this in a subsequent decision for the opinion given by the Advocate General on the grounds that latter one isn't to be seen as pleading with partial interest but as assisting the Court in his exercise of the jurisdiction (Order of 04/02/2000, C-17/98, *Emesa Sugar*). For a more detailed comparison of both cases see:, *Benedetto Conforti* in: *L.C. Vohrah et al.* (eds.), Man's Inhumanity to Man, 2003, p 221et seqq.

29 Case *Mannesmannröhrenwerke*, European Court of 1st Instance, I-112/89, ECR 2001, II-729 (753). The 1st Instance decision based on the former judgment of the ECJ of 18/10/1989, C-374/87 in the case *Orkem*.

30 Case *Funke v. France*, judgment 25/02/1993, Recueil 276-A, § 44.

31 Like said by *Rudolf Schuster* in his speech of 24 June 2003 before the Parliament Assembly of the CoE: "The European Union will always protect its strict but reasonable economic rules, it is for the Council of Europe to watch over the noble ideals of democracy."

system has been proven to be crucial for an effective protection of human rights. Such a supervision by the ECtHR has never been questioned.[32] Therefore it is only logical to argue that the same external control is also necessary in relation to acts which have their source in the Union Law.

7. Before entering into the possibilities to overcome the problem of divergences, it is necessary also to address the problem of the lack of competences of the ECJ in relation to specific areas of action of the European Union,[33] as for instance the foreign and security policy.[34] The Court of Justice in its observation on the competences of the EC Court has been very reluctant, if not negative, in relation to an extension of its jurisdiction to cases in this field. On the other hand, as the case of *SEGI v. 15 Member States of the European Union*[35] demonstrates, it cannot be excluded that a common standpoint of the European Union not only relates to the Member States but also to individuals and may infringe into their rights and freedoms. In the case of *SEGI*, which concerned a common standpoint of the European Council on fighting terrorism, it included measures against individual organisations or individuals that where treated under this heading and in relation to which the co-ordinated police control of Europol was confirmed, if not enhanced. The ECtHR held that these measures referred only to police competences already established and were therefore merely declaratory. This lack of competences of the ECJ may lead not only to a direct application to the Strasbourg Court if no direct action on the national level is taken and the chilling effect of these common standpoints are obvious, but also to the question whether there is a violation of Art. 13 of the Convention, there being no effective remedy on the national level (here: Community level).[36] If no remedy on the national (Community) level exists, then the ECtHR will act as court of 1st instance - not a desirable solution in the light of the duty to exhaust domestic remedies - , a situation which was very much

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32 Except perhaps for reasons of constitutional law by the German Federal Constitutional Court (decision of 14.10.2004 in the case of Görgülü, in: Neue Juristische Wochenschrift 2004, 3407. But also in this case the final execution of the judgment of the ECtHR (Görgülü v. Germany, n. 74969/01, 26/02/2004, Neue Juristische Wochenschrift 2004, 2647) was, in principle, not called into question by the Federal Constitutional Court (see the interim locatory decisions of 28/12/2004, EuGRZ 2004, 809, and 01/02/2005 (not yet published). On the question of execution see *G. Ress*, The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States, in *Irene Maier* (ed.), Protection of Human Rights in Europe, 1982, pp 209 et seqq. (226).

33 See *Wolfram Cremer*, Der Rechtsschutz des Einzelnen gegen Sekundärrechtsakte der Union gem. Art. III-270 Abs. 4 Konventsentwurf des Vertrags über eine Verfassung für Europa, EuGRZ 2004, p 577 et seqq.

34 See Art. III-365 § 1 TEC.

35 See note 7.

36 § 2 of Art. 365 TEC, included in the last minute, gives the ECJ a limited competence in the field of common foreign and security policy. It opens the possibility to call on the court for a review of the legality of restrictive measures against natural or legal persons.

criticised by the dissenting opinions in the cases *Balmer-Schafroth and Others v. Switzerland*[37] and *Athanassoglou and Others v. Switzerland.*[38]

II. Proposed answers to the call for a reform

1. One drastic solution to these problems has been proposed by the British professor *Toth,*[39] that the Member States of the European Union should denounce the European Convention of Human Rights, thereby making it possible to establish the ECJ as the only court for human rights questions within the European Union. This is of course an unrealistic and very "euro- concentrated" approach. It does not take into account that the Convention is aimed at supervising all State acts and omissions (mainly on the territory of the Contracting states, as confirmed in the *Bankovic* case[40]) and therefore no such lack of competences should exist in principle for the supreme and national courts. This applies as well to the Court of Justice of the European Communities.

A contrary but similarly drastic solution was proposed by the members of the European Constitution Group. According to Art. 7 (vi) § 1 and 2 of their Draft Constitution, the ECJ shall have no jurisdiction at all in cases where the interpretation of human rights is involved.[41] Those cases should be decided directly by the ECtHR. But this would make the ECtHR a first instance court, which is contrary to its philosophy.

2. Apart from these radical solutions, in order to avoid divergences in future between the two courts, at least two proposals have been intensively discussed: the reference procedure and accession by the EU to the Convention. The third position could be that accession is not necessary because of the already or nearly established responsibility of the Contracting States under the Convention for all acts and omissions of international organisations even after a transfer of competences. A fourth position could be that the two institutions could live without any formal regulation by just smoothly adjusting their jurisprudence to each other. This pragmatic way may become more difficult in the future when the ECJ with the European Charter of Fundamental Rights and Freedoms as part of the Constitution has his own legal instrument.

Some questions in relation to Art. II-112 § 3 TEC have not yet received a completely satisfactory answer. When does a right of the Charter really correspond to a right of the Convention? And what does "the same... meaning and scope" really

[37] Judgment of 26/08/1997, Recueil 1997-IV.

[38] Judgment of 06/04/2000, application no. 27644/95, ECtHR 2000-IV.

[39] *Toth, A.G.*, The European Union and Human Rights: the way forward, in: Common Market Law Review, 34 (1997), p 491 et seqq., 512.

[40] Decision of 12/12/2001, application no. 52207/99, ECtHR 2001-XII, para 59 et seqq., 67.

[41] Draft Constitution of 8 June 2003, to find in the internet: www.european-constitutional-group.org .

mean? Does the reference also embrace the jurisprudence of the Strasbourg Court? According to the explanations to the Charter updated by the Praesidium of the European Convention[42] the Strasbourg case law is a guideline for the ECJ in interpretating the Charter but does not have legal force. Since there is no reference to the jurisprudence of the ECtHR as "binding" on the ECJ (see the restricted reference in the preamble of the Charter) there is no direct legal relationship between the judgments of the Strasbourg Court and the practice within the European Union, and in particular with the judgments of the ECJ. But, as said before, for an effective protection of human rights the possibility of an external review is crucial.[43] Furthermore remains the probability of divergence in fields where not yet a jurisprudence of the ECtHR exists.

3. A procedure of reference from the ECJ to the ECtHR to solve questions of interpretation of the Convention and to avoid divergences of jurisprudence would in principle be possible since already today the Strasbourg Court has the competence to deliver advisory opinions (Art. 47 ECHR). This procedure would need a modification of the Convention, though, and it would not cover cases which do not fall under the competence of the ECJ, like the *Matthews* case. Furthermore it would not be for the individual to bring this reference procedure to the Court of Strasbourg, but for the ECJ. Apart from this, neither of the two courts has really had good experience with so-called advisory opinions[44].

III. The proposal of a reform in the new Constitution

1. The text of the proposed new Constitution opened the path for accession of the EU to the Convention. The final report of the Working Group II of the European Convention dealt already with the question of implementing the Charter in the Constitution and of accession to the Convention and outlined that both "should not be regarded as alternative, but rather as complementary steps ensuring full respect of fundamental rights by the Union".[45]

Since Art. I-9 § 2 of the draft European Constitution says, "The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms", there exists now a legal basis for accession. This text is an improvement in relation to earlier drafts according to which "the Union

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42 CONV 828/1/03 REV 1, see note 21.

43 See *Callewaert* (see note 1) who states that, "according to contemporary legal views protection of fundamental rights on a domestic level only gains credibility if it is also, subjected to review from outside the state." Taking this view with the Charter accession (to the ECHR) becomes practically a necessity, particularly if the Charter is to acquire binding force.

44 This is true in particular with the advisory opinion of the ECJ about the lack of competence of the European Communities to accede to the Convention (advisory opinion of 28/03/1996, opinion 2/94, Rec. 1996, p I-1759).

45 Working Document 16, page 12 - http://european-convention.eu.int/docs/wd2/2616.pdf.

may seek accession". According to Art. III-325 § 6 TEC, the Union - which will now have legal personality according to Art. I-7 TEC and is therefore able to conclude international treaties and to accede to international organisations - normally needs for a conclusion of international treaties only a qualified majority in the Council. For accession of the European Union to the Convention unanimity is nevertheless necessary. This authorisation would be given with the ratification of the Constitution by all Member States. The Parliamentary Assembly of the Council of Europe decided on 25 June 2003 to ask the Committee of Ministers of the Council of Europe to engage as early as possible in negotiations with the European Union on accession.[46] In the 14th Protocol to the Convention, now open for ratification, the Contracting States have inserted Art. 17 § 2: "The European Union may accede to this Convention" which makes it possible that not only states may become Contracting Parties.

It is to be hoped that the clear signal in favour of accession given by the European Constitution will be followed by a quick preparation of the required legal instruments.[47]

2. One impediment to this accession could be that the status of the ECtHR which - in contrast to the status of the ECJ - has never been defined in clear legal terms[48]. While the ECJ is an organ of the European Communities and will become an organ of the European Union after the Union has acquired legal personality, the same is not true for the relationship between the ECtHR and the Council of Europe. The Council of Europe, in particular the Committee of Ministers, has until now not established clear, definite and satisfactory rules (statutory regulations) on the status of the Court and the judges. The provisional regulation of 1997, which was expressly deemed provisional and to be replaced within one year by a definite one (that is shortly after the coming into force of the 11th Protocol) has until now never been modified or finalised. This provisional regulation speaks of the special status of the Court without clarifying whether the Court is part of the institutional structure of the Council of Europe itself, whether it has legal personality (like other international courts, for instance the recently-created International Court of

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[46] Recommendation based on the Report of the Political Affairs Committee, Reporter *Theodoros Pangalos*, Doc. 9846 of 24 June 2003.

[47] *Peter Schieder*, President of the Parliamentary Assembly of the CoE, called the draft of the European Convention a "crucial first step" not only into direction to accession of the EU to the Convention but also to the EU becoming an associated member of the CoE. *Walter Schwimmer*, Secretary General of the CoE, spoke in favour of an accession in occasion of the 3rd Council of Europe Summit of Heads of State and Government which took place in spring 2005. But first the European Constitution has to be ratified which according to *Romano Prodi* could last approximately two years.

[48] On these questions see *Georg Ress*, Der Europäische Gerichtshof für Menschenrechte, seine Reform und die Rolle der nationalen Gerichte, in : Internationale Gerichtshöfe und nationale Rechtsordnung, Internationales Symposium 28./29.11.2003 zu Ehren von F. Matscher, Band 9 der Schriften des Österreichischen Instituts für Menschenrechte, 2005.

Criminal Law) or whether is has to be considered as a "common organ of the Contracting States", which would mean that it has nevertheless its place outside the Council of Europe but under a certain control of the Committee of Ministers of the Council of Europe as an assembly of the representatives of the Contracting States (not as the Committee of Ministers as such).

Before the European Union seriously envisages the accession to the Convention this question of the status of the ECtHR should be resolved, together with the question of the status of its judges. While judges of other international courts are treated as international staff of a particular judicial nature (independence to the organisation in relation to their judicial function) the judges of the ECtHR are "self employed". They have no contractual or statutory relationship to the Council of Europe and, until now, do not have the status of any of the other staff members of the Council of Europe. They have no access to the administrative tribunal in relation to their working conditions and other conditions of the Council of Europe and they do not enjoy any social protection. Their salary is not guaranteed for times of illness and they do not have pension rights. The judges in a recent resolution unanimously adopted by all of them have voiced concern about their independence and have stated "on the question of principle, the lack of pension provisions in particular, can be perceived as exposing judges to pressure during their term of office as complete loss of income might result from their departure from office or total disability. Alternatively judges may be forced to rely on their governments for pension provisions, which seems incompatible with their status as members of an international court. This goes directly to the independence of the Court, the essence of the status of international judges being that they should be free of all financial dependence on their governments.

Moreover it may be considered inappropriate that the Council of Europe, as a parent institution of the Social Charter, enshrining as it does the right to social security, should be seen to espouse a system that fails to provide any social security for its judges. This lack of basic social protection also sits ill with the Social Security Convention of the ILO which is binding on all Member States and requires them to provide social protection covering at least some of the relevant risks, and with Art. 9 of the International Covenant on economic, social and cultural rights (1966) which provides *inter alia* that "the States Parties .... recognise the right to everyone to social security, including social insurance."

IV. The modalities of accession and the necessary modifications of the statute of the Council of Europe and the European Convention of Human Rights

1. Regarding the modalities of accession by the European Union to the Convention, two options have been proposed; one is for an amending protocol which would contain all the necessary provisions to enable the EU to accede; the other is

for an accession treaty.[49] The first option would entail two steps: the amending protocol would try to overcome the difficulty that the Convention is only open to *States* that are Member States to the Council of Europe (Art. 59 § 1 ECHR, Art. 4 of the statute of the Council of Europe). This amending protocol would have to be signed and ratified by all State parties to the Convention which would probably take at least a few years. Only then the EU could accede to the modified Convention. In order to accelerate the ratification process a "tacit acceptance clause" which provides the automatic entry into force following the expiration of a certain time period, could be used.[50] Since such a clause is designed for protocols of less importance it does not seem to be the adequate instrument to be applied on the occasion of the accession of the EU to the Convention. The other option of an accession treaty would combine both steps into one. The States Parties to the Convention and the EU would sign one treaty. This treaty could contain a rather short text with the agreement that the EU accedes to the Convention and in the annex the necessary amendments to the Convention and the protocols could be regulated.

2. Both the statute of the Council of Europe and the Convention are based on the concept that only *states* may be contracting parties. Since the EU is not (yet) a federal state, its accession would mean that both instruments have to be adapted to the idea of an international organisation being a member of the Council of Europe and a party to the Convention. Here, too, different options exist. To make an *isolated accession* of the EU to the Convention possible, independently from a membership in the Council of Europe, Art. 59 § 1 of the Convention ("This Convention shall be open to the signature of the members of the Council of Europe.") has to be amended. The first option proposed by the working group II of the European Convention is to expressly authorise the EU to accede to the Convention (now Art. I-9 § 2 TEC). The second alternative is to open the possibility of accession to all international organisations with the only restriction that the organisation has to be invited by the Committee of Ministers of the Council of Europe.[51]

3. More complex is the situation in regard to the notion of *State* or *States* to which the Convention refers in Art. 10 § 1, 11 § 2, 17, 27 § 2 and § 3, 38 § 1 a, 56 § 1 and § 4 and Art. 57 § 1. There is either the possibility of adding simply the "EU" to the term of "States", or to use generally the expression "High Contracting Party". Another option would be to make it clear in the amending protocol that whenever the text refers to *State* or *States,* this could be read as *High Contracting*

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[49] See Working document (WD) 08 of the Working Group II of The European Convention which contains a study on technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights elaborated by the Steering Committee for Human Rights, p 7 et seqq.

[50] See WD 08, p 7.

[51] See WD 08, p 11. In this context also the Art. 59 § 4 of the Convention has to be amended to make clear that it refers on ratification or accession and that all the Contracting Parties of the Convention and not only the members of the CoE are to be informed of a new Contracting Party.

Party(ies).[52] Or to state that all state-tailored terms are to be applied accordingly.[53] That would allow the text to remain as it stands and only make one additional rule. This would also avoid the problems how to interpret and apply Articles whose wording obviously is only applicable to states. Those terms are, for instance, "national security", "economic well being of the country", "territorial integrity" and "national laws" used in Art. 8 § 2, 10 § 2, 11 § 2 and 12 § 2 of the Convention. All these terms have to be interpreted *mutatis mutandis* in view of this specific situation in international organisations or in particular the EU. Another example is Art. 15 § 1 of the Convention that refers to "the life of the nation".

4. The situation in the Council of Europe could be solved by admitting the EU not as a state, and thus not as a full member, but as an associate member. This kind of membership does not give the EU an independent status within the Committee of Ministers, except that special regulations are to be provided for in a regulatory or statutory resolution of this body. This kind of "subsequent practice" would avoid a formal modification of the statute of the Council of Europe and a formal ratification by all Member States. It is clear that this kind of procedure is not possible for the Convention, and therefore the accession treaty between the EU and the Contracting States of the Convention needs to be ratified as well by the EU itself and by unanimous decision of the Committee of Ministers of the Council of Europe and on the other hand by all 45 Contracting States. In this respect it is for the first time that quite a large number of Eastern European states, but also Switzerland and Norway would have a formal say on a very substantive question of the further development of the legal order of the EU. It should be made clear that the accession treaty should not be dependent on the fact that one of the Contracting States denounces the Convention according to Art. 58 ECHR or denounces the accession treaty. The legal relation between the EU and the Convention (and the Council of Europe) should not be dependent on the will of states, which may develop in the course of the future a rather intensive opposition to the EU (take the possible example of Russia).

5. A further problem may arise in relation to the execution of judgments of the ECtHR in relation to the European Union. The judgments of the ECtHR are only declaratory and, according to Art. 46 § 2 ECHR, the Committee of Ministers supervises the execution of the judgments. The relations between the representatives of the States in the Committee of Ministers and the duties of the respondent States to execute are practically and also from a legal point of view of utmost importance. Therefore it would be appropriate, if not necessary, that the EU has its own representative as such in the Committee of Ministers. Actually representatives of the European Commission have a right to attend the meetings of the

[52] See WD 08, p 12 et seq.

[53] This proposal goes back to the Memorandum of the European Commission of 4 April 1979, Bulletin of the European Communities Supplement 2/79.

Committee of Ministers but this does not include any right to vote.[54] This situation will not be satisfactory after the accession of the EU to the Convention. It could be argued that because the EU has only limited competences compared with those of a sovereign state, it should also have only limited rights of participation in the supervision of the judgments of the ECtHR. But this "limitation" would also apply to all Member States of the EU that have already transferred quite a number of competences to the EU and are, as a result of this transfer, far beyond to be "a full sovereign state". Limitations of the EU of the right to vote in the Committee of Ministers could consist of an exclusive right to vote only in cases with reference to Union law. But this would be an unjustified discrimination compared to the other Contracting Parties of the Convention. Therefore Art. 46 § 2 of the Convention should be amended in the way that the EU gets a right to vote in the Committee of Ministers as far as the execution of judgments of the ECtHR are concerned and not only judgments against the EU but judgments against all other Contracting Parties. In this respect it would not be necessary to amend formally the statute of the Council of Europe because the reformed Art. 46 § 2 of the Convention would constitute a *lex specialis* to the rules of the statute.[55]

6. It has been argued that the formal accession of the EU to the Convention would be contrary to the so-called autonomy of Union law. But like in the relations to the higher courts of the Member States, the ECtHR would not be an additional instance. The ECJ would not be in a relation of formal subordination to the ECtHR as all national supreme courts are not in a relation of subordination to the Strasbourg Court. The competence of supervision of the Strasbourg Court would exist only in cases with relation to human rights and fundamental freedoms guaranteed in the Convention, which is still a small percentage of all Luxembourg cases. But it is true that more and more questions of fundamental rights and freedoms will arise for decision once the Charter acquires binding status.

7. One of the objections against accession has also been the fear that the standards (the general principles of fundamental rights and freedoms) within the EU may be influenced by positions taken by judges from other legal systems outside the Union and in particular from those of Eastern European countries. Whether there should be, according to Art. 20 and 22 of the Convention, also an EU judge on the ECtHR is a disputed question. Arguments against such a judge are on the one hand the limited competences of the EU compared to a sovereign state. On the other hand it should be taken into account that the EU is already sufficiently represented by the judges of the Member States of the EU. But one has to consider also that there are specific competencies of the EU so that it would seem also possible to have a specific judge on behalf of the Union. If one agrees that the EU should have its own representative with voting right within the Committee of Ministers, then one should also foresee the possibility of such a judge within the ECtHR.

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[54] This accord was met in an exchange of letters between the President of the European Commission and the Secretary General of the CoE in 1997.

[55] Art. 30 § 3 of the Vienna Convention on the Law of Treaties.

This judge would be a full judge as any other judge, elected on behalf of the EU but not called to "represent" the EU. One of the main tasks of the judges in the Court is to provide the Court with their special knowledge of national law. This could also be the case for a judge elected on behalf of the EU who has special knowledge of the Union law. The different nature of the EU as a special international organisation compared to the other Contracting Parties gives no reason to diverge from the principle of one judge in respect of each Contracting Party.[56] Neither would it be justified to give the judge a different status to that of other judges. To a point an ad hoc judge for each case where Union law is involved would not reflect the spirit of this institution. Ad hoc judges are designed in exceptional situations but with an increasing number of cases with connection to EU law that would become a constant situation and would therefore call for a full time judge "à titre de l'Union" as the most adequate solution.

8. Another question is whether it is necessary to create a separate chamber in the ECtHR on Union matters. This proposal reflects again the doubts raised if judges from states that are not members of the EU were to sit in EU cases. Personally I do not see any justification for such a special treatment of the EU. It is just part of the ECtHR system that a mixed college of judges decides. The necessary special knowledge is vested in the "national" judge in so far as there will be an EU case. This regulation seems to be sufficient to take into account the particularities of Union law after an accession of the EU to the Convention; there should be no further reform of the chamber system apart from the integration of the EU judge.

V. Further consequences of such an accession

1. An area of concern is the competence of the ECJ in respect of the standing of individual claimants (Art. 230 § 4 of the EC-Treaty[57]). This Article makes reference only to situations where the individual claimant is directly and personally concerned by an action or omission of the European Union. The Court of Justice has always interpreted these requirements in a very restrictive way and has excluded general acts as for instance regulations or directives from this Article.[58] Only in very specific situations, as for instance the effect of dumping regulations on individual exporters or importers, has the ECJ interpreted their involvment as an individual act.[59] This restriction of the interpretation of the standing of individual claimants may raise problems in the light of Art. 6 § 1 of the Convention.

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[56] Conclusion also drawn by the Steering Committee, see WD 08, p 21 et seqq.

[57] Art. III-365 § 4 TEC. On these issues see *Wolfram Cremer*, loc. cit. supra note 33.

[58] See judgment of 11/12/1996, *Atlanta and others / Communauté européenne*, T-521/93, ECR 1996, p II-1707.

[59] E.g.: judgment of 21/02/1984, *Allied Corporation and others / Commission*, C-239/82, Rec. 1984, p 1005; judgment of 20/03/1985, *Timex / Council and Commission*, case 264/82, Rec.1985, p 849 or judgment of 16/05/1991, *Extramet Industrie / Council*, C-358/89, ECR 1991, p I-2501.

Despite the effort of the European Court of first instance to enlarge this scope (also in view of harmonising the jurisprudence with the interpretation of Art. 6 § 1 of the Convention by the ECtHR), the Court of Justice has nevertheless upheld its restrictive interpretation. After accession of the EU to the Convention, claimants may argue that they did not have access to a court according to the requirements of Art. 6 § 1 ECHR.

2. In relation to the control of the so-called reference procedure (Art. 234 EC-Treaty[60]), it has long been discussed whether it is appropriate, if not necessary, to introduce a special action before the ECJ if a national supreme court, whose judgments are not subject to further review, does not suspend its procedure and refer the question of interpretation or application of Community law to the European Court of Justice? Since these complaints may - and very often do - concern interpretation and application of fundamental rights and duties in the light of the European Convention of Human Rights, and in particular, the right to the legal judge (gesetzlicher Richter) as enshrined in the notion of a fair procedure in Art. 6 § 1 of the Convention, the ECtHR is called upon more and more to supervise this application (or non-application) of Art. 234 EC-Treaty. The Strasbourg Court exercises this control in the same way as a Federal Constitutional Court as to an *arbitrary* denial of reference to the ECJ.[61] Although this kind of review of the Union law - legality of decisions of national courts of the Member States - should be in the hands of the ECJ and not be at first instance in the hand of the Strasbourg Court.

3. The view to the competence of both courts is mainly concentrated on individual complaints, but it should be also taken into account that there exist other procedures: firstly, a procedure of supervision of legality (procedure of violation of treaty law) by the Commission. This procedure is seen as the relevant counterpart to the very restrictive extension of Art. 230 § 4 EC-Treaty (restricted standing for individual parties). There is no comparable procedure within the system of protection of human rights in Strasbourg, except the interstate complaints. The possibility for interstate complaints exists also within the European Court of Justice, but history shows that these complaints are rather rare and carry the risk of sharp dissonance between Member States or Contracting States. It is for the moment under discussion within the Parliamentary Assembly of the Council of Europe whether it is useful to establish within the Council of Europe an institution (like the Commission of the European Union) which is enabled to bring *ex officio* and *sua sponte* a complaint against any Contracting State for any violation of the Convention (on a more general level). The Parliamentary Assembly has already pronounced several times in favour of an *actio popularis* and advocated the creation of a post of public

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[60] Article III-369 TEC.

[61] Case *Willem Arend Spiele v. Netherlands*, decision of 22/10/1997, application no. 31467/96; case *Sociéte DIVAGSA c. l'Espagne*, decision of 12/05/1992 , application no. 20631/92, *case F.S. et N.S. c. la France*, decision of 28/06/1993, application no. 15669/89.

prosecutor at the European Court of Human Rights or a review of the terms of reference of the Commissioner by amending the European Convention on Human Rights.[62] Such a procedure could induce structural reforms and be a response to so-called repetitive cases. It could be an answer also to the problem that individuals for one reason or another may not be willing or be able to bring their grievances before ECtHR. Whether, following accession of the European Union to the Convention, an "interstate" complaint could and should be possible by a state against the European Union is an open question. At least Member States of the Union have already such a possibility of action before the ECJ.

There are procedures within the European Union, except those within the Third Pillar (Art. 46 TEU), where the competence of the ECJ is excluded: This is the case for the so-called suspension procedure if one Member State violates basic elements of democracy and freedom or fundamental and human rights (Art. 7 TEU[63]). Should a state which is subordinated to such a procedure not have access to the ECJ?[64] And should a state which is warned that it might be expelled from the Council of Europe (Art. 3 of the statute) not have a judicial remedy to clarify and to prove such accusations? Since neither the ECJ nor the ECtHR have for the time being competences in this field there can be no divergence of opinions and decisions. Nevertheless, in view of the rule of law, one has to urge that in this field there must be judicial control as well.

VI. Concluding remarks

The solution to the problem of the relations between the Strasbourg and the Luxembourg Court would and could be well handled by the accession of the EU to the Convention. This accession would also reflect the enlargement of the EU, which, with 27 Member States in the near future, would then include more than half of the Contracting Parties of the Convention system. Community law is already now as a preliminary question often applied in the case law of the ECtHR so that it would not be a drastic change for the ECtHR to be given jurisdiction in relation to the EU. Of course, many new questions may arise, that of the "territorial" responsibility of the EU, which would be quite different from that of the States, and whether for the EU accountability and responsibility would be equivalent and synonymous. There may be some problems with reservations on the part of the EU and also in relation of areas which are not covered by the judicial competence of the ECJ. It may be foreseeable that a test period of about ten years is

[62] Cf. Recommendation 1606 (2003) para. 10 ii, http://assembly.coe.int/Main.asp?link=http: //assembly.coe.int/Documents/AdoptedText/TA03/EREC1606.htm Recommendation 1640 (2004) para 7 a, http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA04/EREC1640.htm

[63] Article I-59 § 3 TEC.

[64] In the Constitution a limited supervision of suspension measures is provided. According to Art. III-371 TEC the ECJ shall have jurisdiction solely on the procedural stipulations contained in Art. I-59 TEC.

necessary to answer the question what further reforms are necessary. The reform which was under intensive discussion within the Committee of Ministers and the Parliamentary Assembly in relation to the immense number of applications to the ECtHR and which led to the adoption of the 14th Protocol will be only one element in this review.

Draft Constitution of the European Union: the new division of competences

Joachim Wuermeling

The European Heads of State or Government set a clearer delimitation of European competences as a priority for the Convention on the Future of Europe. Thus, the Laeken Declaration states that "the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union."[1] The scope of competences should no longer depend on the legislator's discretion or on the pro-Community judgments of the European Court of Justice. The potentially comprehensive competence of the European Union was to be transformed into a clear division of competences. Was this achieved?

The Convention and the Intergovernmental Conference put forward a new chapter on competence in its draft constitution. The following article deals initially with the new categories of competence (I) and rules governing competence (II) and finally with some individual competences (III).

I. Categories of competence

1. Structure

For the first time ever in a European Treaty, the fundamental principles of the division of competence are set out in a chapter devoted exclusively to the issue of competence. The basis for this is formed by the categorisation of competences into exclusive competences, areas of shared competence and complementary measures (Art. I-12), with some additional specific provisions (Art. I-15 to 18).

A specific article deals with each individual category, describing the nature of the competence and listing the policy areas concerned.

It is important to note that the mere act of drawing up such lists does not in itself provide any legal basis for the competence. The scope and extent of the specific competences are defined by the individual legal bases in part III of the draft (Art. I-12 (6))[2]. How the articles in part III are interpreted may be, however, be influenced by the choice of category.

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1 BGBl. 2001 II, p. 1700.

2 *Engelmann,* Titel III: Die Zuständigkeiten der Union, Zentrum für Europäische Integrationsforschung, Discussion Paper C124, 2003, p. 39 (41); *von Bogdandy/Bast/ Westphal*, Die vertikale Kompetenzordnung im Entwurf des Verfassungsvertrags, Integration 4/03, p. 414 et seqq.

2. Exclusive competence

In areas where the Union enjoys exclusive competence, the Member States may only take action if expressly empowered to do so by the European Union (Art. I-12 (1)). While the current EC-Treaty also refers to "exclusive competences", it does so only in order to exclude the application of the principle of subsidiarity when making use of exclusive competences (Art. 5(2) EC-Treaty) without laying down the policy areas covered by this provision.

The extent of the areas of exclusive competence is quite modest: monetary policy, trade policy, customs union. The delimitation vis-à-vis other areas should not pose any problems.

This situation is quite different as regards "exclusive competence to establish the competition rules necessary for the functioning of the internal market" (Art. I-13 (1) b). Already with regard to the provisions of the abovementioned Article 5(2) EC-Treaty, the question as to whether the internal market fell within the scope of exclusive legislative powers, as the Commission always maintained in order to avoid the application of the principle of subsidiarity, was somewhat controversial. A great deal depends on the language used to describe the competence. Whereas the use of a results-oriented wording (creation of an internal market) would suggest the exclusive competence of the Union, the use of subject-area related descriptors, such as "commercial law", would conversely clearly suggest an area of shared competence.

The distinction drawn in the final stages of the Convention between the functional competition rules (exclusive competence) and the "internal market" (shared competence) in general lacks terminological certainty and requires interpretation and further systematisation. A distinction could, for instance, be drawn between legal acts resulting directly in the opening of the market, such as mutual recognition or European licensing procedures, and measures intended to harmonise legislation more generally, governing subject areas in part, such as the harmonisation of civil law provisions.

3. Shared competence

The Member States shall exercise their competence in these areas "to the extent that the Union has not exercised, or has decided to cease exercising, its competence" (Art. I-12(2)). While the phrase "to the extent" does indicate a certain affinity to the concept of competing competences, the underlying idea at the basis of the concept of shared competence is that it is the field of European action which must be specified and not, as it is the case with competing competences, that whole areas of legislation are subject to regulation by the next higher level. However, in the case of shared competence, the Member States are free to act even in the areas specifically transferred to the Union, if the European Legislator does not make use of its competence.

The areas of shared competence include the internal market, area of freedom, security and justice, agriculture, transport, energy, social policy, regional policy,

environment, consumer protection and common safety concerns in public health matters. In this case also, the scope of the competence is not conditioned by the description used in that Article, but is instead predicated by the individual legal bases in part III. This was again made clear when the article was being considered in order to avoid giving the impression that the European Union would now be free to harmonise legislation freely in all the areas listed.

The fact that regional, research and development policies are listed here owes less to systemic than political reasons. Regrettably, while action in these areas serves merely to promote them, strong forces within the Convention successfully opposed the alleged down-grading of this significant European activity to a "complementary measure".[3]

4. Complementary measures

It is through support programmes and coordination activities that the Union can adopt the "complementary measures" (Art. I-12(5)). A great deal of emphasis was placed on the fact that this is not a real competence of the European Union since its activities do not affect the Member States' competence in these areas. That the latter is the case is expressed by the phrase "without thereby superseding their competence in these areas" (Art. I-12(5)) and the express exclusion of harmonization from the scope of this action in Art I-17. This self-limitation is further complemented by the express prohibition of measures adopted under the flexibility clause circumventing this exclusion (Art. I-18(3)).

Legislation in these areas is only possible to create the requisite legal bases for the expenditure of European funds pursuant to Art. I-53(4).

While coordination activities are already mentioned in Art. I-12(5), additional terms such as "guidelines and indicators" where incorporated in the individual competences at the final stages of the deliberations of the Convention. This was actually unnecessary and was intended as a counterbalance to the rejection of the ardent demand for a general adoption of the method of open coordination beyond the fields of Community competence. It does not in itself have any additional legal substance.

Complementary measures are possible in the areas of industry, health, education, youth policy, sport, culture, tourism, administrative cooperation and civilian protection. Health policy is given a hybrid status so to speak as it is also mentioned under the shared competences, at least as regards safety issues. Part III only includes a legal basis for the complementary measures (Art. III-278). This diverges unnecessarily from the fairly consistent and clear categorisation. It would have been better to include the issue under harmonisation in connection with the internal market or to place it together with social policy.

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[3] Cf. *Oppermann,* Eine Verfassung für die Europäische Union, DVBL. 2003, p. 1165 (1172).

5. Specific provisions

Specific provisions were drafted for a number of special cases. The Common Foreign and Security Policy (Art. I-16) could not be made to fit the competence categories. Moreover, its implementation shows even stronger intergovernmental characteristics and had already hitherto formed its own pillar outside the EC-Treaty.

The coordination of economic, employment and social policy (Art. I-15) could just as well have been included in the competence categories. It was decided not to do so in particular in view of the comprehensive activities to regain international competitiveness (Lisbon and Luxembourg processes). The creation of this article was intended to check greater demands for a comprehensive EU competence to coordinate all policy areas.

In contrast to this, the originally planned special provisions for the area of home and judicial affairs from the third pillar of old were discarded. This field comes under the "European area of freedom, security and justice" as one of the areas of shared competence.

The controversial flexibility clause (formerly Art. 308 EC-Treaty and Art. 235 EC-Treaty) was maintained despite much opposition; the conviction of the Convention that such a clause was necessary[4] to cover all eventualities could not be shaken.[5] However, the unanimity requirement was also maintained, which will render any substantial legislation on this legal basis very difficult in an enlarged Union of up to 30 Member States. In addition, the approval of the European Parliament will in future also be required. The proposal to limit the period of validity of legal acts[6] until the establishment of a regular competence was not adopted.

The scope of the article was extended vis-à-vis that of the former article 308 of the EC-Treaty beyond the area of the internal market. It must be said, however, that this limitation did not prove very restrictive in the past. Thus, for instance, it was this article which served as the legal basis for the disaster fund (for victims of flooding). Nevertheless, the scope of the article remains clearly limited to the matters covered in part III and does not cover all the objectives of the first part of the Constitution. It was the Commission which opposed this restriction for a long time.

The de facto scope of application will in future be reduced by the fact that a series of new competences now cover areas which were hitherto based on the flexibility clause (e.g. European Patent, energy, promotion of sport).

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4 Cf. *Weatherill*, Competence, in: *De Witte*, Ten Reflections on the Constitutional Treaty for Europe, E-Book: http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf, 2003, p. 45 (59).

5 Cf. *Teufel,* Konturen der europäischen Verfassung, Lecture at the Humboldt-Universität zu Berlin, 23/04/2003,http://www.rewi.huberlin.de/WHI/deutsch/fce/index03.htm#fce303.

6 The so-called "Sunset-Clause", cf. *Oppermann*, loc.cit. (note 3).

II. Rules for exercising the Union's competences

1. "Spirit" of the Constitution?

The philosophy of how the competences are to be exercised as expressed in the preamble and in part I tends far more towards the limiting of competence when compared to the earlier Treaties. The "motto" of the Union "united in its diversity" (Preamble and Art. I-8) exemplifies this. The phrase used since Maastricht of an "ever closer union" (twelfth recital, Treaty on European Union), implying a constant expansion of competences at European level was dropped although the words "ever more closely" do reappear in the Preamble (para. 3).

Moreover, in exercising its competences the EU is obliged to respect national identities, regional and local self-government (Art. I-5 (1)) and the autonomy of the churches (Art. I-52).[7] The unilateral loyalty to the Union formerly required of the Member States is now rendered as a mutual loyalty between the Union and the Member States (Art. I-5(2)).

2. Principle of conferred powers

The European Union only enjoys the competences that have been explicitly conferred to it.[8] Although, according to the case-law of the European Court of Justice, this principle has always applied, legislation adopted in practice and the "Community-friendly" interpretation of the ECJ, did not exclude any area of state activity from EU intervention.[9] The draft Constitution now seeks to put a stop to this, enshrining the principle of conferred powers, referring to it in several places and in various contexts.

To start with, the "principle of conferred powers" is stated explicitly, the second sentence of Art. I-11(2) clearly affirming that "competences not conferred upon the Union in the Constitution remain with the Member States". This principle may not, as was previously the case, be circumvented through the derivation of powers from the general objectives of the Union (Art. I-3(5)). Similarly, the description of policy areas in the categorisation of competences does not in itself give rise to competences, since pursuant to Article I-12(6), the scope of the Union's competences is determined by the specific provisions in part III. A further guarantee is included in Art. II-111 in connection with fundamental rights, pursuant to which the Charter of Fundamental Rights does not establish any new power or task for the Union. This provision was rendered more firm still by the Convention through the addition of the following clause: "This Charter does not extend the field of application of Union law beyond the powers of the Union." Moreover,

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7 Cf. *Wuermeling*, Europa neu verfassen, BayVbl. 2003, p. 193 (195).

8 Cf. *Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedsstaaten unter besonderer Berücksichtigung der Regionen, BayVbl. 2001, p. 481 (486).

9 For a critical assessment, see: BVerfGE 92, 203 (235 et seqq.).

the clauses under Art. III-115 to III-118 may not serve as a basis for extending competences. For this reason, Art. III-115 explicitly states that the Union shall take "all its objectives into account [...] in accordance with the principle of conferring of powers". Finally, in entering any international agreements the EU may not exceed the framework of competences laid down in the Constitution (Art. III-323(1)).

The Member States retain the competence to decide on the conferral of any further competences to the European Union (Kompetenzkompetenz). The establishment of new competences requires ratification by all Member States.

However, the scope of the principle of conferral of powers is qualified somewhat by the establishment of the flexibility clause (Art. I-18), pursuant to which the EU may adopt complementary measures under certain circumstances (see above).

With these otherwise unequivocal fundamental principles, the draft Constitution sends a clear signal both to the legislator and the judiciary. I therefore consider that the interpretation guidelines developed by the European Court of Justice, e.g. as regards the *effet utile* or the complementary competences, need to be reviewed.

The general provisions, however, are not adequately complemented by a more precise rendition of the individual competences in part III.[10] It was simply too much to cope with for the Convention and even more so for the IGC to review all Community action in areas such as the freedom to provide services, environmental protection, social policy or asylum policy to verify whether such action is strictly necessary. After all, the existing *acquis communautaire* comprises some 10.000 legal acts. Thus, the principle of the conferral of powers lacks a vital counterpart of clearly outlined legal bases.

3. Subsidiarity and proportionality

Subsidiarity and proportionality remain the guiding principles in exercising European competences. Two changes were made to the definition in Art. I-11(3) vis-à-vis that in Art. 5(2) of the EC-Treaty: Regional and local authorities are to be taken into account in the application of the principle of subsidiarity. As has hitherto been the case, in order to comply with the principle of subsidiarity two requirements must be met: can action at a lower level not sufficiently meet the objectives of the proposed action and can they be better achieved by the Community. Previously, however, both conditions were linked by the conjunction "therefore" whereas now the conjunction used is "rather". This means that merely because the first condition ("not sufficiently") is met, it does not imply that the second one is "better". Both conditions must therefore be met in future. Thus, for instance, the Commission will in future have to clearly justify why a given action at Union level will achieve the objectives better than action at national level. Up to now, it merely needed to point out existing shortcomings.

[10] As noted by *Engelmann* (note 2, p. 45 et seq.).

Unfortunately, proposals to incorporate further objective criteria in the definition, such as a cross-border dimension, did not find much support in the Convention. The Protocol on Subsidiarity consequently does not deal in substantive issues.

The draft Constitution does, however, introduce new procedures and rights to bring legal action to ensure compliance with the principle of subsidiarity. The real losers in cases of infringements of the principle of subsidiarity are those who do not, or only to a limited, extend participate in the European decision making process, i.e. the national parliaments and regions. The national parliaments are consequently for the first time given the right to bring legal action before the European Court of Justice for infringements of the principle of subsidiarity (paragraph 7 of the Protocol on Subsidiarity in conjunction with Art. III-365). Similarly, the Committee of the Regions is also given the possibility to appeal to the European Court of Justice on the grounds of infringement of the principle of subsidiarity (ibid. and Art. III-361(3)). What did not find enough support in the Convention was a right for individual regions to bring legal action since this would have created an enormous number of privileged entities with a right of action. Nevertheless, German *Länder* will have the possibility to bring legal action through the Bundesrat, possibly even at the request of a single *Land.*

However, the right of action explicitly refers to subsidiarity only and not to compliance with the delimitation of competences. That said, it is almost inconceivable that the European Court of Justice would rule that the principle of subsidiarity has been complied with in cases where there is no EU competence. Thus the question as to whether the EU would even have any competence is a preliminary question for any verification of compliance with subsidiarity.

A further novelty is the introduction of the "subsidiarity objection" to the national parliaments. They are thus for the first time given a formal right in the European legislative procedure. Pursuant to paragraph 5 of the Protocol on Subsidiarity, any chamber of a national parliament of a Member State may, within six weeks from the date of transmission of the Commission's legislative proposal, send a reasoned complaint regarding non-compliance with the principle of subsidiarity to the Community Institutions. Where a third (or a quarter in the case of proposals concerning the European area of freedom, security and justice) of all national parliaments lodge such subsidiarity objections, the Commission will be obliged to review the proposal.

While national parliaments cannot prevent the adoption of a legal act at this stage, the political impact, not least with regard to the government representatives in the Council, should not be underestimated. Because after adoption of a legal act, national parliaments will be able to pursue their objections by means of legal action. This gives the subsidiarity objection some teeth.[11]

In Germany, both the right of action and the subsidiarity objection can be made use of by either the Bundestag or Bundesrat independently of each other. This was controversial till the end, since representatives of unicameral systems deemed this to be in effect a doubling of the rights of other Member States. This objection was

[11] Cf. *Oppermann* (note 3, p. 1171).

overcome as regards the quorum for subsidiarity objections by giving each Member State two votes to be cast together by unicameral parliaments and separately by each chamber in bicameral systems.

Finally it is remarkable that the regional parliaments are mentioned in the Protocol on Subsidiarity[12]: national parliaments must also consult regional parliaments where their legislative competence is affected.

III. Individual competences

1. Delimitation of competences

As stated above, it did not prove possible to redraw the delimitation between the individual legal bases in order to delineate a clearer division of competences between the European Union and the Member States. The sole exception to this is immigration policy. While Art. 63(3) of the EC-Treaty on EU competence for measures on immigration policy could also encompass arrangements concerning immigrants' access to the labour market, Art. III-267(5) clearly establishes that this Article does not affect the right of Member States to determine admission of third-country nationals seeking work.

It would have been beneficial if such a clarification of competences would also have been provided for other policy areas, such as harmonisation in the internal market (Art. III-172), environmental policy (Art. III-233, 234), controls on state aid (Art. III-167) and social policy (Art. III-210). [13]

2. New competences

However, the draft Constitution proposes a whole series of new competences for the European Union. But these do not so much concern legal harmonisation as coordination and support activities.

Art. I-15 paves the way to coordination of economic, employment and social policy (see above). The detailed provisions, however, are to be found in part III. As regards coordination of economic policy, the provisions under Art. III-179 are essentially the same as under Art. 99 of the EC-Treaty. Thus, no new instruments are introduced which could oblige the Member States to respect the "broad guidelines of economic policy". A binding system is to be created for the members of the Euro system. In this connection, Art. III-194 provides that "the Council shall [...] adopt measures" to "set out economic policy guidelines [...] while ensuring that they are [...] kept under surveillance." What is new is the provision allowing the Commission to issue a warning prior to a formal recommendation from the Council of Ministers (Art. III-179(4)).

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[12] Cf. *Engelmann* (note 2, p. 46).

[13] Cf. *Oppermann* (note 3, p. 1170).

The coordination of employment policy pursuant to Articles III-205 and 206 does not constitute an extension of competence vis-à-vis Articles 127 and 128 of the EC-Treaty.

While Article 140 of the EC-Treaty referred only to "cooperation" as regards social policy so as "to facilitate the *coordination* of their action", Article III-213, first sentence, now establishes "*coordination*"[14] of the Member States' action as the objective of this activity. Pursuant to Article III-213, second sentence, the Commission shall adopt "initiatives aiming at the establishment of guidelines and indicators" and "the necessary elements for periodic monitoring and evaluation". While this happens already under the "open coordination", it did not hitherto have a legal basis in the European Treaties. Similar passages were included with regard to complementary measures relating to public health and industry.

The legal bases for legislative actions were extended only in very few and limited cases. A novelty consists in the possibility of laying down certain conditions with regard to services of general economic interest in the Member States (Art. III-122). The Convention thus met the calls for legislation to lay down in detail how such services are to be guaranteed and was supported by the IGC with the addition made there. This was hitherto a purely executive decision of the Commission on the basis of the Treaties.

The legal basis for the protection of intellectual property may appear new but it is not. Since the creation of individual instruments such as a European trade mark or a European patent did not constitute a legal harmonisation pursuant to Art. 95 of the EC-Treaty, such measures were based on Art. 308 of the EC-Treaty, thus requiring unanimity and involving the European Parliament only to an insufficient extent. This situation is remedied by placing the area referred to in Art. III-176 within the scope of the normal legislative process. There is, however, an exception from the majority-decision rule as regards the linguistic arrangements for such instruments.

New "complementary measures" established for the EU in the areas of sport (Art. III-282), energy (Art. III-256), civil protection (Art. III-284) and administrative cooperation (Art. III-285).

The new section on energy, as confirmed by the clarification made at the IGC, (Art. III-256) does not de facto extend EU competences. The EU had already previously adopted a series of measures to ensure the functioning of the energy market and the security of energy supply. Similarly, the promotion of energy efficiency and energy saving were also the subject of European support programmes.

A more substantial extension of EU legislative competences is, however, to be found with regard to criminal procedural law, e.g. as regards the mutual recognition of decisions, on international jurisdiction and on judicial cooperation (Art. III-270(1)). Moreover, as regards procedural aspects, minimum standards may be

[14] Translator's note: The author's comments refer to the use of the terms *Abstimmung* and *Koordinierung* in the German versions of the EC-Treaty and draft Constitution respectively. No such distinction is made in the English versions, the term *coordination* being used in both the EC-Treaty and draft Constitution.

established in connection with the admission of evidence and the rights of individuals in criminal procedure including the victims of crime (Art. III-270(2)). Other aspects may also be regulated upon a unanimous decision of the Council (Art. III-270(2)1).

The EU will in future be able to lay down the harmonisation of the definition of criminal offences in the areas of "particularly serious crime with cross-border dimensions" if owing to the "nature or impact of such offences" there is a special need to "combat them on a common basis". Examples given include drug trafficking and corruption. The list may be extended through an unanimous decision of the Council.

Art. III-271(2) could be of significant importance since it would allow the EU to use criminal law provisions to seek to enforce compliance with its own provisions. The only precondition is that this should prove essential. This opens up a potentially broad area of action in view of the extensive range of European activities.

The competences of European bodies are also expanded as regards the common legal area (Art. III-276 on Europol and Art. III-273 on Eurojust) as is the possibility of to create further bodies (Art. III-274 on the creation of a European Public Prosecutor's Office).

IV. Conclusion

The new division of competences is better than the old one but it does not meet all expectations as regards a more precise framework of competences.

The provisions are suffused with the spirit of a limitation of excessive regulation. This implies a shift in the guiding principle away from a constant expansion of European activities to a proper allocation of responsibilities. The Constitution establishes sensible instruments against an excessive use of legal bases. The cyclic changes in the division of competences in "federal systems" – notably as seen in the USA – has finally caught up with the EU. This would imply that the old "bicycle analogy", according to which Europe must continue going forward if it is not to fall over, has been abandoned or perhaps superseded by a second bicycle rule according to which it risks falling into the ditch if it goes too fast.

The German view, that a competence needs in principle to reside on one level or the other, did not find favour. Flexibility and room for development were accorded priority over constitutional ridigity. Thus, questions of competence will continue to be a matter for political decisions. The choice between flexibility and limitation has been shifted further towards limitation but sturdier crash barriers would not have done any harm.

As long as the legal bases do not describe the competences in precise terms, the effect of the improved fundamental principles will be limited.

New rules do not in itself constitute progress in limiting the creeping transfer of competences. There is a need for a new "culture of subsidiarity" to emerge from

all the provisions as a whole. The Constitution may well provide an impetus for this but it cannot bring about the new swing on its own.

The order of competence within the Treaty establishing a Constitution for Europe

Martin Nettesheim

I. The five dimensions of the competence debate

Every public governance system within which several decision-making levels are interrelated, is in the first instance and most notably characterised by the division of competence. The division of competence defines the principal characteristics of the system, its mission and its finality. Its problem-solving ability and its efficiency are an expression of this division. In technical legal terms, a constitutional order of competence may be characterised by five primary criteria:

- the principles of the content of the *division of competence*;
- the degree of certainty and clarity of delimitation of the *allocation of competence;*
- the degree of normativity of the rules for the exercise of competence;
- the degree of *substantive finality* of the competence, and
- the embodiment and degree of juridification of the *monitoring of competence.*

It is obvious that the *five dimensions of the order of competence*[1] designated by these criteria are of supreme constitutional significance. Competences define the substantive finality of the EU, and also always involve a fundamental decision in relation to the future course to be taken by the EU, between international organisation and constitutional sovereignty. European sovereign power which is not rooted in and legitimised by means of competence,[2] has no place within Europe's constitutional thinking.[3] It is not surprising therefore that the question of competence has been addressed in virtually every paper that has tackled the problem of constitutional legislation in Europe over the past few years.[4] Considerations related to

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1 A slightly different classification in *F.C. Mayer*, Die drei Dimensionen der europäischen Kompetenzdebatte, ZaöRV 61 (2001), p. 577, 578 et seqq.

2 Case 230/81 Luxembourg -v- European Parliament [1981] ECR 255; Case C-57/95 France –v– Commission (Communication re pension fund), [1997] ECR I – 1627. This also applies to the use of budget funds: Case C 106/96 UK –v– Commission [1998] ECR I – 2729 (see further *A.D. Dashwood*, The Limits in European Community Powers, (1996) 21 EL Rev. 113).

3 On the relationship between State and Competence, see *Ch. Möllers*, Staat als Argument, 2000, p. 256 et seqq.

4 On the structure of competence in general see e.g. *U. Everling*, Kompetenzordnung und Subsidiarität, in: *W. Weidenfeld* (ed.), Reform der EU, 1995, p. 166; *T.Beyer*, Die

competence habitually represent the core of any discussion paper that has contributed to the constitutional debate, because in quite general terms, an order of competence "based on reasonable, federal principles" was sought, because more concrete substantive proposals relating to the shifting of competence within a multilevel system were put forward, or because institutional or procedural precautions for the implementation and review of restrictions of competence were taken.[5] The review, revision and reform of the order of competence were also at the heart of the mission conferred by the Laeken European Council.[6]

During the work of the Convention however, treatment of the question of competence was somewhat eclipsed. It triggered significantly less dispute than discussions prior to assembly of the Convention[7] had led to expect. The fact that the considerations on the question of competence were fragmented amongst four Working Groups also undoubtedly contributed. Working Group I (Subsidiarity) dealt with the question of the ongoing development of the principle of subsidiarity and proportionality, focussing on the question of how monitoring of observance of

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Ermächtigung der Europäischen Union und ihrer Gemeinschaften, Der Staat 1996, p. 189; *J. Martín y Pérez de Nanclares*, El sistema de competencias de la Comunidad Europea, 1997; *H.-D. Jarass*, Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten, AöR 121 (1996), p. 173; p. *Ch. Müller-Graff*, Kompetenzen in der Europäischen Union, in: *W. Weidenfeld* (ed.), Europahandbuch, 1999, p. 779; *T. Fischer/N. Schley*, Europa föderal organisieren, 1999, p. 145 et seqq., *I. Boeck*, Die Abgrenzung der Rechtsetzungskompetenzen von Gemeinschaft und Mitgliedstaaten in der EU, 2000; *G. de Búrca/B. de Witte*, The Post-Nice Delimitation of Powers (draftpaper 3rd May 2001); *Chr. Vedder*, Das System der Kompetenzen der EU unter dem Blickwinkel einer Reform, in: *V. Götz/J. Martínez Soria* (eds.), Kompetenzverteilung zwischen der EU und den Mitgliedstaaten, 2002, p. 9; *M. Nettesheim*, Kompetenzen, in: *A. von Bogdandy* (ed.), Europäisches Verfassungsrecht, 2003, p. 415.

5 Survey in p. *Häberle*, Die Herausforderung des europäischen Juristen vor den Aufgaben unserer Verfassungs-Zukunft: 16 Entwürfe auf dem Prüfstand, DÖV 2003, p. 429.

6 Found at http://european-convention.eu.int/pdf/LKNDE.pdf. On this *R. Wägenbaur*, Die Erklärung von Laeken zur Zukunft der EU, EuZW 2002, p. 65.

7 Cf e.g. *J. Schwarze*, Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht, DVBl. 1995, p. 1265; p. *Kirchhof*, Gewaltenbalance zwischen staatlichen und europäischen Organen, JZ 1998, p. 965; *I. Pernice*, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 2000, p. 866; *Th. Fischer/N. Schley*, Organizing a Federal Structure for Europe: An EU Catalogue of Competencies, 2000; *A. von Bogdandy/J. Bast*, Die vertikale Kompetenzordnung der Europäischen Union, EuGRZ 2001, p. 441; *R. Bieber*, Abwegige und zielführende Vorschläge: Zur Kompetenzabgrenzung der Europäischen Union, integration 2001, p. 308; *I. Pernice*, Eine neue Kompetenzordnung für die Europäische Union, WHI-Paper 15/02 (www.whi-berlin.de); European Public Law Group, Proposal on the Debate on the European Constitution, European Papers Nr. 2, 2003; *E. Teufel*, Leitlinien für die Ordnung der Kompetenzen zwischen der Europäischen Unin und den Mitgliedstaaten im künftigen Verfassungsvertrag (found at http://register.consilium.eu.int); *J. Show*, Flexibility in a "Reorganized" and "Simplified" Treaty, CMLRev. 2003, p. 279.

the requirements of the principle of subsidiarity could better succeed.[8] There were overlaps with the work of Working Group IV (The role of national Parliaments), which dealt with the question of strengthening the institutional position of the national Parliaments of Member States within the decision-making process of the EU, in which the "early-warning mechanism" to assert the principle of subsidiarity played a significant role.[9] Working Group V (Complementary Competencies) initially discussed the role and place of "complementary" and "supporting competencies". However, by interpreting their remit in a broad sense, this Working Group also dealt with the question of how the transparency of the order of competence as a whole could be increased.[10] Finally, the work of Working Group IX ("Simplification"), which primarily dealt with questions related to acts, instruments and the hierarchy of legislation, whilst remaining constantly aware of the reference to competence problems, also acquired a dimension related to competence.[11] The plenary meeting focussed on questions related to competence on three occasions: on 15 and 16 April 2002 the members of the Convention discussed how the competence system could be improved[12] and the distribution of missions optimised,[13] on 23 and 24 May 2002 they tackled the problems of the exercise of competence, and on 12 and 13 September 2002 they finally considered the simplification of instruments and procedures.[14]

The draft *Treaty establishing a Constitution for Europe*, (CIG 86/04) accepted by the Heads of State and Heads of Government on 18 June 2004, and updated from the draft treaty adopted by the European Convention[15] on 18 June 2003, not only represents significant progress over currently valid law, but is of a high quality, despite displaying certain tensions, inconsistencies and redundancies in content terms. However, it does not yet constitute a final version in terms of its constitutional substance.[16] The fundamental union structure is retained,[17] whilst the

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8 Final report of Working Group I, 23 September 2002, CONV 286/02.

9 Final report of Working Group IV, 22 October 2002, CONV 353/02.

10 Final report of Working Group V, 4 November 2002, CONV 375/1/02.

11 Final report Working Group IX, 29 November 2002, CONV 424/02.

12 Synthetic report of plenary session, CONV 284/02.

13 Synthetic report of plenary session, CONV 60/02.

14 Synthetic report of plenary session, CONV 284/02.

15 Assessment of Convention method and work in: *T. Oppermann*, Vom Nizza-Vertrag 2001 zum Europäischen Verfassungskonvent 2002/2003, Deutsches Verwaltungsblatt 2003, p. 1; *S. Magiera*, Die Arbeit des europäischen Verfassungskonvents und der Parlamentarismus, DÖV 2003, p. 578; *D. Blumenwitz*, Der Europäische Verfassungskonvent, Pol. Studien, Sonderheft 1/2003; *R. Knöll/M. W. Bauer*, Der Konvent zur Zukunft der EU – eine Zwischenbilanz aus Sicher der deutschen Länder, NVwZ 2003, p. 446; *J. Schwarze*, Auftakt für Europas Reform, Financial Times Deutschland of 8 July 2003; *E. Teufel*, Konturen der europäischen Verfassung, Forum Constitutionis Europae 3/2003; *M. ter Steeg*, Eine neue Kompetenzordnung für die EU, EuZW 2003, p. 325; *F. C. Mayer*, Macht und Gegenmacht in der Europäischen Verfassung, ZaöRV 63 (2003), p. 59.

16 First assessment in *Th. Oppermann*: Eine Verfassung für die Europäische Union, DVBl. 2003, pp.1165 and 1234; *J. Schwarze*, Ein pragmatischer *Vertrag über eine*

qualitative leap, namely a change to the identity of the EU,[18] has not been made.[19] With its coherently updated and consolidating content, the Constitution represents a significant step forward.[20] The increase in transparency and way in which the irrelevancies have been removed from the previous treaties may be seen as a vast achievement. In institutional terms too, serious errors in the Treaty of Nice,[21] for example with respect to the size of the Commission and resolutions in the Council,[22] have been corrected. If we examine the *Treaty establishing a Constitution for Europe* with respect to its *legal content in relation to the order of competence* however, we come to a different judgment. This becomes clear from a reading of the Convention results, in the light of the critical expectations set out before the Convention began its work.

Verfassung für Europa, EuR 2003, p. 535; p. *M. Huber*, Das institutionelle Gleichgewicht zwischen Rat und Europäischem Konvent in der künftigen Verfassung für Europa, EuR 2003, p. 574.

17 On this e.g. *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, CMLRev. 36 (1999), p. 703; *Th. Öhlinger*, Verfassungsfragen einer Mitgliedschaft zur Europäischen Union, 1999; *J. Schwarze* (ed.), Die Entstehung einer europäischen Verfassungsordnung, 2000; *J. Schwarze*, Auf dem Wege zu einer europäischen Verfassung - Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht, EuR Beih. 1/2000,p.7; *G. F. Schuppert*, Anforderungen an eine Europäische Verfassung, in: *H.-D. Klingemann/F. Neidhardt* (eds.), Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung, 2000, p. 237; *H. Bauer*, Europäisierung des Verfassungsrechts, JBl. 2000, p. 749; p. *Kirchhof*, Der Verfassungsstaat und seine Mitgliedschaft in der EU, Liber Amicorum Oppermann, 2001, p. 201; *I. Pernice*, Europäisches und nationales Verfassungsrecht, Bericht, VVDStRL 60 (2001), p. 147; p. *M. Huber*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), p. 196; *A. Peters*, Elemente einer Theorie der Verfassung, 2001; *T. Schmitz*, Integration in der supranationalen Union, 2001; *A. Hatje*, Entwicklungen zu einer europäischen Verfassung, in: *G. Hohloch* (ed.), Wege zum europäischen Recht, 2002, p. 73; *M. Nettesheim*, Die konsoziative Föderation von EU und Mitgliedstaaten, in: *B. Heß* (ed.), Wandel der Rechtsordnung, 2003, p. 3; *Chr. Möllers*, Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung, in: *von Bogdandy* (ed.) (note 4), p. 1; *H.H. Rupp*, Anmerkungen zu einer Europäischen Verfassung, JZ 2003, p. 18.

18 On this e.g. *W. Graf Vitzthum*, Die Identität Europas, EuR 2002, p. 1; *Th. Oppermann*, Europarecht, 2nd edn. 1999, p. 333 et seqq.; *W. Loth* (ed.), Das europäische Projekt zu Beginn des 21. Jahrhunderts, 2001; *A. Bleckmann*, Die Wahrung der „nationalen Identität" im Unionsvertrag, JZ 1997, p. 265.

19 On the discussion on constitutional theory, see e.g. *Chr. Dorau*, Die Verfassungsfrage der Europälischen Union, 2001.

20 On the demand for approval by referendum *F.C. Mayer*, Ein Referendum über die Europäische Verfassung? EuZW 2003, p. 321.

21 Assessment e.g. in *G. Pleuger*, Der Vertrag von Nizza: Gesamtbewertung und Ergebnisse, Integration 2001, p. 1; *K.H. Fischer*, Der Vertrag von Nizza, 2001.

22 *A. Hatje*, Die institutionelle Reform der Europäischen Union – der Vertrag von Nizza auf dem Prüfstand, EuR 2001, p. 143.

II. Division of competence in terms of content

1. Issue competence

Both political and scientific circles have complained for many years that the EU has lost its once clear mission. Following the successful establishment of the customs union, the internal market and the common agricultural policy in the Sixties, Seventies and Eighties, the boundaries to the competence of the EU have been abolished. They have been extended during ever more Rounds, without evidence of guiding binding principles, or a clear concept of the division of competencies between the EU and its Member States. During the Eighties and early Nineties, this development gave rise to a somewhat indiscriminate discussion between those who considered any increase in competence at European level to be a "positive step towards Europe integration" and those who saw it as a lamentable "loss of sovereignty" for Member States, to be avoided at all costs.[23] Some of these battle lines still remain drawn, for example with respect to the general demand that certain political spheres within Member States (for example the area of services of general interest) should be withdrawn from the legal effects of European market discipline[24] through what are termed "security clauses".[25] However, this type of discussion has since been largely overcome,[26] and the focus is now on seeking principles in terms of content via which the division of competence between the EU and its Member States is able to be subject to normative guidance. These questions are frequently discussed under the heading "The finality of European integration".[27]

In the meantime, academic discussion has polarised into two camps, beyond the positivist defence of the current integration status, based for example on Art. 2

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[23] A good survey in *J. H. Kaiser*, Grenzen der EG-Zuständigkeiten, EuR 1980, p. 97; *E. Steindorff*, Grenzen der EG-Kompetenzen, 1990.

[24] Cf. on this e.g. resolution by the Bundesrat "Forderungen der Länder zur Regierungskonferenz 1996", BR-Drs. 667/95, Anlage; on this D. Reich, Zum Einfluss des Europäischen Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p. 1.

[25] Cf. e.g. para II 4.6. of the postition of the conference of State Prime Ministers on the IGC 2000, version 24/25.3.2000, p. 10 et seq, 12: „The objective is to preserve exclusive competence for the Laender in major areas of social welfare, such as the system of 'Landesbanken' and savings banks, local public transport, public broadcasting services and social security structures via welfare agencies." More restrictively: The Bavarian Prime Minister, *E. Stoiber*, speech in Brussels of 10.5.2000.

[26] There are no exceptions for individual areas in EU law at present: Case 9/74 *Casagrande*, [1974] ECR 773, para 6, Case 287/85 Germany et al. –v– Commission [1987] ECR 3203; Case 285/98 *Kreil* [2000] ECR I – 69.

[27] On this e.g. *Chr. Tomuschat*, Das Endziel der Europäischen Integration, in: *M. Nettesheim/P. Schiera* (eds.), Der Integrierte Staat, 1999, p. 155. With claims for the finality: *J. Fischer*, Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration, Integration 23, Nr. 3, 2000, p. 149 et seqq.

TEU. Firstly there are those who consider the question of competence in terms of efficiency, and who will not only emphasise the importance of systemic competition within the European Union, but will also conclude that in many areas (for example social, industrial or even agricultural policy), it makes sense to transfer competence back to Member States. The contrast between the economically liberalising EU and socially responsible Member States is seen in this case as a future-orientated model of a modern, intrinsically competition-orientated and efficient multi-level system.[28] From this angle it also appears obvious to promote the abolition of competence according to Art. 308 EC-Treaty (the flexibility clause) and in this way to remove a gateway to claims for legislation at EU level which brings risks (because it is indiscriminate). On this basis, extension of the competence of the EU should only be considered in those areas in which the concept of systemic competition cannot apply for structural reasons, in particular in the areas of foreign and security policy. On the other hand there are those who consider the question of competence against the background of the concept of political unity, who will not be prepared to accept the separation of competence for competition and responsibility for the common interest. Proponents of this view believe that Member States' public interest would be seriously prejudiced if competence for economic and social affairs were separated rather than held together. They maintain that only a "one stop" economic and social policy, which is capable of properly balancing the effects, can satisfy the responsibility for public interest which is carried by the public authorities.[29] The upward leverage of the structures of Member States which has been brought about over past decades by the basic freedoms and the internal market programme, is put forward as evidence of the lack of accountability of a competitive system which competes at two levels, and in which tension is inherent as a result of the different demands of constitutional theory and constitutional law. Adherents to this position bemoan in particular the competitive pressure on the social systems of the Member States, and frequently plead (at least indirectly) in favour of the creation of a European social state.

It is obvious that within a federal union, the question of who is responsible for which issues must be repeatedly asked, and in times of turbulently advancing social and global development, must be continuously re-evaluated. One would therefore have expected that a body which accepted the future-orientated direction of the EU, would initially accept the fundamental division of competence between the EU and its Member States.[30] This expectation is also explicitly expressed in

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[28] On this e.g. *L. Gerken*, Vertikale Kompetenzverteilung in Wirtschaftsgemeinschaften, in: *id.* (eds.), Europa zwischen Ordnungswettbewerb und Harmonisierung, 1995, p. 3; *T.Apolte*, Vertikale Kompetenzverteilung in der Union, in: *M. E. Streit/Voigt* (eds.), Europa reformieren, 1996, p. 13; European Constitutional Group, Criticism of the draft European constitution, Nov 2003.

[29] E.g. *E.-W. Böckenförde*, Welchen Weg geht Europa? 1997.

[30] Sceptic note however in p. *Ch. Müller-Graff*, Der Post-Nizza-Prozess: Auf dem Weg zu einer neuen europäischen Verfassung?, integration 2/01, pp. 208, 210.

the Laeken Declaration.[31] The Convention however produces no future-orientated solutions to this specific question. In terms of its content, the *Treaty establishing a Constitution for Europe* will not give rise to *any serious shifts of competence* between the EU and its Member States. There are virtually no *reallocations* of competences which have up to now been the responsibility of the EU, but which could now be given back to Member States as a result of integration progress or altered social circumstances. The reasons for this are obvious: the anticipated resistance by Member States would have been so great that the political acceptance of the Convention's results, and perhaps even the work of the Convention itself, would have been most seriously compromised. This applies especially to those political spheres in which EU policy focuses on the (direct or indirect) redistribution of financial wealth. For net beneficiaries, these spheres are politically sacrosanct. However, even in areas with limited financial impact, there was no desire to see reductions, especially because any reallocation would be considered a retrograde step, or even a downgrading, in terms of integration policy, capable of prejudicing the progress of the integration process as a whole. It would appear that the analogy of integration as a cyclist, who can neither stop nor reverse, still had an effect.

The Constitution Treaty does not produce any serious restrictions, in particular with respect to the EU's competence in relation to the internal market. Over the past few years, repeated criticisms have been expressed regarding the fact that the EU has broad competence, through its competence in relation to the internal market, to exert liberalisation pressure over the economic systems of Member States.[32] The European Union can not only compel Member States to open up their legal systems under secondary legislation, on the basis of Art. 95 EC-Treaty, and thereby generate competitive pressure wherever market structures exist or are to be established, with the characteristic feature of Art. 95 EC-Treaty being the fact that vast functional breadth of competence and liberal finality of competence[33] combine.[34] It is also able, using the means available to it under European competi-

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[31] "This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.", found at http://european-convention.eu.int/pdf/LKNEN.pdf.

[32] See for a deletion of this provision e.g. *V. Götz*, Die Abgrenzung der Zuständigkeiten zwischen der EU und den Mitgliedstaaten nach dem Europäischen Rat von Laeken, in: *V. Götz/J. Martínez Soria* (eds.), Kompetenzverteilung zwischen der EU und den Mitgliedstaaten, 2002, p. 83, 93 et seqq.; *Chr. Calliess*, Kontrolle zentraler Kompetenzausübung in Deutschland und Europa: Ein Lehrstück für die Europäische Verfassung, EuGRZ 2003, pp. 181, 182.

[33] A clear statement on this in Case C-376/98 Germany –v– Parliament and Council, [2000] ECR I – 8419 (tobacco labelling directive).

[34] There is an old erroneous view that EU competences are capable of being distinguished according to subject–related and objective-related types. All EU competences concern a specific substantive matter – albeit to varying extents. In addition, the degree of final extent of competence is different. (See on this *M. Zuleeg*, in: *H. v.d. Groeben/*

tion law, to prevent anti-market intervention by Member States into free market economic activity. As we are aware, the application of European aid law to services of general interest has brought considerable confusion over the past few years. However, the efforts made during the run-up to the work of the Convention[35] and in the Convention itself, to restrict the extremely broad functional competence under Art. 95 EC-Treaty were unsuccessful,[36] and the well-established structures of the internal market remain in place in this respect. At all events, Art. III-122 TEC emphasises (as did Art. 16 EC-Treaty) the importance and position of services of general economic interest, in particular their relevance in promoting social and territorial cohesion. It is important that the freedoms and responsibilities of Member States in relation to the organisation and financing of these services should in future be brought well to the fore. The search for a balance between the European interest in the establishment and protection of efficient and open markets and the interest of Member States in protection their services of general public interest will also have to be pursued under the new Constitution.[37]

Not only has the requirement to transfer competence back from the EU to Member States not been met, but the competence of the EU has been extended, albeit not to the extent brought about for example by the Maastricht and Amsterdam Treaties. Internally, the *Treaty establishing a Constitution for Europe* makes provision for new competence in the spheres of energy policy, the protection of intellectual property, public health, disaster protection, space and sport. The significance of the introduction of independent competence for coordination of economic and employment policy, which embraces the already valid competence for social policy, cannot be overestimated. Contrary to all political statements in the run-up to the Convention consultations, the critics of the plans to allow the EU to adopt a social policy role failed in their attempt to set clear limits to its stealthy appropriation in social matters, let alone in their attempt to repel it. In fact the Constitution enables further advance, firstly by defining in Art. I-3 (3) TEC, as fundamental aims of the Union, the establishment of a (competitive) social market economy, full employment and social progress, and secondly through Art. I-15 (2) TEC, which makes it obligatory to take measures to ensure coordination of

J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 1997, Art. 3 b EGV, para 4; p. *Ch. Müller-Graff* (note 4), p. 779 et seqq.

35 Cf. e.g. Art. 32, para 1 of the "Freiburg proposal" (J. Schwarze) on a *Treaty of a Constitution for Europe*, which provides that harmonisation of the internal market will in future only be permissible for those Member State legal and administrative provisions which have a specific and direct connection with the internal market. While this proposal is in fact capable of serving as a basis for a balance between the objective of liberal economic cross-border movement and the need for protection of Member States rule-making powers, the vagueness of the wording leaves it to the interplay of the political forces to decide what type of balance could be achieved.

36 On the need to delete Art. 95 EC-Treaty, see *W. Clement*, Europa gestalten – nicht verwalten, 12 February 2001 (www.whi-berlin.de/clement.htm), para 23.

37 On this extensively *R. Hrbek/M. Nettesheim* (eds.), Europäische Union und mitgliedstaatliche Daseinsvorsorge, 2002.

employment policies, and in Art. I-15 (3) TEC, which gives authority to take initiatives to ensure coordination of social policies. In the dispute as to whether the EU should safeguard its role as a liberal counterweight to the legislation of the Member States in the area of economic and social policy, or whether it should take over responsibility for social policy in Europe,[38] the *Treaty establishing a Constitution for Europe* decides in favour of the latter option. This decision harbours potential for a far-reaching change to the economic constitution of the EU.[39]

In terms of competence, the *Treaty establishing a Constitution for Europe* contains a graduated system of economic and social competence. According to Art. I-13 (1) (c) TEC, the EU has exclusive competence for monetary policy in those Member States whose currency is the euro. Competence is shared in those areas of social policy which are assigned to the EU in Part III of the Constitution (Art. I-14 (2) (b) TEC). Articles III-209 to III-224 TEC contain some real harmonisation and legislative competences; for example, Art. III-210 (1) in conjunction with (2) (b) TEC in the areas of social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers and conditions of employment for third-country nationals legally residing in Union territory. In other areas, for example the integration of persons excluded from the labour market or equality between men and women on the labour market, there is competence to establish support and encouragement measures (Art. III-210 (1) in conjunction with (2) (a) TEC). On the other hand, this competence is restricted by exclusion and protection clauses. As an example, Art. III-210 (5) TEC excludes prejudice to the fundamental principles of the social security systems of Member States or to its financial equilibrium. Member States retain the right to legislate in relation to pay, the right of association and the right to impose lock-outs. Regardless of these reservations, the order of competence laid down by the Treaty remains very vague in this area and opens up to the EU broad gateways into the social systems of its Member States. Moreover, the EU only has competence to coordinate with respect to economic and employment policies (Art. I-15 TEC).The precise content is laid out in Art. III-203 to III-208 TEC. The European Social Fund does permit financial support measures, albeit at a low level (Art. III-221 TEC).

The *Treaty establishing a Constitution for Europe* also provides for consolidation of the substantial EU competence in relation to domestic and justice policy, the latter primarily with respect to Europol. In future, Europol will be permitted to prosecute all crimes "which violate a joint interest which is the subject of a Union policy". It has authority to take actions, but is required to cooperate and consult with the authorities of the Member States. In the spheres of foreign and security policy, authority exists to establish a European Armaments, Research and Military

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[38] On the state of discussions *E. J. Mestmäcker*, Europäisches Wettbewerbsrecht im Zeichen der Globalisierung, in: *J. Schwarze* (ed.), Europäisches Wettbewerbsrecht im Zeichen der Globalisierung, 2002, p. 11; *A. Hatje* (ed.), Das Binnenmarktrecht als Daueraufgabe, Beiheft Europarecht 1/2002.

[39] Survey by *A. Hatje*, Wirtschaftsverfassung, in: *A. von Bogdandy* (ed.), Europäisches Verfassungsrecht, 2003, p. 683.

Capabilities Agency (in addition to the significant assistance provisions in Art. I-41 (7) TEC) (Common defence) and Art. I-43, III-329 TEC (Solidarity clause), whose duty is to determine the operational requirements for European military capabilities and to assist in meeting this requirement. In practice the new foreign and security policy competence is significantly reduced because the principle of unanimity still applies in this area. In an EU of 25 or more Member States, this is capable of making a competence rule meaningless in practical terms. According to Art. I-40 (7) TEC, the transition to qualified majority voting is possible (passerelle clause), but it is not possible to assess whether the Member States will ever unanimously agree to such a step.

2. Flexibility

The question of the future of Art. 308 EC-Treaty is unquestionably one of the points of dispute to which special attention was paid in the run-up to the work of the Convention[40]. As we know, this provision enables the EU to enact secondary legislation where the primary legislation does not assign it any explicitly formulated issue competence, provided only that action is appropriate through the (frequently) vague objectives of the Treaty. The authority to overcome the boundaries of the order of judicial issue competence by referring to the objectives of the EU, brought particular criticism from the representatives of German Länder, who saw this enlarged competence as a dangerous and politically unnecessary instrument designed to shift the competence limits laid down in the Treaty.[41] The criticism was directed primarily at the unreserved use which was made of this provision during the Seventies and Eighties, for example in order to develop competence in relation to environmental issues. In fact the former Art. 235 EEC-Treaty offered the Community a springboard via which it could become involved in areas in which a common supranational presence appeared appropriate, but in which the necessary amendments to the Treaty could not yet be made.[42] The fact that virtually all areas which were initially developed using Art. 235 EEC-Treaty, later became the subject of an explicit competence, may indeed be seen as confirmation of the policies laid down at the time. In addition, critics of Art. 308 EC-Treaty do not always sufficiently appreciate that the significance of this provision has reduced over the past few years, and the EU has not recently made serious inroads

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[40] Cf. e.g. *M. Bungenberg*, Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog, EuR 2000, p. 879.

[41] On this *D. Reich*, Zum Einfluss des Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p. 1.

[42] On the reaction by the ECJ: *A. Tizzano*, Lo sviluppo delle competenze materiali delle Communità europee, Riv.Dir.Eur. 1981, p. 139; *R. Dehousse*, La Cour de justice des Communautés européennes, 1994, p. 53.

into the sphere of competence of Member States on the basis of this provision.[43] However, Member States still remain mistrustful of this provision.

The continued existence of the flexibility clause was the subject of heated debate in the Convention, but its opponents were unable to achieve its abolition. They did not even manage to restrict the content of the sphere of application of the flexibility clause (Art. I-18 TEC). Whilst the former Art. 308 EC-Treaty only allows the EU to intervene if "action by the Community [is] necessary to attain in the course of the operation of the common market, one of the objectives of the Community", the *TEC* now makes provision for interventionary competence to apply wherever this is necessary to attain one of the objectives of the EU "within the framework of the policies defined in Part III", thereby opening up the formerly restricted sphere of application of the clause and extending it to cover the entire breadth of operation of the EU. However, according to the flexibility clause in Art. I-18 (3) of the *TEC*, measures based on this article may not in future entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation. Art. I-18 (1) TEC may not therefore be used to overcome the barriers to harmonisation within the Treaty. In the light of the principle of systematic interpretation, this goes without saying, although it needs to be emphasised for political reasons. The procedural barriers to the use of the flexibility clause are furthermore higher than ever, since the clause may still only be used within the Council of Ministers by unanimous agreement. Member States have preserved their veto, and as the number of Member States increases, this will further weaken the political significance of the provision. Furthermore, its use will be made even more difficult as a result of the requirement for the consent of the European Parliament.[44] According to Art. I-18 (2) TEC, the political "early-warning system", via which the national Parliaments of the Member States are involved in control of adherence to the subsidiarity principle,[45] also applies in relation to monitoring of the handling of the flexibility clause. Against this background, the provision under Art. I-18 TEC must be considered as a successful compromise between the interests of the EU in terms of flexibility and the concern of Member States in relation to the uncontrolled encroachment by the EU into their spheres of competence. It is regrettable that Art. I-18 TEC contains no expiry clause, which would cause the flexibility rules to lapse after a certain period.[46]

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43 *T. Lorenz/W. Pühs*, Eine Generalermächtigung im Wandel der Zeit: Art. 235 EG-Vertrag, ZG 1998, pp.142, 150; *de Búrca/de Witte* (note 4), pp. 12–14.

44 *Müller-Graff* (note 30), p. 211.

45 Principles: *C. Calliess*, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union, 2nd edn., 1999; *R.v. Borries*, Das Subsidiaritätsprinzip im Recht der Europäischen Union, EuR 1994, p. 263; *S. Pieper*, Subsidiarität, 1994; *G. Bermann*, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum.L.Rev., 1994, p. 332.

46 On this *Th. Oppermann* (note 4), p. 1173.

3. Vertical order of functions

The questions related to competence which were tackled by the Convention also included the problem of the vertical and horizontal distribution of functions.[47] The present system is characterised in particular by the pronounced vertical division of powers *within the functions*, in the legislative sphere by the interaction of directives and national implementing legislation and in the administrative sphere by the principle of administrative federalism.[48] In contrast to the American "federalism by separation", the Member States have retained the authority and obligation to administer EU law even where the EU itself legislates. There are of course exceptions to this principle. For example the Commission is responsible for administering European competition law. The concept of separation of legislation and administration however remains formative. This view was endorsed during the Amsterdam Summit in 1997 in a declaration relating to the Protocol on the application of the principles of subsidiarity and proportionality, in which it was stated that "the administrative implementation of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangement". In positive constitutional terms, this principle is for example reflected in Art. 175 (4) EC-Treaty, which states that "the Member States shall finance and implement the environment policy". Recently however, the principle of the vertical division of powers within the functions has been subjected to pressure to adapt in two respects.

Firstly, Member States' scope for administration is undermined by the EU legislators setting increasingly detailed requirements in relation to content. In particular the original concept that *Directives* may only legislate on fundamental matters, whilst Member States retain discretion to implement these, has long been forgotten. Directives which make extremely detailed requirements of Member States have since become the norm. The Treaty legislator is well aware of this trend. According to No. 6 of the Protocol adopted in Amsterdam (1997), governing the application of the principles of subsidiarity and proportionality, the EU shall not legislate beyond what is necessary to achieve its objectives. However, this rule has had no noticeable effects.[49] Not even the *Treaty establishing a Constitution for Europe* attempts to set further limits, undoubtedly in the knowledge that rules laid down in the Constitution cannot be expected to be capable of effectively limiting the density of secondary legislation. In order to describe the legal effects of the

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47 Good descriptions of the present legal situation: *K. Lenaerts*, Some reflections on the separation of powers in the European Community, CMLRev., 1991, p. 11, 19 et seqq.; *K. Lenaerts/P. van Nuffel*, Constitutional Law of the European Union, 1999, p. 458 et seqq.; on the failure of general lessons to be learnt: *D. Simon*, Le système juridique communautaire, 1997, p. 74.

48 *B.-O. Bryde*, Auf welcher politischen Ebene sind welche Probleme vorrangig anzugehen?, in: *B. Sitter-Liver* (ed.), Herausgeforderte Verfassung. Die Schweiz im globalen Kontext, 1999, p. 223, 235 et seqq.

49 *Zuleeg* (note 34), para 6 in Art. 3b EGV; *H. p. Ipsen*, Europäisches Gemeinschaftsrecht, 1972, 21/29.

"European Framework Law", Art. I-33.1.3 TEC uses the wording which applies to the Directive that is used in Art. 249 EC-Treaty. The *TEC* does not endeavour to guarantee discretion for Member States. The requirement to introduce "basic competence", which could have allowed the degree of density of European legislation to be controlled,[50] was ignored.

Secondly, the *Treaty establishing a Constitution for Europe* exhibits a real loophole in that it fails to tackle the question of the division of administrative competence. The former system of basic competence of Member States has also recently come under serious pressure by the EU increasingly using its own independent institutions and agencies to perform administrative duties at European level. Although most of these institutions have so far restricted themselves to the procurement and dissemination of information, institutions whose decisions have direct legal effect for European citizens have also come into being in recent years. The most familiar example is the European Trade Marks Office. This area not only throws up questions related to democratic control which are extremely difficult to tackle in terms of both constitutional theory and practicality, but this development also brings questions related to legal protection which so far remain unanswered. There is no doubt that the development of the outsourcing of institutions (indirect EU administration) is far from over. In fact in its White Book on "European Governance",[51] the European Commission made it clear that it is keen to promote the expansion of indirect EU administration. The scale of this development in constitutional theory and political terms is directly evident, making it all the more regrettable that the *Treaty establishing a Constitution for Europe* refrains from any legal structuring of this problematic area. Perhaps such an area clarifies the Convention's limited powers and procedures which designed to consolidate and clarify, but not to effect future-orientated, bold political configuration. The *TEC* does nothing to arrest the erosion of Member States' implementation and configuration competence. This also confirms the overall impression that the aim of the *TEC* is, in terms of competence and regulatory policy, one of consolidation rather than change.

III. Certainty, sharpness of delimitation and clarity of the rules for the allocation of competence

1. The accusation of exceeding competence

We readily recall the accusation, at the end of the Eighties and increasingly in the Nineties, that the EU institutions were using the provisions related to competence under European law in an expansive manner and possibly even in an illegal, over-

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[50] Cf. e.g. *W. Clement*, Europa gestalten – nicht verwalten, 12 February 2001, www.whi-berlin.de/clement.htm, para 18–21 (Clement puts density and scope (direct applicability) together).

[51] Europäische Kommission, white paper European Governance, COM (2001) 428 final.

bearing manner.[52] This involved firstly the interpretation (by the authorities, but principally by the judiciary) of the primary legislative constitutional provisions (basic freedoms, general ban on discrimination, loyalty obligations), via which broad and deep breaches could be driven through extensive areas of national legal systems.[53] Beyond economic administrative law, these provisions now also direct significant areas of Member States' administrative law[54] and court procedural law.[55] Accusations are additionally levelled against the handling of the competence which give the EU institutions authority to deal with secondary legislation. Some believed they were able to observe EU institutions combining objectives and competence rules.[56] The accepted norm such as Art. 6 (4) TEU not being a rule establishing competence[57] appeared to be becoming less certain.[58] Terms such as overstepping competence[59] and "breakaway legal act" appeared,[60] whilst the

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[52] On the discussion in particular: *H. Laufer*, Kriterien der Kompetenzabgrenzung, in: *W. Weidenfeld* (ed.), Reform der Europäischen Union, 1995, p. 201; *H. Laufer/ T. Fischer*, Zur Kompetenzverteilung zwischen der EU und den Mitgliedstaaten, in: *W. Weidenfeld* (ed.), Reform der Europäischen Union, 1995, p. 214. On the discussion in the seventies: *V. Constantinesco*, Compétences et pouvoirs dans les Communautés européennes, 1974.

[53] On the role of the ECJ: *U. Everling*, Rechtsfortbildung in der Europäischen Gemeinschaft, JZ 2000, p. 217; *Th. Oppermann*, Die Dritte Gewalt in der Europäischen Union, Deutsches Verwaltungsblatt 1994, p. 901; *F.Schockweiler*, Die richterliche Kontrollfunktion: Umfang und Grenzen in Bezug auf den Europäischen Gerichtshof, EuR 1995, p. 191; *I. Pernice*; Die Dritte Gewalt im europäischen Verfassungsverbund, EuR 1996, p. 27; *O. Dubos*, Les juridictions nationales, juges communautaires, 2001; *T. Öhlinger*, Gesetz und Richter unter dem Einfluß des Gemeinschaftsrechts, Festschrift für Thomas Fleiner, 2003, p. 719.

[54] *St. Kadelbach*, Allgemeines Verwaltungsrecht unter europäischem Einfluß, 1999, p. 296 et seqq.; *G. C. Rodríguez Iglesias*, Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts, EuGRZ 1997, p. 289.

[55] *F. Schoch*, Die Europäisierung des Allgemeinen Verwaltungsrechts, JZ 1995, p. 109; *E. Schmidt-Aßmann/W. Hoffmann-Riem* (eds.), Strukturen des Europäischen Verwaltungsrechts, 1999; *H.-J. Blanke*, Vertrauensschutz im deutschen und europäischen Verwaltungsrecht, 2000; *J. Bergmann* (ed.), Deutsches Verwaltungsrecht unter europäischem Einfluss: Handbuch für Justiz, Anwaltschaft und Verwaltung, 2002.

[56] Uncertainties for example in: Case 287/85 Germany et al. –v– Commission (migration policy) [1987] ECR 3202; on this earlier: *M. Zuleeg*, Der Verfassungsgrundsatz der Demokratie und die Europäischen Gemeinschaften, Der Staat 17 (1978), p. 27.

[57] *D. Simon*, in: *V. Constantinesco/R. Kovar/D. Simon* (eds.), Traité sur l'Union européenne, 1995, Art. F, para 17 et seq.; *A. Puttler* in: *C. Calliess/M. Ruffert* (eds.), Kommentar zum EU-Vertrag und EG-Vertrag, 1999, Art. 6 EU, para 199 et seqq.

[58] The Federal Constitutional Court devoted many pages to this question in the Maastricht judgment (BVerfGE 89, 155).

[59] Particularly extensively in: *F.C. Mayer*, Kompetenzüberschreitung und Letztentscheidung, 2000.

Bundesverfassungsgericht *[German Constitutional Court]* made it (abundantly) clear in its Maastricht ruling that in Germany at least, such legal acts should make no claim to validity.[61] Some observers had the distinct impression that the apparent fixed competence limits were, in the hands of the EU institutions, simply dissolving and making way for an authority without bounds, which was used to commit ever new, more extensive violations. These fears were not entirely without justification: even in pro-European circles it is now acknowledged that when unanimity was required, the Member States still holding a right of veto treated the question of competence as a political problem. Its legal dimension first gained significance when there was a move to the majority principle in the Council, and as the EU began to encroach upon the competence of individual countries, players without political co-determination rights became involved. It did not help matters when a member of the European judiciary once commented in this regard, in an almost triumphantly tongue-in-cheek manner: "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."[62]

Initial reactions to the accusation that the EU was not taking seriously the restrictions imposed on it by the principle of restricted authority came, as we know, as early as the beginning of the Nineties. Not only was the content of the new competence provisions worded less precisely than previously, but increasing use was being made of the opportunity to prohibit the EU from acting in certain areas (a significant reversal of the concept of the transfer of sovereign rights to the EU).[63] For example Art. 18 (3) EC-Treaty excludes EU competence with respect to passports, identity cards, residence permits, social security or social protection within residence law. Art. 137 (2) (a) and (4) EC-Treaty restrict the scope of EU measures as regards the fundamental principles of the social security systems of Member States. Finally Art. 157.3.3 EC-Treaty removes from the Community the authority to adopt industrial policy measures which affect the taxation authorities of Member States or which affect the rights and interests of employed persons, specifically cooperation between undertakings.

The present EU order of competence also draws criticism because it lacks transparency to European citizens, and in some respects to experts in jurisprudence. It is more or less impossible to gain an overview of the EU's profile of competence without in-depth study. Not only do the powers of the EU only become accessible by means of a general examination of the primary legislation and seeking out the competence rules (some of which are extremely well hidden) in hundreds of Treaty Articles, but also, certain types of competence rules, in par-

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60 Thus *W. Schroeder*, Zu eingebildeten und realen Gefahren durch kompetenzüberschreitende Rechtsakte der Europäischen Gemeinschaft, EuR 1999, p. 452.

61 BVerfGE 89, 155, p. 210.

62 *K. Lenaerts*, Constitutionalism and the Many Faces of Federalism, 38 AJIL 205 (1990), p. 220.

63 On the principles: *D. König*, Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses - Anwendungsbereich und Schranken des Art. 23 des Grundgesetzes, 2000.

ticular in relation to implied competence,[64] are only positively dealt with within the Treaty in a rudimentary fashion. One needs to be an expert in European law, familiar with the case-law of the European Court of Justice in relation to implied competence, to be capable of adequately describing the powers of the European Union. The actual content and scope of other competences remain unclear. In particular, the change within the organisation of integration from an economically liberalising administrative association to a genuinely politically operating body responsible for public power cannot readily be derived from the primary legislation. The Treaties offer the average citizen, who questions what Europe actually stands for and what direction it is taking, no real information.

2. Clarification through listing and typing

The Laeken Declaration not only talks about the need to "adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union", but the Declaration also emphasises the need to "clarify [and] simplify the division of competence between the Union and the Member States". The authors of this Declaration were particularly concerned to clarify the competence structure written into the Treaties in such a way that it becomes clear to citizens which tasks the EU is required to perform and what authorities it has in order to do so. The *TEC* manages to achieve this clarification, and thereby to significantly improve the clarity and transparency of the order of competence, by setting out the fundamental principles of the division of competence in Part I. Without making any legal change, Art. I-11 (1) and (2) TEC highlight the fact that the EU only has competence where this is assigned to it by the primary legislation (the principle of restricted authority).[65] It must observe the principles of subsidiarity and proportionality during the exercise of its competence (Art. I-11 (1) in conjunction with (3) and (4) TEC). In line with the way the order of competence is dealt with in the Grundgesetz *[German "Basic Law" or Constitution]*,[66] Art. I-12 - I-17 TEC go on to define the various types of competence. The issue areas given over to the EU are then assigned to a type of competence. This constitutes a true gain in quality terms in a number of respects.

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[64] Case 22/70 Commission –v– Council (ERTA) [1971], ECR 263, Opinion 1/94 WTO [1994] ECR I – 5267; Articles: *G. Nicolaysen*, Zur Theorie von den Implied Powers in den Europäischen Gemeinschaften, EuR 1966, p. 129; *O. Dörr*, Die Entwicklung der ungeschriebenen Außenkompetenzen der EG, EuZW 1996, p. 39; *M. Hilf*, Ungeschriebene EG-Kompetenzen im Außenwirtschaftsrecht, ZfV 1997, p. 295.

[65] On this *H.-P. Kraußer*, Das Prinzip der begrenzten Einzelermächtigung im Gemeinschaftsrecht, 1991.

[66] On German doctrine e.g. *R. Stettner*, Grundfragen einer Kompetenzlehre, 1983, p. 42 et seqq.; *id.*, in: *R. Dreier* (ed.), Grundgesetz-Kommentar, Bd. 2, 1998, Art. 70, para 17 et seqq.

3. Listing of matters

It is important to note that the *Treaty establishing a Constitution for Europe* lists the issues which have been assigned to the EU in a transparent manner.[67] The organisation of the *TEC* thus approximates the production of a list of competences[68] such as is frequently requested during political discussion.[69] It thus becomes clear even to the layman in what spheres the EU is authorised to act.[70] What is important in this context is that for the first time the Treaty assigns competence to the EU itself, and not to its executive institutions, thereby obviating the need to extend legal entity competences over and above the institutional competences. The lists of competences in the first Part of the *TEC* have legal quality. However, in contrast to other constitutional documents which include a list of competences, they are not themselves capable of establishing powers: they are more descriptive, and do not have the nature of laws. This necessitates duplication: the rules establishing competence are set out in the third Part of the *TEC*, and this is where the *TEC*, similarly to existing EC law, is far more precise in terms of content than a simple list of competences ever could be. In particular the competence provisions added in the Nineties display far-reaching certainty and specifically protect Member States against legislative encroachments. In any event, the wordings of the first Part of the *TEC* are potentially useful in legal terms. They may be used as an aid during the interpretation and application of the competence rules of Part Three, but prevent extension beyond the boundaries drawn by the wording of the provisions of Part Three. The same applies to the provisions of the Part dealing with Fundamental Rights. The *TEC* places great emphasis on the fact that the provisions of the Charter of Fundamental Rights should not be deemed to

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67 On non-transparency in general: *C. Schmid*, Konsolidierung und Vereinfachung des europäischen Primärrechts, EuR Beiheft 2/1998, p. 17.

68 E.g. *H.-P. Folz*, Demokratie und Integration, 1999, p. 383; *I. Boeck* (note 4); *G. Hirsch*, EG: Kein Staat, aber eine Verfassung, NJW 2000, p. 46. In the Convention's deliberations the objection against an exhaustive catalogue of competences was, on the one hand, that this would lead to unnecessary and damaging rigidity. On the other hand, it was pointed out that a catalogue of competences would not show the necessary precision to allow for a clear limitation of competences if there was no wish to have such precision which would do away with the clarity and transparency of the catalogue.

69 The call for the introduction of a catalogue of competences in which the powers transferred to the EU, are listed and thus established, is one of the standard demands made in the run-up to Nice and now again in the context of the deliberations of the Constitutional convention. Many of these in favour of such a demand appeared to be motivated by the belief that a catalogue of competences could constitute an effective instrument to repel excessive competence power shifts. The general opinion appeared to be that the technique used as a basis for arguments in favour of such a catalogue, which differentiates, but makes the substantive scope difficult to establish, has not proved itself and should therefore be replaced by a different model.

70 The proposal to adopt a charter of competences as a separate document (see *F.C. Mayer*, note 1, p. 611) was not followed.

establish competence.[71] In order to protect the unity of the Treaty, the provisions of the third Part must be read in the light of the aspirations underlying the rules relating to fundamental rights.[72]

However, the accessibility of the order of competence suffers through Title V of Part One TEC which includes separate exercise provisions going beyond the typical basic procedure, for the areas of Common Foreign and Security Policy (Art. I-40), Security and Defence Policy (Art. I-41) and implementing the "area of freedom, security and justice" within domestic and justice policy (Art. I-42). The less we are able to question the fact that such reminders of the former three pillar structure of the TEU are appropriate in functional terms, the more impenetrable the competence of the EU becomes as a result of this regulatory technique. Dependent on the issue, up to three different sections of the Treaty are relevant. The failure of the *Treaty establishing a Constitution for Europe* to definitively list the matters which are to be assigned to the category of shared competence, also causes problems. This regulatory technique not only creates the problem that the transparency of the *TEC* seriously suffers as a result, but anyone wishing to find out in which areas the EU has (shared) competence will still need to consult the 322 Articles of Part III.

The additional omission by the *TEC* of the objectives and tasks listed in the former Art. 3 EC-Treaty, is especially important in constitutional terms. This deletion constitutes a further significant constitutional step along the path towards transformation of the EU from a traditional international organisation into a federation. Whilst this primarily demonstrates that it establishes clearly defined aims to be pursued by Member States the general interest task of a state sovereign power cannot be broken down into individual objectives, and if it could be, then only with recourse to values such as fairness, peace, freedom etc. Almost too many such statements of values appear in Art. I-2 and Art. I-3 TEC. Although we may dispute the size of the integration effect of such constitutional provisions (in academic circles attempts are already being made at idealisation), there is no question that this represents a reversal in quality terms. The *TEC* does not go so far as to grant Member States residual areas of competence in which they are protected from EU influence. Such a step would have made a breach into Member States' natural assumption of themselves as sovereign entities.[73]

4. Establishment of a schedule of competence types

The fact that the *Treaty establishing a Constitution for Europe* conclusively designates the types of competence under EU law may be considered a significant

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[71] Art. II-111 (2) TEC

[72] On fundamental rights content, in general: *Th. Schilling*, Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts, EuGRZ 2000, p. 3.

[73] Thus *J. Schwarze*, Das schwierige Geschäft mit Europa und seinem Recht, JZ 1998, p. 1077, 1085 et seq.

gain.[74] The *TEC* fundamentally focuses on the question of what relative powers the EU and Member States have *in the legislative sphere* in order to establish a schedule of competence types. In typological terms, a distinction is made between exclusive competence, parallel (shared) competence and coordinating or supporting competence. Art. I-14 (1) TEC describes the category of shared competence as a residual category, which always applies if a competence is not declared to be an exclusive or supporting authority. This implies in particular that the matters listed in Part III, which are not explicitly assigned to one of the categories in Part I, must be deemed to be shared competence. Delimitation of the various areas will cause some interpretative problems, for example where Art. I-14 (2) (k) TEC defines "common safety concerns in public health matters" as a shared competence, and the "protection and improvement of human health" is seen as a supporting competence (Art. I-17 TEC).

Regardless of the effort made by the *Treaty establishing a Constitution for Europe* in the definition of competence types, many questions will arise during its practical handling. For example the *TEC* specifies that in the sphere of exclusive competence, only the institutions of the EU have the power to adopt legally binding (specifically legislative) measures. The *TEC* leaves open the question of the extent to which Member States may operate using non-legislative control measures. In the light of the regulatory technique laid down in Art. I-12 TEC and against the background of the unequivocal definition in Art. I-12 (1) TEC, it must be assumed that Member States are not entirely condemned to inactivity in the spheres of "exclusive competence", contrary to the apparent meaning of the word. They are free to endeavour to achieve political objectives using means which do not cross the threshold of legally binding effect.

The constitutional understanding underlying the definition of "shared competence" also brings problems. According to Art. I-12 (2) sentence 1 TEC, both the EU and Member States have the right to legislate in those areas in which the Constitution establishes shared competence. Whilst the term "shared competence" gives the impression that the European Union and Member States may operate permanently alongside one another, Art. I-12 (2) sentence 2 of the *TEC* makes it clear that this is by its nature *competing competence.*[75] The Treaty states that Member States may exercise their competence only to the extent that the Union has not exercised, or has decided to cease exercising, its competence. This wording makes it clear that the legislator has in mind a true bar such as is also brought about by Art. 72 of the German Grundgesetz. It is not the priority of the secondary legislation adopted,[76] but the constitutional provision itself which takes away Member States' right to act. The *TEC* is not however entirely clear on the timing of the start of operation of the bar. It is directly clear that Union law is always

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[74] Thus already calls by *I. Pernice* (note 7), p. 875; *Müller-Graff* (note 30), p. 209.

[75] This is in accordance with the present legal situation, but needed to be emphasised, as there was no clarity in academic writings on this point.

[76] The state of the law under the present provisions, *A. Dashwood* (note 2), p. 126; *A. v. Bogdandy/M. Nettesheim*, in: *E. Grabitz/M. Hilf* (eds.), Das Recht der Europäischen Union, 2001, Art. 3 b EGV, para 13.

intended to have the effect of a bar if the Union has made use of its power. In contrast, the functional significance of the second alternative is less than clear. If we take the provision at its word, then Member States may also act where the Union has exercised its competence, but has at the same time decided that it will no longer make use of this competence in the future. However, we must not only question whether a decision by the European institutions can truly have the effect of lifting such a bar, but in such a case we must also question in what form and to what degree of clarity such a decision would have to be made.

Legal problems also arise in that the *Treaty establishing a Constitution for Europe* establishes shared competence in the areas of "research, technological development and space" and in "development cooperation and humanitarian aid" (Art. I-14 (3) and Art. I-14 (4) TEC), but states that the exercise of that competence may not result in Member States being prevented from exercising theirs. This may be understood either to mean that the EU is prohibited from binding legislation in those specified areas. However, in that case this would be supporting competence rather than shared competence and its inclusion in Art. I-14 TEC would be contradictory. The wording of these provisions also leads to the conclusion that the EU has authority to legislate, but that this right does not have a binding effect on Member States. With a view to protecting the effectiveness of the secondary legislation however, such an interpretation is not truly convincing. There is still a need for revision in this respect.

Where the EU has been assigned coordinating and supporting competence, it may not legislate with binding effect, in order to harmonise Member States' statutory and administrative provisions (Art. I-12 (5) TEC). It is unfortunate in technical regulatory terms that such coordinating competence is found both in Art. I-15 and Art. I-17 TEC. Shared competence in substantive terms also exists where the Treaty assigns coordinating or supporting competence to the EU. In this case coordinating and supporting competence may come into play as a special application of shared competence. The fact that the *TEC* henceforth explicitly assigns the EU the power to conduct supporting, coordinating and complementary measures in the sphere of administrative cooperation represents a groundbreaking development in European administrative law.

The *TEC* regrettably does not manage to persevere with the typological approach based on legislative competence in relation to all matters. Beyond the typology set out in Art. I-12 TEC, the EU has authority in the spheres of foreign and security policy. The *Treaty establishing a Constitution for Europe* does not assign this competence with respect to legislative powers, but more or less sets it in brackets. Without making any further distinction, Art. I-16 TEC states that "the Union's competence in matters of common foreign and security policy" extends to "all areas of foreign policy and all questions relating to the Union's security" and no attempt is made to classify using the typology set out in Art. I-12 TEC. In substantive terms, there must be considered to be shared competence in the area of foreign and security policy. We shall have to assume that with respect to the conclusion of international agreements, this will not even evolve into an exclusive competence in the event of one of the circumstances of Art. I-13 (2) TEC. Art. I-16 TEC must be seen as a conclusive special provision which excludes the

application of Art. I-13 (2) TEC. The special position of Art. I-16 TEC must be the result of the fact that it is currently politically virtually impossible for Member States to accept that the EU is developing exclusive competence in the sphere of foreign and security policy and that they are losing their powers to act. This obviously does not affect the obligation to observe measures adopted by the EU. Moreover action by the Union and Member States in the sphere of foreign affairs is coordinated through their reciprocal duty of sincere cooperation (Art. I-5 TEC).

Moreover, it should crucially be noted that what is known as the "open method of coordination"[77] is not mentioned in Part One TEC. One could take the view that this is merely a special form and technique of coordination, and that it is included in the general types of competence (shared competence and coordinating authority). It would however have afforded the *TEC* greater transparency and made EU law more accessible if this increasingly important form of cooperation between the EU and Member States had been mentioned. The reluctance exhibited in the Treaty is an expression of political differences of opinion in relation to the position and efficiency of this method of coordination. Whilst some have high expectations of this method in political and content terms, others see it as a stealthy endeavour by the Union to develop new spheres of competence for itself. As far as its critics are concerned, it makes no odds that this coordination method does not afford the EU any legislative powers. They rightly point out that considerable de facto pressure to act may be exerted through the instruments of open coordination.

5. Determining the scope of exclusive competence

It is also important that the *Treaty establishing a Constitution for Europe* will end the recurring disputes regarding the scope of the exclusive competence of the EU. Disputes repeatedly arose in particular in relation to the question of the extent to which the competence to establish the internal market is an exclusive competence. Whilst the Commission, for example, expressed the view on a number of occasions that the task of putting the internal market into practice was by its very nature one which only the EU could undertake (with the consequence that it must constitute an exclusive competence),[78] the Member States repeatedly made it clear that they would retain the ability to legislate in the sphere of the internal market as long as they do not breach European law. Different interpretations of the concept of exclusive competence are clearly expressed in this dispute. The *TEC* (and in the

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[77] See *M. W. Bauer/R. Knöll*, Die Methode der offenen Koordinierung: Zukunft europäischer Politikgestaltung oder schleichende Zentralisierung?, Aus Politik und Zeitgeschichte 2003, p. 33; *B. Schulte*, Die „Methode der offenen Koordinierung" – Eine neue politische Strategie in der europäischen Sozialpolitik auch für den Bereich des sozialen Schutzes, ZSR 2002, p. 1.

[78] See for the Commissions opinion Agence Europe 30 October 1992, No 1804/05. See further *A G Fennelly's* opinion in Case 376/98 Germany –v– Parliament and Council [2000] ECR I – 8419, pp.135-142.

meantime also the European Court of Justice),[79] subscribes to an interpretation according to which, as regards the term exclusive competence, it does not depend on who can deal with a certain task, but whether a task assigned to the EU can only be adequately fulfilled if the Member States are absolutely and permanently prevented from acting.[80] The *TEC* only calls for such an absolute bar in a few areas, namely establishing "the competition rules necessary for the functioning of the internal market", "monetary policy for the Member States whose currency is the euro", "common commercial policy", "customs union" and "the conservation of marine biological resources under the common fisheries policy" (Art. I-13 (1) TEC). If we ignore the (superfluous) unionisation of elements of competition policy (in relation to which secondary legislative competition rules would be just as effective),[81] the *TEC* essentially corresponds to the already valid understanding of the primary legislation.[82] No direct constitutional provision is made for the unwritten competence of Member States to act as "guardians of the public interest", which has been acknowledged by the ECJ;[83] however, this constitutes an acceptable loophole.

For the first time, those annexed international competences of the EU, which the European Court of Justice has postulated during its development of the law within its highly variable "AETR case law", which has now extended over thirty years, are defined in Art. I-13 (2) TEC. The *TEC* essentially codifies the current legal position. This codification specifically involves the EU being assigned exclusive international competence where this is necessary to allow it to exercise its internal competence. When Art. 13 I-(2) TEC states that the EU should have exclusive competence, where the conclusion of an agreement by a Member State "may affect common rules", this also does not extend beyond currently valid law. This wording must however be interpreted in a narrow sense; Member States are only prevented from acting where the international agreement they are planning to sign significantly counteracts the regulatory effects of an EU act. Moreover, the third subsidiary clause of Art. I-13 (2) TEC is unclear in terms of content and questionable in terms of legal policy: it states that the EU should also have exclusive competence "for the conclusion of an international agreement when its

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79 Case C – 491/01 British American Tobacco [2002] ECR I – 11453.

80 See also in respect of Art 95 EC-Treaty: *Ph. Manin*, Les Communautés européennes, l'Union européenne, 5th ed., 1999, p. 143; *W. Kahl* in: *C. Calliess/M. Ruffert* (eds.), Kommentar zum EU-Vertrag und EG-Vertrag, 2nd edn., 2002, Art. 95 EG, para 20 et seqq.

81 On more recent developments in secondary legislation: *C.-D. Ehlermann*, The modernization of EC antitrust policy: A legal and cultural revolution, CMLRev. 37 (2000), p. 537.

82 Against the Commission's opinion (Agence Europe 30 October 1992 No 1804.05) agricultural policy in particular is not treated as an exclusive competence of the EU (see on this *J.-C. Piris*, Hat die Europäische Union eine Verfassung? Braucht sie eine?, EuR 2000, pp.311, 332).

83 Cf *M. Pechstein*, Die Mitgliedstaaten als "Sachwalter des gemeinsamen Interesses", 1987, p. 75 et seqq.; *R. Streinz*, Europarecht, 5th edn., 2001, para 131.

conclusion is provided for in a legislative act of the Union". This "self-authorisation clause" does not take sufficient account of the fact that the immediate exclusion of action by a Member State is on no account appropriate when the conclusion of an international agreement is planned under secondary legislation. Furthermore, it is not absolutely clear why secondary legislation programmes (a secondary legislative act cannot establish competence) should lead to a bar on action by Member States. The enactment of secondary law in relation to the EU and Member States is unconvincingly overextended. Steps taken by Member States which could lead to impairment of the Union's procedure for the conclusion of agreements are already preventable using the loyalty clause (Art. I-5 TEC). Nevertheless, in this wording, the *Treaty establishing a Constitution for Europe* has followed the ECJ's understanding of competence.[84]

IV. The normativity of the rules relating to the exercise of competence

Currently, there is no evidence of federally structured governance rules,[85] in which the order of competence only includes exclusive competence, i.e. in which a complete and clearly defined separation of powers has been undertaken. Competing or shared competence is the prevailing type of competence. This is not only because no other type of competence offers a reasoned understanding of the levels via appropriate solutions in as obvious or indeed compelling way, but also because it permits novel situations to be tackled with remarkable flexibility.[86] This type of competence however also brings challenges and risks, specifically in determining when the higher or lower level should be called upon to legislate remains uncertain in normative terms and must be given over to the political process. Considering that the superior level necessarily has priority where there is shared competence, appropriations and acquisitions of competence are difficult to avoid.

1. The conflict surrounding the rules relating to the exercise of competence

To constitutional experts, it is obvious that even the most refined order of competence is powerless against the workings of political forces, distortions at the boundaries of competence and possibly also politically motivated shifts. Constitu-

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[84] See the decisions of the ECJ concerning competences in air transport (e.g. ECJ Case C-475/98 Commission –v– Austria, [2002] ECR I – 9797).

[85] On the multiplicity of forms of federalism see *D. E. Lazar*, Exploring Federalism, 1987; *J.H.H.Weiler*, Federalism and Constitutionalism. Europe's Sonderweg, Harvard Jean Monnet Working Paper 10/00.

[86] The political call for levels of competence (cf e.g. *J. Fischer* (note 27, p. 149) does not always seem to take account of the cost of the rigidity which accompanies this.).

tional order is no more "political" anywhere else, in the sense that it has managed to resist political forces acting by mutual consent. Not even a constitutional court will wish to curb the political forces in questions of competence, especially where they are the expression of action by mutual consent. It is therefore not surprising that the ECJ has not resisted the politically desired exploitation, even overextension of the Community order of competence which has been driven forward by the Commission and the Council, while the Member States had a veto in the Council on the basis of application of the principle of unanimity. The ECJ only became involved during this period in disputes relating to competence where protection of the basic structures of the integrated union or safeguarding the distribution of power between the EC institutions (for example protection of the participatory rights of the Parliament) were involved. It quickly proved an illusory hope that in this situation, accepting the principle of subsidiarity would have the effect of limiting the workings of political forces, or at least of steering them in particular directions. The principle of subsidiarity is unquestionably a restrictive corrective measure, through which the exercise of competence can be rationalised.[87] There is no doubt that the principle (at least in the version of Art. 5 EC-Treaty)[88] cannot be limited in substantive terms without compromising the aims underlying it within the balance of European legal unity and the competition between systems and legal orders.[89] Such a compromise cannot succeed, and is not even politically attempted. The corresponding principles have not yet even been set out in a pan-European constitutional theory.[90] Against this background it is not surprising that the European Court of Justice has shown considerable reserve in the application of this principle.[91] It is just as unsurprising that critics of the "upward force of competence" which unquestionably still exists, find it difficult to prove a violation of the principle of subsidiarity.[92] It is however difficult to describe this as an expres-

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87 On this *R. von Borries*, Das Subsidiaritätsprinzip im Recht der Europäischen Union, EuR 1994, p. 268; *H. Lecheler*, Das Subsidiaritätsprinzip, 1993.

88 Attempts to develop more clearly worded version, e.g. in *Fischer/Schley* (note 4), p. 18 et seq.

89 Proposals for a more clearly worded version setting out the limits in *I. Boeck* (note 4), pp. 174-176.

90 On the idea of a pan – European legal order, see in particular p. *Häberle*, Gemeineuropäisches Verfassungsrecht, EuGRZ 1991, p. 261; *id.*, Gemeineuropäisches Verfassungsrecht, in: *R. Bieber/P. Widmer* (eds.), L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area, 1995, p. 361; *M. Heintzen*, Gemeineuropäisches Verfassungsrecht in der Europäischen Union, EuR 1997, p. 1.

91 See ECJ case C-84/94 UK –v– Council [1996] ECR I – 5755, C - 233/94 Germany –v– Parliament [1997] ECR I – 2405, Cases C-36 and 37/97 *Kellingusen* [1998] ECR I – 6337.

92 Illustrated by the Subsidiarity report of the Federal Government of 18 August 2000, BT-Drs. 14/4017; on these problems also *R. v. Borries*, Rechtsetzung in der Europäischen Gemeinschaft: Der Jahresbericht 2000 der Europäischen Kommission, Zeitschrift für Gesetzgebung (ZG) 2001, p. 79 et seqq.

sion of a successful innovation in European law.[93] It serves little purpose in these circumstances to require the Commission to submit an annual report.[94] Just a few years after the introduction of the principle, discussion began on how it could be given more bite. Most of those involved in this discussion saw institutional provisions as a solution.[95]

There was nothing wrong with such proposals, and the number of proposed amendments made over the past few years has been quite phenomenal.[96] They extend from the creation of courts dealing with competence or subsidiarity issues through the establishment of political competence-monitoring bodies (in particular subsidiarity committees[97] involving members of national Parliaments[98]) and the appointment of an ombudsman or an individual responsible for European competence,[99] right up to the upgrading of the Committee of the Regions into a third chamber with joint decision-making powers in relation to competence questions.[100] More thoughtful observers however always point out that many proposed solutions carry a high price tag, either because the institutional expansions under discussion would lead to serious impairment of the efficiency and decision-making capability of the EU, because the allocation of decision-making responsibility and the demand for political responsibility would be made more difficult, or because the proposed solutions unilaterally placed decision-making responsibility in the event of competence conflicts in the hands of the Member State institutions. Adequate account has not always been taken of the "Europeanisation" of members' views which can even occur within control bodies manned by Member States. Some critics also overlooked the fact that due to very difficult test measures and constitutional responsibilities, European and national constitutional jurisdiction are in a position of latent antagonism, which has a significant rationalisation effect, specifically in relation to questions of competence.

2. Substantive delimitation and reasoned rationality

There was little political likelihood that the Convention would assimilate the *institutional change proposals* made during the run-up period and would expose the institutional structure of the EU to a challenge whose scope was difficult to esti-

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93 See *von Bogdandy/Bast* (note 4), p. 456.

94 Art. 9 last indent of Protocol of Subsidiarity.

95 A good survey in: *Chr. Koenig/R. A. Lorz*, Stärkung des Subsidiaritätsprinzips, JZ 2003, p. 167.

96 *F.C. Mayer*, Kompetenzüberschreitung und Letztentscheidung, 2000, p. 330 et seqq.; *F.C. Mayer* (note 1), p. 592 et seq.

97 On this extensively *Chr. Calliess*, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union, 2nd edn., 1999, p. 287 et seqq.; *I. Pernice* (note 7), p. 876.

98 *I. Pernice* (note 7), p. 876; *L. Siedentop*, Democracy in Europe, 2000, p. 147; *J. Schwarze* (note 7), p. 1268 et seqq.

99 See *F.C. Mayer* (note 1), p. 601 et seq.

100 On this *I. Boeck* (note 4), p. 188.

mate. This was due not least to the resulting shifts of power following the acquisition of competence by the EU, which operate less to the detriment of Member State governments in the narrow sense but principally to the detriment of the Parliaments of the Member States and, in the case of federally structured Member States, incorporated organisations. The Convention deliberations substantiated the proven theory that such institutions would not manage to assert their interests against the wishes of the national governments. What was expected actually occurred. It was not possible to increase the normativity effect of the delimitation of competence even in substantive terms. The Convention did in fact attempt in some respects to place greater emphasis on the legal responsibility of the EU towards its Member States during the exercise of competence. There is also a tightening up in Art. I-5 (1) TEC, in that it henceforth reads: "The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security." The *Treaty establishing a Constitution for Europe* thus accepts a proposal by *Ingolf Pernices*, that Art. 6 (3) TEU should be developed further in relation to the guarantee of "federal basic rights".[101] In fact this involves an important concretion of the general principle of loyalty to the Union.[102] Ignoring the emphasis of these last demarcations (which make it clear how far-reaching the roles of the EU and the Member States have changed in substantive terms), the Convention Constitution refrains from attempting to tighten up the rules relating to the exercise of competence in substantive terms. The EU would appear to have reached the natural limits of normative rigour along the path it took when it introduced the principle of subsidiarity.

There is no doubt that the efforts at tightening up and giving precision to the competence provisions within EU law quickly come up against natural boundaries associated with the peculiarities of the language and the "nature of the beast". Beyond the secure boundaries of constitutional law, delimitation of competence must primarily and principally be understood as a discursive process, which involves the mediation and balancing of supranational units against national units, but primarily against the interests of sub-national units. Delimitation of competence therefore means rationalisation of the discourse in relation to such interests.

It is not surprising that the Convention Constitution initially accepts this aim, in that it requires the players involved to set out their reasons and therefore obliges them to exercise self-monitoring. Of course, even under current Union law, the legislative institutions of the EU are obliged to substantiate the legal acts which they adopt. Every aficionado of European law of course knows full well that the EU institutions accept this duty without much enthusiasm and that substantiation

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[101] *I. Pernice* (note 7), p. 875; *W. Clement* already mentions the regions (note 50, para 23). Also compare *T. Würtenberger*, Auf dem Weg zu lokaler und regionaler Autonomie in Europa, Festschrift *H. Maurer*, 2001, p. 1053.

[102] *P. Unruh*, Die Unionstreue - Anmerkungen zu einem Rechtsgrundsatz der Europäischen Union, EuR 2002, p. 41.

of the legal acts frequently lies somewhere between simply paraphrasing the substantive provisions and making a few additional minor points.[103] There is something to be said for the assumption that this is inevitable and unavoidable, because the legislator speaks through its statute, but does not need to explain it. Notwithstanding these doubts regarding the rationalising and restricting effect of the substantiation requirements, the *Treaty establishing a Constitution for Europe* is continuing along the path it has chosen and is tightening up the substantiation requirements: the Protocol on the application of the principles of subsidiarity and proportionality henceforth explicitly obliges the Commission to attach an explanatory memorandum to its proposals with respect to these principles.

The Commission is required to use a special form, on which it provides "details" of the effects of the measure, in particular in financial terms and with respect to the effects for Member States and their regional units. The fact that a Union measure is more capable of achieving an objective than measures by Member States must be substantiated with reference to criteria related both to quality and where possible, to quantity.[104] A certain degree of scepticism remains as to whether these substantiation requirements compel the Union institutions to conduct a process of reasoned self-determination, which will result in a change of political practice. At all events, nothing is required in this respect to which a reasonable legislator would not already be committed.

3. The early-warning mechanism

The true innovation of the "early-warning mechanism" lies in the fact that national Parliaments and their chambers are afforded the right to express substantiated opposing views within the process of European legislation, for reasons related to subsidiarity. In accordance with the basic principle (Art. 6 of the Subsidiarity Protocol), the national Parliaments of a Member State or chambers of a national Parliament must demonstrate in a reasoned opinion, within six weeks after transmission of a legislative proposal by the Commission, that the draft in question does not comply with the principle of subsidiarity. When drawing up their opinion, the national institutions must if necessary consult the regional Parliaments having legislative powers, and in this respect they act as the legal representatives of the interests of the legislative institutions of the individual Member States. These Member State parliamentary elements may not however derive out of Art. 6 of the Subsidiarity Protocol any claim under European law to require the national Parliament to adopt a certain position in its motion for reconsideration. The position of national Parliaments or their chambers acting in isolation is in fact weak. The

[103] There is a minimal degree of judicial review: ECJ Case C-233/94 Germany –v– Council and Parliament (Deposit guarantee scheme) [1997] ECR I – 2405.

[104] The Commission takes into account that the financial and administrative burden on the Union, the governments of the Member States, the regional and local authorities, industry and private citizens should be kept to a minimum and should be proportionate to the objective pursued.

Subsidiarity Protocol makes provision only for the legislative institutions of the EU to be obliged to "take into account" the substantiated opposing views of the national Parliaments or their chambers. However, the picture changes if the subsidiarity argument is brought by a sufficiently large group of national Parliaments. The Subsidiarity Protocol defines the threshold as one third of Member State Parliaments. In order to prevent the difference between Member States with a single chamber system and those with a two chamber system from having an effect, the protocol gives each Member State two votes, which are shared where there is a two chamber system. If a group of Member State Parliamentary institutions which represent at least one third of the total number of votes (currently 30) submits a substantiated subsidiarity-based counterview, then the Commission is obliged to review its proposal, with the consequence that it must pass another resolution on it. In such a circumstance it is obliged to substantiate its position. National Parliaments and the Commission are thus bound into a reasoned process of understanding on the assignment of duties within Europe, the rationalising effect of which can necessarily have a braking effect within the process of the "upward" shift of power. This mechanism will however only prove its worth provided the Parliaments (or chambers) of the Member States have a true willingness to critically monitor the work of the EU institutions and if necessary to step in. This will only be possible in real terms provided the national Parliaments adapt their organisation to meet this challenge, with crosslinks in particular being established at working level, and agree on generally valid substantive rules. The subsidiarity-based criticism, which has to date been put forward in a somewhat indiscriminate manner, offering no evidence of internal normative coherence, will not be capable of causing the EU institutions to rethink.

V. The level of materialisation of the competence provisions

So far, a fourth dimension of every order of competence has been largely ignored during constitutional theory discussions, namely the degree of substantive determinateness of the competence. In this respect the EU, according to the description, would appear to be performing a remarkable U-turn. After it developed in the Nineties into a politically active association, which not only implements a prescribed teleological approach in both law and practice, but acts genuinely politically, it now appears to be developing into an association which prescribes broad areas of the ethics guiding its action in constitutional terms. It is especially remarkable with respect to the introductory provisions of Part III of the *TEC* that the competence given over to the EU is integrated in substantive terms within an intensifying process to an extent that we have, at least to date, seldom seen in national constitutions. As an example, Art. III-117 TEC obliges the EU institutions to take into account "requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

The EU is also required to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art. III-118 TEC). In Art. III-116 TEC, the aim to eliminate inequalities between women and men is confirmed. Other examples may be stated. Explicit legislative competence to assert discrimination bans goes one step further: the ban on discrimination on grounds of nationality anchored in Art. I-4 (2) may be laid down in European laws or framework laws (Art. III-123 TEC), and Art. III-124 TEC provides for legislative competence to combat such discrimination, in conformity with Art. 13 EC-Treaty.

If we do not wish to dismiss such provisions as "cosmetics", via which the treaty drafters seek the acceptance and approval of EU citizens, they still remain somewhat problematic in terms of the theory of competence. At any event, the inherent moralisation means that the order of competence threatens to impair the freedom to make politically responsible decisions. More importantly, it *could* be read almost as an invitation to extend competence. These provisions are likely to also remain significant in the relationship between the political legislator and the controlling institution of the ECJ. No in-depth discussion of the opportunities and risks associated with this moralisation of the EU Constitution has yet taken place, so that it is not possible to do more than simply note this point.

VI. Degree of juridification of the review and control of the exercise of competence

1. The accusation of lack of judicial control

To characterise and understand an order of competence, we finally also need to establish how politics and law interact in the event of a dispute on the legality of the perception of competence. Although EU law defers to the political process when controlling the exercise of competence (it is the representatives of the Member States within the Council who are required to control the legality of EU acts in competence terms, this being one of their official duties). EU law affords the ECJ, as a quasi second line of defence, a comprehensive controlling power, which may be called upon as laid down in Art. 230 EC-Treaty. In theory therefore, the level of juridification of control of competence is high, and in practice the ECJ displays no reserve in its administration of its controlling duty. At least until recently its attentiveness rather served to protect the horizontal functional order within the EU[105] and to secure the institutional system as a whole[106] than to delimit vertical competence. Of course a number of ECJ judgments may be listed, in which the Court has declared EU measures invalid on grounds related to competence, in

[105] Cf. e.g. Case 287 Germany et al –v– Commission (migration policy) [1987] ECR 2303.
[106] Opinion 2/94 ECHR [1996] ECR I – 1763.

particular because the incorrect legal basis has been selected.[107] However, the number of cases in which the ECJ has reversed a decision through lack of legal entity competence[108] is small.[109] It is therefore not surprising that one could gain the impression that the European courts are not prepared to monitor the observance of the order of competence during the examination of secondary legislative acts effectively enough.[110] This accusation is unjustified, because in a federal system such as that of the EU, it cannot be the duty of a court to become involved[111] in the political decision-making process of Member States acting by consensus, on grounds related to competence.[112] The ECJ only took on the function of a true arbitrator between political forces when the majority principle was introduced. It is however surprising that it found this role difficult to play due to a lack of adequate legislative rules.[113] The ECJ judgment in the case relating to the tobacco labelling directive[114] also now reflects the fact that the ECJ's constitutional theory role altered significantly with the transition to the majority principle, and the Court is now required to act as a federal constitutional court.[115] This presupposes the juridification of political power conflicts.[116] [117]

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[107] Cf. e.g. Case 294/83 Les Verts v European Parliament [1986] ECR 1339, and Case 287/85 Germany v Commission [1987] ECR 3202: Opinion 2/94 ECHR [1996] ECR I – 1759. See more extensively *N. Colneric*, Der Gerichtshof der EG als Kompetenzgericht, EuZW 2002, p. 709.

[108] See e.g. *N. Colneric* (note 107), p. 711 et seq.

[109] *K. Boskovits*, Le juge communautaire et l'articulation des compétences normatives entre la Communauté européenne et ses Etats membres, 1999.

[110] Clear criticism e.g. in: *R. Scholz*, Europäisches Gemeinschaftsrecht und innerstaatlicher Verfassungsrechtsschutz, in: *K.H. Friauf/R.Scholz* (eds.), Europarecht und Grundgesetz, 1990, p. 97; *P.M. Huber*, Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der gemeinschaftsrechtlichen Kompetenzordnung, AöR 116 (1991), pp. 211, 213; *T. v. Danwitz*, Zur Entwicklung der gemeinschaftsrechtlichen Staatshaftung, JZ 1994, pp. 335, 340.

[111] Of course, the situation in respect of infringement of fundamental rights proEC-Treatyting Individuals.

[112] See *M. Simm*, Der Gerichtshof der Europäischen Gemeinschaften im föderalen Kompetenzkonflikt, 1998; *H. G. Fischer*, Die Rechtsetzung der Europäischen Gemeinschaft im Lichte der Rechtsprechung des Europäischen Gerichtshofs, ZG 2000, p. 165.

[113] The assessment of the role of the ECJ varies greatly in legal science circles: one opinion (which refers to the prohibition on tobacco advertising) is that the ECJ has proved itself so well as an independent judge of competence that the institutional reforms would not be feasible (*von Bogdandy/Bast*, note 7), 454); another is that the ECJ is not the appropriate body, for structural or political reasons, to play the independent supreme arbiter in vertical conflicts of competence (e.g. *J. Weiler*, The European Union Belongs to its Citizens: Three Immodest Proposals, ELRev. 22 (1987), p. 150 (155)).

[114] This may be seen clearly in Case C-376/98 Germany –v– Parliament and Council [2000] ECR I – 8419 (Tobacco labelling directive).

[115] *Rodríguez Iglesias* (note 54), p. 126 et seq.

[116] On the nature of conflicts on competence: *M. Nettesheim*, Horizontale Kompetenzkonflikte im Gemeinschaftsrecht, EuR 1993, p. 246.

However, the ECJ has so far had little opportunity to prove itself in its new function.[118] There is no evidence of those metatheoretic measures and standards via which the relationship between unity and multiplicity may be broken down in a legally rational and general way.[119] No challenge has yet been made to allow it to prove itself in a politically trenchant existential conflict.[120] The Convention was however broadly unanimous in its belief that it is not in order to mistrust the ECJ. It rightly refrained from introducing institutional changes via which the exercise of competence (assumed or actual) could be better monitored.[121] The price for this would have been too high and the likelihood of success too small.[122]

2. The complaint related to subsidiarity within the Treaty establishing a Constitution for Europe

Although the TEC makes no provision for constitutional changes, it does aim to emphasise the role of the ECJ as a federal constitutional court. In initial reactions, the fact that the subsidiarity protocol now provides for ongoing judicial control of the principle of subsidiarity, is rightly afforded special significance. The fact that Art. 8 of the Protocol affords a Member State the right to bring proceedings against a legislative act "in accordance with the rules laid down in Article III-365", is only of declaratory significance. Member States already had this right as a privileged plaintiff. The Protocol goes beyond the former right to bring an action, in that it affords national Parliaments or chambers of national Parliaments the right to make an application in proceedings in accordance with Art. III-365 TEC (formerly Art. 230 EC-Treaty), going further than the former right of action.[123] This is remarkable because this is the first time that the constitutional

[117] A sceptical view of the chances for this: *J. H. H. Weiler* (note 113), 155.

[118] Cf. recently Case C-377/98 Netherlands –v– Parliament and Council [2001] ECR I – 7079. On more recent case law of the BVerfG: *Chr. Calliess*, Kontrolle zentraler Kompetenzausübung in Deutschland und Europa, EuGRZ 2003, p. 181.

[119] On the constitutional position under the „necessary and proper" clause in the US: *L.Tribe*, American Constitutional Law. Volume One, 3rd edn., 2000, p. .798.

[120] This particularly applies if the Federal Constitutional Court uses Art. 23 EC-Treaty to decide a EU act cannot be applied. On the role of the Constitutional Court see *J. Limbach*, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ 2000, p. 417; *R. Nickel*, Zur Zukunft des Bundesverfassungsgerichts im Zeitalter der Europäisierung, JZ 2001, p. 625.

[121] Such claims are made for example by *S. Broß*, Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte, Verwaltungs-Archiv 2001, p. 425 et seqq.; *Clement* (note 50), para 29; *U. Goll/M. Kenntner*, Brauchen wir ein Europäisches Kompetenzgericht?, EuZW 2002, p. 101.

[122] See also *N. Colneric* (note 107), p. 709; *U. Everling*, Quis custodiet costodes ipsos?, EuZW 2002, p. 357. Zur Problematik schon früh: *F. Schockweiler*, Zur Kontrolle der Zuständigkeitsgrenzen der Gemeinschaft, EuR 1996, p. 123.

[123] Generally see: *Rengeling/Middeke/Gellermann*, Handbuch des Rechtsschutzes in der EU, 2nd edn., 2003.

bodies of Member States have been in a position to seek legal protection. *Elements* of a Member State *with legal capacity* (as plaintiffs without privilege) have of course always been able to seek legal protection, if they were the addressees of EU measures or were directly and individually affected by such measures. Institutional dispute between a Member State institution and EU institutions was not however envisaged. The Subsidiarity Protocol is henceforth directed towards a situation which has always existed where there is dispute between EU institutions. The Commission was always able to bring an action against the Council. From a constitutional point of view, the regulatory approach of the Subsidiarity Protocol makes it especially clear how far the federalisation of the integrated union has progressed. The ancient and more or less impermeable boundary between the internal political process and the transnational appearance (through the governing bodies required to fulfil this purpose) is once again breached. However, remnants of the traditional view still remain in the Subsidiarity Protocol, in that it must be a Member State which brings the action "on behalf of their national Parliament or a chamber of it". Thus the authority to conduct proceedings remains in the hands of the national governments.

This rule brings a number of legal problems, of which we will consider two. Firstly: the Subsidiarity Protocol gives no concrete definition of the terms "national Parliament" or "chamber of the national Parliament". It is however clear from the context of the system that these must be national constitutional bodies, which are decisively involved in the legislative procedure. The Subsidiarity Protocol does however deal with the balance of power and force in the legislative sphere. Not every body involved in the legislative process can however be covered by this term. As is obvious from the wording, these must be bodies with deliberative function. An executive such as the German Bundespräsident does not have authority under Art. 8 of the Subsidiarity Protocol, although, according to Art. 81 GG, he is involved in the legislative process and has a restricted substantive right of examination. There is no doubt that the *Bundesrat* must be considered as a "chamber" of a national Parliament for the purposes of the Subsidiarity Protocol. Although it comprises members who are not directly elected by the public, it is a legislative deliberative body and is part of the legislative established by the Grundgesetz. The Bundesrat, alongside the Bundestag, may therefore also bring an action in accordance with Art. 8 of the Protocol.

There is furthermore a need for clarification as regards the legal relationships between the national Parliaments which are the beneficiaries under the Subsidiarity Protocol and the national governments. These are legal relationships whose content is addressed under national law. Does the national Parliament (or one of its chambers) have a legal right to require "the Member State" (i.e. specifically the government of the association) to "bring" an action? Under the Grundgesetz, it is possible to give a positive response and to derive such a claim of a reciprocal duty of loyalty to the federation (Bundestreue). Even if the Bundesregierung itself considers a legislative act of the EU to be in accordance with the order of competence, it will accept the doubts in relation to subsidiarity which are expressed by the legislative bodies and will support their claim. This understanding of the law is supported by an interpretation which is in conformity with EU law, in that Art. 8 of

the Subsidiarity Protocol explicitly refers to a simple "notification role" of the bodies of the Member State which represent it externally. Although the Protocol fundamentally provides that actions should be notified in accordance with "their legal order", national law may not be interpreted in such a way that it allows the protection afforded by competence to fail to take effect.

It must finally be noted in this context that the Subsidiarity Protocol does not restrict the application powers of a Parliament or a chamber in such a way that a claim may only be made with respect to an encroachment or direct intervention by the Union into its own competence. The Bundestag and Bundesrat may also claim that there has been a violation of the principle of subsidiarity if this operates to the detriment of the Länder as a result of the division of competence under the Grundgesetz. The subsidiarity action may not be interpreted to mean that a complaint may only be brought when there is a possibility of prejudice to the competence of the Parliament or a chamber of it.

The practical significance which the subsidiarity action will have is difficult to assess at the present time. Experiences in the national context appear dubious. The new version of Art. 72 (2) GG, which has been in force since 1994, further reinforced by a special opportunity to bring a complaint before the constitutional court, has not yet truly brought about any change of direction in the federal German system. This is worthy of note, irrespective of the fact that the German Federal Constitutional Court recently made it clear that it would in future be examining more closely the need for standard federal rules.[124] Although the German Federal Constitutional Court has now declared in its care for the elderly ruling that it considers this constitutional provision to be entirely liable for trial, it remains unclear what substantive measures the Court will apply. In the light of the traditional and deep-rooted de facto European jurisdiction, there is no cause to expect that after the introduction of a special authority to bring proceedings, the principle of subsidiarity will henceforth become the basis of radical adjudication, or even of adjudication which merely has a significant braking effect. It must rather be expected that the ECJ will primarily concentrate on monitoring procedural correctness and on fulfilment of the reasoning requirement. This points towards the possibility that the action will acquire importance more as a latent warning in the background of the reasoned early warning system, than as a means of invalidating legal acts which have already been adopted. For the Parliaments of Member States, this means that they may not permit developments to drift, by relying on the possibility of bringing an action.

[124] BVerfG, decision of 24 October 2002, EuGRZ 2002, p. 631; see also *H. Jochum*, Richtungsweisende Entscheidung des BVerfG zur legislativen Kompetenzordnung des Grundgesetzes, NJW 2003, p. 28; *K. Faßbender*, Eine Absichtserklärung aus Karlsruhe zur legislativen Kompetenzverteilung im Bundesstaat, JZ 2003, p. 332; *Chr. Calliess* (note 32), p. 181.

VII. The competence, legitimacy and theoretical capacity of the EU as a state

Theoretical state capacity is always reflected within the order of competence of a sovereign association. Although the fundamentally all-embracing competence ("competence-competence") of a state, its responsibility for the welfare of the people who are subject to its sovereign power (common interest) and its right to make a final decision in the event of a conflict is expressed in its order of competence, its functional character as a simple instrument of Member State cooperation is expressed in the order of competence of traditional international organisations.[125] According to Art. III-115 TEC, the principle of restricted individual authority (based on the wording used) is still valid.

Against this background, will the *Treaty establishing a Constitution for Europe* redirect or realign the EU?[126] The *TEC* does in fact seek to change the EU into a *body of sovereign authority with a formal constitution.* The answer to this question must at all events be negative. This is further demonstration that the *TEC* brings more semantic changes than objective ones. It carries forward the ambivalent position of the EU between a coordinating international organisation and a responsible state, and emphasises more clearly than before the statelike capacity of the EU. On one hand, Art. I-1.1 TEC describes the nature of the Union as a Union of the citizens of Europe. The Constitution Treaty thus seeks to shift the legitimacy of the EU and to set it more clearly than before on *two* pillars. It remains to be seen whether this view will be accepted by Europeans. The former pillar structure with its deep division within the legal content of the competence of the EU[127] is abolished, so that the question of whether the binding effect of the competence under Title V and VI TEU differ from that of the competence under the EC-Treaty[128] becomes irrelevant.[129] On the other hand, the Constitution Treaty makes it clear that the Union derives its competence exclusively from the treaty legislating act of the Member States. In contrast to a state association, the competence of the EU is still not legally based in the association itself,[130] but is established on a derived

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[125] See *M. Nettesheim*, Das kommunitäre Völkerrecht, JZ 2002, p. 569.

[126] On the pressure for changing constitutional theory: *G. Biaggini*, Die Idee der Verfassung - Neuausrichtung im Zeitalter der Globalisierung, ZSR 119 (2000), p. 445; taking up this idea *I. Pernice/F.C. Mayer*, De la constitution composée de l'Europe, RTDeur. 36 (2000), p. 623.

[127] *D.Curtin*, The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 CMLRev.1993, p. 17.

[128] Denied by *M. Pechstein/Ch. Koenig*, Die Europäische Union, 3rd edn., 2000, para 193; a different view is expressed by *Ph. Manin* (note 80), para 128.

[129] On these problems see also *M. Pechstein*, Die Justiziabilität des Unionsrechts, EuR 1999, p. 1.

[130] Views differ as to whether these competences derive from the Constitution of the Association or directly from the quality of statehood.

basis. Without any real transfer having taken place,[131] it remains established through an act of the cooperatively linked Member States.[132]

The ambivalence of the *Treaty establishing a Constitution for Europe* is finally also obvious in the commercial and social sphere. Firstly, the scheduled final provisions of the Constitution Treaty are intended to allow the EU to appear alongside Member States in this sphere with virtually equal authority. As described above, the competence of the EU in the social sphere is being further extended. Secondly, the Treaty does not make provision for the imposition on the EU of any genuine responsibility for the social welfare of the people under its sovereign power, which is currently one of the fundamental features of sovereignty. Union citizens are not afforded the right to claim performance and protection aimed at discharging such responsibility. Simply through lack of adequate financial strength, the EU would moreover be completely overburdened if it were to take over the role of the Member States. This means that authority to act and responsibility are separated in an alarming way. This separation could become politically evident if the EU were to eliminate the now emerging competition between the social systems by aligning social benefits, through its harmonising and coordinating measures, thereby selecting a level which overburdens the economically weaker States. The EU would not be committed to take responsibility for the consequences of this policy. Just as there is no doubt that the EU is a "public interest association" (nowadays public governance can only be viewed in terms of obligation towards the public interest),[133] there is also no question that the EU is remarkably lacking in responsibility, which is all the more striking in view of the abundance of its competences.

Against this background, it must compellingly be concluded that the fundamental relationship between EU law and national law does not alter against the background of the new Art. I-6 TEC. For the first time in the history of European integration, this provision anchors the primary claim of EU law in a positive manner within a Treaty. The provision reflects the view of the ECJ, according to which the primacy claim is unconditional, i.e. also in the event of a conflict with national constitutional law. In the light of the responsibility for the public interest, which the Member States still carry, the limit of the primacy claim must however come, as far as Member States are concerned, at the point where the guarantee and securing of this responsibility is involved. It therefore remains consistent in terms of constitutional theory, for each Member State whose constitutional rules contain clauses which secure its structure, to afford these priority over EU law. Art. 5 (1) TEC (transferred from Art. I-6.3 TEU) is unable to infringe this claim, because the EU (still) lacks the requisite quality for this in constitutional theory terms.

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[131] See *Th. Flint*, Die Übertragung von Hoheitsrechten, 1998, p. 85 et seqq.

[132] BVerfGE 37, 271, p. 280; *E. Grabitz*, Gemeinschaftsrecht bricht nationales Recht, 1966, p. 41 et seqq.; *G. C. Rodríguez Iglesias*, Zur "Verfassung" der Europäischen Gemeinschaft, EuGRZ 1996, pp. 125, 127.

[133] See e.g. *Chr. Calliess*, Gemeinwohl in der EU – über den Staaten- und Verfassungsverbund zum Gemeinwohlverbund, in: *M. Anderheiden/W. Brugger/S. Kirste* (eds.), Gemeinwohl in Deutschland, Europa und der Welt, 2002, p. 173.

The distribution of competences between the European Union and the Member States in the light of the new Constitutional Treaty: the Spanish experience

Luis Jimena Quesada

I. Introduction: the distribution of competences as a constitutional challenge

The distribution of competences between the European Union (hereafter EU) and the Member States forms one of the basic constitutional challenges of European integration.[1] This is the approach of *Declaration no 23 on the future of the Union, annexed to the Treaty of Nice of February 2001*, which, in point 5, raises one of the main challenges "how to establish and monitor a more precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity", together with the three other important objectives: the role of the national Parliaments in the construction of Europe, the simplification of the Community treaties, and the statute of the *Charter of Fundamental Rights of the European Union.* All these objectives are taken up again in the *Declaration of Laeken of December 2001* with a "constituent" approach[2], as a consequence of the "constitutional deficit"[3] still existing in the EU.

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1 With such an approach, maintains *Stelio Mangiameli*: "Integrazione europea e diritto costituzionale", in Annuario di diritto tedesco (a cura di *S. Patti*), ed. *Giuffrè*, 2001, p. 25: "The existence of a European Constitution is denied, but the shadow of the old *jus publicum europeum* has already taken its first steps. And, although the refusal to grant Europe a constitutional type order remains strong, even after the treaty establishing the EU, European issues increasingly lend themselves to being reconstructed in terms of "constitutional law". This is even more true when relations between the European Union and European Community on the one hand, and the Member States on the other, can only be meaningfully assessed if they are submitted for discussion together with categories of international law, including those which are really closer to State law."

2 *Alessandro Pace*: "La Dichiarazione di Laeken e il processo costituente europeo", Rivista trimestrale di diritto pubblico, no 3, 2002, p. 630.

3 See Pablo Pérez Tremps: "La Carta Europea de Derechos Fundamentales: ¿Un primer paso hacia una futura Constitución europea?", in the monograph Carta Europea de Derechos, no 17 de Azpilcueta-Cuadernos de Derecho, 2001, pp. 30-33, together with *Francisco Rubio Llorente*: "El constitucionalismo de los Estados integrados de Europa", Revista Española de Derecho Constitucional, no 48, 1996, p. 20.

In any case, the issue of the distribution of powers is a transversal one, that is, it connects with other issues concerning the future of the EU, in as far as it always forms the focus of the discussion on the European integration of member countries (especially after the expansion by ten countries on 1st May 2004) and with the candidate countries awaiting entry (Bulgaria and Rumania planned for 2007). In fact, it is illustrative that, for example, the precedent of the Spanish Constitution of 1978 which served as a basis paving the way for European integration, underlines that "organic law can authorize the signing of Treaties that *attribute to an international organization or institution the exercise of* ***competences*** *deriving from the Constitution*" (Article 93). Clearly, the premise of the division of powers between the EU and the Member States is to transfer national powers to the former.

In this sense, three movements can be referred to: firstly, *horizontal "communitarization" (or "federalization") on a European scale,* involving competences connected with the traditional method of inter-governmental cooperation (as is the case with common foreign and security policy, or police cooperation and criminal justice) gradually becoming competences associated with the method of integration. On the other hand, *vertical "communitarization"*, under which State competences become competences whose exercise is transferred to the Union. Also, thirdly, we should speak of *the "Europeanization" of the internal division of powers, in the case of Member States with politically decentralized structures,* (that is, the projection of EU membership into the internal distribution of powers between the State and territorial bodies).[4] Working with these parameters, in this essay I am going to look at these movements, approaching them from the point of view of the Spanish experience.

II. Types of power in the European Union and types of power in Spain: federalizing parallels

1. Categories of power

The *Treaty establishing a Constitution for Europe* (in its version of 13 October 2004) designs a clearer distribution of competences between the EU and the Member States, not based on the traditional functionalist method (according to Community objectives), but rather on a typically federal system (with competences shared between the EU and the Member States and with competences belonging exclusively to each of them). So, Article I-12 TEC lists the Union's categories of competences and, immediately afterwards, establishes the list of competences typical of federal states, with "areas of exclusive competence" of the Union (Article I-13 TEC) and with the "areas of shared competence" between the Union and the Member States (Article I-14 TEC). In a similar way, in Spain, the Constitution of 1978 establishes, in Article 148, the exclusive competences of the autonomous communities (ACs), while in Article

[4] *Vlad Constantinesco*: "Comunidades Europeas, Estados, regiones: el impacto de las estructuras descentralizadas o federales del Estado en la construcción europea", Revista de Instituciones Europeas, no 1, vol. 16, 1989.

149 it fixes the exclusive competences of the State and the competences it shares with the regional bodies.

The objective of the Constitutional Treaty is a laudable one in terms of legal security, as within the system of distribution of competences still in force (including the provisions of the Treaty of Nice of 2001) as profiled by the founding treaties, there have been many conflicts over competences between the EU and the Member States which have had to be resolved before the Court of Justice in Luxembourg. Consequently, it is reasonable that the distribution of competences should be carried out as clearly as possible at a normative level (in the European Constitutional Treaty) in order to not put the self-restraint of the judges in Luxembourg to the test too often and so that they should not have to operate a "case law definition" of the respective competences (State and European). The same kind of self-restraint must guide the approval of European laws and European framework laws (which replace regulations and directives respectively), in a proper understanding of the principles of subsidiarity and proportionality. Without this, they will continue to hand down very important European judgments, over which the communications media in society would underline how the Court of Justice has had to decide that powers over aviation matters, for instance, are "exclusive" to the European Union. By way of example, eight judgments of the Luxembourg Court dated 5 November 2002, pronounced on cases presented by the Commission against eight Member States should be mentioned:[5]

In the case of the Spanish State made up of autonomous communities, the Constitution of 1978 designed an open territorial model, not only because it does not number or name the autonomous communities but also because of the ambiguous drafting of the constitutional clauses covering the issue. As with the case of the EU, this ambiguity has meant that the Constitutional Court has forged a "case law definition" of the distribution of powers between the State and the autonomous communities. Right now, in the current legislature (2004-2007), the political party in power and its partners in government are trying to bring forward a constitutional reform that redefines the Spanish territorial model, not only including the official names of the autonomous communities, as is the general rule in politically decentralized states (such as the case of Austria[6] or Italy[7]), but also reflecting the development of constitutional case law. Alongside this, the reflection of this development must involve a reform of the Statutes of Autonomy, so that the "bloc de constitutionalité" is brought up to date.

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5 Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany* ECR [2002] I-9427. The eight countries prosecuted had signed bilateral agreements with the United States of America under which the American authorities were authorized to revoke, suspend or limit traffic rights of airlines designated by these Member States and which did not belong to these countries.

6 See *Jaume Vernet i Llobet*: El sistema federal austriaco, Marcial Pons-Escola d'Administració Pública de Catalunya, 1997.

7 See *Massimo Siclari*: Costituzione e riforme. Interventi critici, ed. Aracne, october 2000, especially chapter 3 ("Riflessioni sul procedimento da adottare per la modifica della denominazione delle Regioni").

2. The basic principles governing the distribution of powers

The text of the Constitutional Treaty of 13 October 2004 includes the basic principles governing the exercise of competences by the Union in relation to national competences. Specifically, within the framework of Section III ("Union Competences") of Part I, Article I-11 is entitled "Fundamental Principles" including the basic "triad of principles covering competences"[8], in these terms: "1. The limits of Union competences are governed by the *principle of conferral*. The use of Union competences is governed by the *principles of subsidiarity and proportionality*." In any case, the *principle of conferral* is modulated by the so-called *flexibility clause* (Article I-18.1 TEC)[9], which recalls the clause covering implicit competences in Article 308 of the EC-Treaty. As a complement to the above, the now classical *principle of primacy of Union law over the law of the Member States* (Article I-6) must not be forgotten[10], together with the *principle of sincere cooperation* (Article I-5.2).[11]

If we now introduce the internal perspective, the European Union's competences are those which the Member States "give up". In order to do this they, as a corollary, make a specific attribution of competences "derived from the Constitution" (Article 93 of the Spanish Constitution), using a specific instrument for this purpose (Organic Acts in the case of Spain).[12] Continuing the parallels between the European Union and Spain, it should be pointed out that, while relations between Union law and the law of Member States are governed by the principle of subsidiarity, in relations between State ordinances and autonomous community ordinances, subsidiarity is not applied (by contrast to federal systems *stricto sensu* like the German or United States ones) but rather *State precedence* (Article 149.3 of the Spanish Constitution). More precisely, Article I-11.2.2 TEC confirms this federal principle when it establishes

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8 As *Javier Barnés* puts it in: "La distribución de competencias entre la UE y los Estados", Cuadernos de Derecho Público, no 13, 2001, p. 47.

9 According to Article I-18.1 TEC: "If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

10 According to Article I-6 TEC: "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."

11 Article I-5.2 of the Constitutional Treaty says: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

12 Thus, Article 93 of the Spanish Constitution has been used as a basis for enabling adhesion to the Community and later reforms: Organic Act 10/1985 for adhesion to the European Communities, together with the Organic Acts 4/1986, 10/1992, 9/1998 and 3/2001 in order to ratify the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice respectively.

that: "Competences not conferred upon the Union in the Constitution remain with the Member States." On the contrary, the aforementioned Article 149.3 of the Spanish Constitution provides that "matters not expressly attributed to the State by the Constitution may correspond to the autonomous communities, by virtue of their respective statutes. *Competence over matters not included in the Statutes of Autonomy will correspond to the State, whose regulations will prevail, in the case of conflict, over those of the autonomous communities concerning everything not attributed to their exclusive competence.*"

In the same way as the Member States are subject to the principle of sincere cooperation with respect to the European Union, within them, the *principle of loyalty or constitutional fidelity of the territorial bodies* is also enshrined. However, despite this parallelism, there is an important qualitative difference between the Constitutional Treaty on one hand and the constitutions of the federal states and the Spanish State of autonomous communities on the other; that is, the opportunity the States, in contrast to the EU, have of enforcing respect for this constitutional loyalty. In effect, while the maximum sanction provided under the Constitutional Treaty against Member States is the procedure to suspend certain rights deriving from belonging to the Union (Article I-59 TEC), in the case of clear risk of serious violation of common European values, (that is, mere suspension, but not expulsion), Article 155 of the Spanish Constitution contemplates coercion to force the autonomous communities to comply. With this same spirit of loyal cooperation, Spain's constitutional prohibition on the establishment of a federation between autonomous communities (Article 145 of the Spanish Constitution) must be mentioned.

These territorial and frontier issues are of great interest for an increasingly integrated European Union.[13] Thus, Article I-8 TEC (*The symbols of the Union*) establishes that "The motto of the Union shall be: *United in diversity*". In this context, a great challenge for the new Spanish legislature inaugurated after the elections of 14 March 2004 with the victory of *Rodríguez Zapatero* consists of confronting what is known as the "Ibarretxe Plan", that is, the "*Draft Political Statute for the Community of Euskadi*" (which affects the Basque territories of Spain and France. This proposal will have to be formally discussed as a plan for reforming the Basque Country Statute of Autonomy (as established by the Spanish Constitutional Court in a plenary decision of 20 April 2004). In any case, it should be noted that this project includes clauses going against this constitutional principle of loyal cooperation, in as far as it excludes *expressis verbis* in its Articles 6.2 and 14 the application of Articles 145 and 155 respectively of the Spanish Constitution.

[13] Along the same lines, at a meeting held in Estoril (Portugal) in October 2002 by the European Popular Party approved a group proposal to fight for the inclusion in the Draft European Constitution which the Convention presided over by *Giscard d'Estaing* had to draw up, of the principle of the non-alteration of the Members States' internal frontiers.

III. The specific mechanisms of synergy between the European Union and Spain concerning competences

1. Law-making mechanisms

The starting point for approaching the distribution of competences between the State and the autonomous communities and, consequently, determining how to plan this distribution at a European Union level, is supplied: in the first place, by the *principle of competence*, which governs relations between the state organization and the autonomous community organizations, in accordance with the aforementioned Articles 148 and 149 of the Spanish Constitution. And, secondly, by Article 147.2 of the Spanish Constitution, whose section d) says that the Statutes of Autonomy must fix "the competences assumed within the framework established in the Constitution". If both aspects are clear in theory, in practice tensions arise between the State and the autonomous communities; conflicts over competences that need to be resolved before the Spanish Constitutional Tribunal (Tribunal Constitucional) and, in some cases, before the European Court of Justice. Clearly there is also the added danger of additional tensions between these two courts.

Significantly, this dialectic tension between the competences of the State and the autonomous communities is usually more frequent when the internal implementation of EU law is involved. In these circumstances, Spanish constitutional case law has pronounced in favour of State competences to the detriment of regional ones, playing this game by deploying various principles: on one hand, the principle of coordination; and, on the other, the combined role of the principles of additionality and the primacy of State law over regional ordinances. Let us look at both circumstances:

Firstly, the principle of state coordination in implementing EU law operates in practice as a coercive measure, interfering with the competences of autonomous communities. In effect, it is significant that the exclusive competence of the State over matters including the "basis and coordination of general planning of economic activity" (Article 149.1.13ª of the Spanish constitution) has become a blank cheque for the State to implement EU Law (by way of competence with preferential vis atractiva) to the detriment of the competences of the autonomous communities set up as exclusively theirs by the Spanish constitution (Article 148), such as that over agriculture and livestock rearing. On this matter, this attractive force of the aforementioned State competence is very often used, given that European agricultural policy is the most important competence Europe has in quantitative terms and, consequently, the one which requires the greatest degree of implementation in the internal sphere.

Secondly: the significance of the clauses of primacy and additionality of State law with respect to autonomous community law has been understood in practice by the Constitutional Court as a pretext for better compliance with EU Law. The principles of primacy and additionality, both contained in Article 149.3 of the Spanish Constitution, are established as a safeguard for the proper functioning of the State of the Autonomies: while the former operates as a mechanism negatively delimiting competences (that is, in the case of conflict between State and autonomous communities),

the latter acts as an instrument positively delimiting competences (that is, in the absence of friction).

As has been said, the principle of the primacy of State law over autonomous government ordinances was a political choice by the Spanish constituent assembly of 1978 when, on this point, it distanced itself from a clearly federal option. The essential condition for State primacy is rooted in the fact that there is no assumption of competences in the Statutes of Autonomy, so the scope of this principle should have become progressively obsolete with the consolidation of the State of the Autonomies: in other words, the primacy clause was conceived to a certain degree as a regulation with transitory significance until the respective Statutes of Autonomy had been promulgated and the corresponding competences assumed. Despite this, *the recent implementation of new European mandates (think, for example, of food safety) has fostered the continuing validity of this clause.*

For its part, the *principle of additionality of State law* appears formulated in the final subsection of Article 149.3 of the Spanish Constitution in these brief terms: "State law will be, in all cases, additional to the Law of the autonomous communities." The fact is that *the Constitutional Tribunal has understood that the additionality clause allows the State to provide regulations incorporating EU law when the autonomous communities do not do so* (STC 147/1991). So, Spanish constitutional judges have made a controversially extensive interpretation of the clause of the additionality of State law (criticised as "constitutional falsification")[14], which gives the State powers to provide compliance with EU law (under the pretext of fulfilling its international responsibility) when the autonomous communities do not do so, even though they have competence over the matter which is the subject of the incorporation or implementation (STC 79/1992).[15]

2. Institutional mechanisms

The study of the mechanisms that ensure, on one hand, the internal implementation of Union law (*descending phase*) and, on the other, the European projection of the State and the autonomous communities (*ascending phase*) is especially interesting in the case of Spain, in that *Europe of the Regions* presents diverse, asymmetrical scenarios.[16]

Within this framework, European case law is indifferent to the internal regional model: the important thing is that European obligations are met. By way of example, the *judgment of the Court of First Instance of 6 March 2002* indicates that "the fact that the Historical Territory of Álava has fiscal autonomy, recognized and protected

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[14] *Javier Tajadura Tejada*: La cláusula de supletoriedad del Derecho estatal respeto del autonómico, Biblioteca Nueva, 2000, p. 173.

[15] This can be gleaned from constitutional case law, among others SSTC 147/1991 and 79/1992.

[16] See *Iñigo Bullain López*: Las regiones autónomas de la Comunidad Europea y su participación en el proceso de integración, Oñate, IVAP, 1990; and *Jasone Astola Madariaga*: Poder Regional de la UE, Vitoria-Gasteiz, IVAP, 1994.

by the Spanish Constitution, does not, however, exempt that region from respecting the provisions of the Treaty (EC-Treaty) concerning State aid", given that "the measures adopted by the infra-state bodies (decentralized, federated, regional or others) of the Member States, whatever their legal nature or name, are included, in the same way as the measures adopted by the federal or central power, in the sphere of application of Article 87.1 of the Treaty."

Along similar lines, in the "descending phase" of application of EU law, Spanish constitutional case law has confirmed (STC 102/1995) that "the cardinal principle" in the matter "consists of the fact that Spain's membership of the European Communities does not alter, in principle, the distribution of competences between Spain and the ACs". So, the translation of derived Community regulations into internal law must necessarily follow the constitutional and statutory criteria for the distribution of competences (SSTC 252/1988, 64/1991, 236/1991 and 79/1992). Consequently, the implementation of Community law corresponds to whoever naturally holds the competence according to the rules of internal law, because there is not a specific competence for the implementation of Community law (STC 141/1993).

Under these premises, the so-called *descending phase* does not currently present too many problems, since the time when the European Court of Justice also declared that the important thing from the perspective of EU law was that it should be complied with in the Members States in accordance with their respective constitutional arrangements, regardless of the type of legal instrument or body (State or regional) ensuring such implementation. This is what is known as the *principle of institutional and functional autonomy*, in connection with that of *loyal cooperation* (*case of Francovich and others, 19 November 1991*, in the European Court of Justice).

What is happening with the *ascending phase* of EU Law?[17] At first sight, a reading of Article 149.1.3 of the Spanish Constitution, attributing to the State exclusive competence in matters of "international relations" appears to preclude the autonomous communities having any room for action in drawing up international treaties. However, the interpretation made by the Spanish Constitutional Court (among others, SSTC 153/1989 and 80/1993) has adjusted the scope of this provision: it does not cover the entire foreign activity of the State but only the "essential content" or "fundamental core" of these matters, which essentially forms three aspects: *treaty-making power*, foreign representation and international responsibility. Consequently, not all foreign activities by the autonomous communities through the regional administrations interfere with the State's exclusive competence established in Article 149.1.3 of the Spanish Constitution. Instead, it depends on the functions carried out by these autonomous community bodies. Along these lines, constitutional case law (in particular STC 165/1994) has given the green light to what are known as the autonomous communities' *liaison offices* with European institutions (for collecting information,

[17] A full compendium of the mechanisms concerning the ascending phase can be found in the work of *Pablo Pérez Tremps*: "La participación de las CCAA en los asuntos comunitarios europeos", in the collection Administraciones Públicas y Constitución. Reflexiones sobre el XX Aniversario de la Constitución Española de 1978 (coord. by *E. Álvarez Conde*), INAP, 1998.

aspects of protocol, promoting autonomous community companies and products and even lobbying).

In this picture, among the specific *internal* mechanisms (besides the EU's Committee of the Regions) for participation by the autonomous communities in the construction of Europe, the following might be mentioned:

1) The State parliamentary level expressed through the *General Committee of the autonomous communities, established in the Senate Regulations*, which must be informed by another Parliamentary Committee (the *Mixed Congress-Senate Committee for the European Communities,* regulated by *Act 8/1994, 19 May*) "on the processes to adapt regulations or actions of EU bodies of importance to the regions or autonomous communities".

2) The system of *multilateral cooperation* channelled through the *Sectorial Conferences* which, set up in 1988 by the Minister for Public Administration, was formalized as the *Conference for European Community Issues* by way of an Accord of 1992 and an Act of 1997 (*Act 2/1997, 13 March*). This Community projection mechanism has been backed by other actions such as the *Accord of 19 November 1990 on the intervention of the autonomous communities in precontentious and contentious proceedings before the European Court of Justice* or the creation of the figure of *Councillor for autonomous community Affairs as part of Spain's permanent representation before the EU* (*Royal Decree 2105/1996, 20 September*).

3) The model based on *bilateral bodies* (between the State and each autonomous community in particular) similar to the multilateral conference, which goes back to the creation in 1995 of the State-Basque Country autonomous community Bilateral Commission for Administrative Cooperation on European Community Issues.

And 4) the *direct action* mechanism before European institutions through the aforementioned autonomous community *liaison offices* in Brussels. However, remember that this instrument is for information purposes, not for negotiation or decision-making. Equally, it should not be forgotten that the Conference for European Community Issues (Act 2/1997) is characterized as a merely consultative body, or that the Councillor for autonomous community Affairs in Spain's permanent representation before the EU (created to work with the autonomous community offices in Brussels) is a State figure (not answerable to the autonomous community governments and, therefore, not comparable to the German Länder's Observer). For these reasons, negotiations go on in Spain directed towards integrating the presence of a representative of the autonomous communities in the central Government delegation for meetings of the EU Council dealing with matters that are the exclusive competence of the autonomous communities. These negotiations will be strengthened with the victory of *Rodríguez Zapatero* in the elections of 14 March 2004, as one of the important commitments of his government programme is constitutional reform of the territorial model in order to, among other things, adapt it to Spain's membership of the European Union.

In connection with these mechanisms, and especially with the second one (multilateral conferences), the recent institutionalization in Spain of the "Conference of autonomous community Prime Ministers", set up by Prime Minister *Rodríguez Zapatero* in November 2004, must be mentioned. This new mechanism provides for a joint meeting of all the Prime Ministers of the autonomous communities and the national

Prime Minister to deal with "matters of common interest" affecting all Spanish citizens.

3. The most controversial European projection issues in Spain

a) Agricultural policy

It has come to be said at times that the European Communities are establishing a kind of giant European Ministry of Agriculture, a claim which is entirely founded if it is borne in mind that almost half the European Union's budget is directed towards agricultural policy and that case law from the Court of Justice has expanded still further the room for manoeuvre and powers for intervention of European institutions on this issue.[18] The scope of this policy has, on certain issues concerning food crises, created great social alarm among European consumers (think of the so-called "mad cow crisis" or foot and mouth disease). The enormous scope of European agricultural policy has, as a logical corollary, meant the decreasing importance of national agricultural policy and the consequent obsolescence of the mandate of Article 130 (modernization and development of all economic sectors "and, in particular, agriculture, stock-rearing, fishing and crafts, in order to provide all Spaniards with an equal standard of living") or the "exclusive" regional competence of Articles 148.1.7 (autonomous community competence over "agriculture and stock-rearing, in accordance with the general organization of the economy") of the Spanish Constitution. Nowadays, in this context, the core of the job of the Spanish Minister of Agriculture, or those of his autonomous community opposite numbers, consists of complying with European Community mandates.

In this scenario, as has been noted, Article 148.1.7 of the Spanish Constitution attributes to the autonomous communities exclusive competence over matters of "agriculture and stock-rearing". With this normative base, it is understood that the autonomous communities, in exercising their constitutionally-provided competences, dictate their own regulations involving the application or implementation of obligations originating in EU law. However, in practice, this regional exclusivity is paradoxically altered by the game of European integration, giving primacy to the State's general powers of coordination over the activities of the autonomous communities on economic matters (Article 149.1.13 of the Spanish Constitution)[19]: this State power

[18] In particular, in the case of SMW Winzersekt GMBH against Land Rheinland-Pfalz, of 13 December 1994, C-306/93 ECR [1993] I-5555, the Luxembourg court indicated "that, on matters of the Common Agricultural Policy, the community's legislator has broad powers of discretion".

[19] The Spanish Constitutional Court has explicitly declared that "*on matters of agriculture and stock-rearing, which are the specific competence of the ACs, the State may intervene by virtue of its general competences over the general organization of the economy*" (STC 79/1992, 28 May, FJ 2).

ends up being used as a general criterion for applying European Community mandates, with the backing of constitutional case law.[20]

In this position, the agricultural sector illustrates better than any other the imposition on the Member States that they must establish controls on the management by the regional bodies of the aid and benefits coming from European funds. Along these lines, the *decision of the European Court of Justice of 21 March 2002* (C-36/00 *Spain v Commission* ECR [2002] I-3243,) has shown the deficient control operated both by the regional and State authorities: the offences attributed to Spain derived from irregularities that had happened in various Spanish autonomous communities, especially in the case of aid in the linen and hemp textile sector. Lamentably, these circumstances show that the internal management of European funds is a potential source of corruption.

b) Economic freedoms and monetary policy

In the economic sphere, and from the point of view of European integration, internal tensions over competences between the State and autonomous communities have particularly emerged in three specific areas: firstly, freedom of commercial opening hours; secondly, the Spanish system of financing the autonomous communities, and, thirdly, administrative contracting concerning town and country planning. Let us look at the three areas we have indicated.

Concerning the ***freedom of commercial opening hours***, Spanish constitutional case law has given primacy to the State competence over the general organization of the economy to impose restrictions in this area (Article 149.1.13 of the Spanish Constitution) as opposed to autonomous community competence over internal trade to regulate this freedom of opening hours (Article 148.1.13 of the Spanish Constitution). So, the problem stems from a series of Constitutional Court judgments of 1993 (numbers 225, 227, 228, 264 and 284) in which various provisions of autonomous communities' laws regulating commercial opening hours were declared unconstitutional: the Constitutional Court, although recognizing that the freedom of shop opening hours was linked to autonomous community competences over matters of internal trade, declared that such regional asymmetry could threaten the principles of "unity of the national economic order and the single national market" (Article 149.1.13), ultimately backing basic State regulations intended to prevent divergence in the system of opening hours.

In my opinion, the majority criterion of the Spanish Constitutional Court is questionable in view of the freedom of enterprise proclaimed both at a national level (in Article 38 of the Spanish Constitution) and at European level (Article 16 of the European Union Charter of Fundamental Rights), with the declaration of a *"single" national market* as opposed to the *internal European market*, also a *"single"* one, resulting somewhat paradoxical. As an example of the controversy, STC 225/1993 resolved, by seven votes in favour to five votes against, that the regional law being challenged was unconstitutional, although one of the five dissenting votes criticized

[20] *Jasone Astola Madariaga*: "Un Estado autonómico en la Unión Europea", Cuadernos de Alzate, no 25, 2001, p. 129.

the majority criteria based on the "basic unity" of the national economic order, saying it "meant ignoring the fact that this undisputed basic unity is not incompatible with the existence of different commercial structures and opening hours, as demonstrated by the existence of a plurality of regulations covering opening hours within various European states, including our own in periods of strong political centralization. The European Court of Justice, which is entrusted with the task of protecting the unity of the European market, has repeated on many occasions that the diversity of commercial opening hours in no way infringes or threatens this unity". As can be seen, the dissenting judges are even claiming a serious divergence between Spanish constitutional case law and European case law.

As for the existing ***system of financing the autonomous communities*** in Spain, this must stem from the recognition of the financial autonomy (demonstration of political autonomy) of the autonomous communities (Article 156 of the Spanish Constitution), which requires the full availability of the financial means for them to exercise their own competences. Along these lines, the Organic autonomous communities Finance Act 8/1980 governs the "common" autonomous community finance system, with the single exception "wanted" by the constituent assembly of 1978 of the singular systems for the Basque Country and Navarre (backed by the First Additional Provision of the Constitution, which protects the historic rights of territories with their own privileges).

It is precisely this regional exception which has led to internal conflicts over competences argued before European courts: through the judgment of the Court of First Instance of 6 March 2002 (case of the Álava Provincial Government and others versus the Commission), considered that the Basque Country's tax framework (the Financial Agreement), despite being included in Spanish legislation (including the Constitution), could not serve as a scenario for falsifying competences through certain tax benefits, such as those applying in the Historical Territory of Álava at the time of the facts, which were classified as State aid not permitted by EU law, favouring a company that was already European leader in the sector. This same philosophy characterizes STC 96/2002, 25 April, in which the Spanish Constitutional Court declared unconstitutional the eighth additional provision of the State Taxation, Administrative and Social Order Measures Act 42/1994, 30 December (Act accompanying the Budget for 1995), in that it established favourable tax measures for economic operators connected with the Basque Country and Navarre, which were discriminatory against economic agents not linked to the market of these two regions. But, once again, it is a right to call attention to the possibility of friction between Spanish constitutional case law and European case law, as STC 96/2002 pronounces on the execution of Union law in Spain, appropriating this task from the Court of Justice in Luxembourg.

Finally, on ***administrative contracting, especially over urban development***, internal conflicts have also emerged between the State and the autonomous communities. However, on this occasion, the Spanish Constitutional Court has backed a position more in favour of the autonomies, supporting exclusive regional competence over "planning, urban development and housing" (Article 148.1.8 of the Spanish Constitution). The most outstanding example of this regionalist position is established by STC 61/1997, which declared more than two hundred of three hundred and ten Articles of

the *Land Regime and Town Planning Act, 26 June 1992,* to be unconstitutional.[21] The truth is that, although the sphere of State competence is ostensibly restricted, the autonomous communities have approved regional laws regulating urban development activity that have favoured speculation and abuses perpetrated by huge construction companies, ultimately prejudicing the enforcement of European mandates, in particular, firstly, free competition in this sector of the economy, and, secondly, the transparency and equality that must govern administrative contracting in accordance with a large number of Community Directives.[22] For this reason it is not surprising that some ambassadors from European countries presented complaints to the Spanish government and the European authorities about some of these regional laws in 2002.

c) The various protection standards covering human rights[23]

As has already been said, the Charter of Fundamental Rights of the Union is included in Part II (the "dogmatic part") of the European Constitutional Treaty. The Preamble to the Charter appears *a priori* to maintain the principle of not affecting the distribution of competences between the EU and the Member States, declaring: "This Charter reaffirms, *with due regard for the powers and tasks of the Union and the principle of subsidiarity*, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights."

This declaration is faithfully reflected in Article 51 of the Charter itself (Article II-111 TEC), where it establishes the following *field of application*: "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution. 2. This Charter does not extend the field of

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[21] This position is criticized negatively by *Tomas Ramón Fernández Rodríguez*: De la arbitrariedad del Legislador, Civitas, 1998.

[22] See also the judgment of the European Court of Justice in Luxembourg handed down on 12 July 2001, case C-399/98 *Ordine degli Architetti delle Province di Milano et Lodi et al. v Comune di Milano* ECR [2001] I-5409 – preliminary reference presented by the Tribunale Amministrativo Regionale per la Lombardia.

[23] Cf. *Lorenzo Martín-Retortillo Baquer*: "Derechos y libertades fundamentales: estándar europeo, estándar nacional y competencias de las CCAA", Revista Vasca de Administración Pública, no 7, 1983. More specifically, with respect to the regulation of autonomous government standards on this issue, see *Enrique Lucas Murillo de la Cueva*: "Delimitación de la competencia autonómica para la regulación de los derechos fundamentales", Revista de Derecho Político, no 46, 1999; *Manuel Martínez Sospedra*: "Derechos y Estatuto de Autonomía. Notas para una hipótesis de trabajo", Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, no 34/35, 2001, p. 311.

application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."

However, the theoretical lack of effect on the distribution of competences between the EU and the Member States in this sphere is certainly difficult to achieve. Firstly, in the Constitutional Treaty, the accession of the Union to the European Convention on Human Rights (Articles I-9.2) remains a pending issue[24], so that the problematic distribution of competences between the ECJ in Luxembourg and the ECtHR in Strasbourg continues to have important repercussions in the internal sphere[25]. National judges will, on occasion, find themselves in a dilemma, having to opt for the Council of Europe's solution or for the EU solution.[26] Secondly, the idea of not affecting the distribution of competences between the EU and the Member States, or of not creating new competences in one area or the other, is going to be difficult to control in the light of the experience of the application of the Charter of Nice as a catalyst for the process of constitutionalizing Europe.[27]

In effect, the Charter is already being used as an interpretive parameter, not only in the European jurisdictional sphere[28], but also in the sphere of national justice.[29] And, most importantly, this use of the Charter by the national jurisdictional bodies is not being carried out according to the competences established by the Constitutional Treaty (that is, use by "the Member States only when they are implementing Union

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[24] According to Article I-9.2 TEC: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution."

[25] See *Volkmar Götz*: "Auf dem Weg zur Rechtseinheit in Europa", Juristen Zeitung, 6/1994.

[26] Remember the divergent doctrine concerning the inviolability of the home, extendable to individuals and organizations by the ECtHR in Strasbourg (cf. case of *Niemitz v Germany* (13710/88) [1992] ECHR 80, 16 December 1992), and only to individuals by the ECJ in Luxembourg (cf. case of *Hoechst v Commission* of 21 September 1989 - Joined Cases 46/87 and 227/88 [1989] ECR I-2859).

[27] *K. Lenaerts / E. Eddy De Smitjter*: "A Bill of Rights for the European Union", Common Market Law Review, no 38, 2001, pp. 299-300.

[28] Cf. the Conclusions of the Advocate General invoking Article 41 of the Charter in the case of *Z v European Parliament* (T-244/97 OJ C 331 of 1.11.1997), which gave rise to the judgment of the Community Court of Justice of 27 November 2001, or the judgment of the Court of First Instance of 30 January 2002, handed down in the Case T-54/99 ECJ *max.mobil Telekommunication Service GmbH v Commission of the European Communities* [2002] ECR II-313.

[29] In Spain the Constitutional Court used the Charter of Nice for the first time in its judgment no 292, 30 November 2000 (that is, just a few days before it was solemnly proclaimed in the European Council at Nice) or, more recently, judgment no 53, 27 February 2002. For its part, the first time the Supreme Court (Civil Division) resorted to it was in judgment no 93, 8 February 2001 (appeal no 2344/1999) and later in the contentious administrative division in judgments of 26 March 2002 (appeal 8220/1997), 27 March 2002 (appeal 8218/1997) and 2nd April 2002 (appeal 9932/1997).

law"), but by way of a "new competence" taken on by these jurisdictional bodies in going to the charter even when European law is not in question.[30]

IV. Final reflections

The question of the distribution of competences between the EU and the Member States is not only a continental challenge for the model put forward by the text of the "European Constitution" agreed at the European Council in Brussels on 18 June 2004 (following the way pointed by Declaration no 23 annexed to the Treaty of Nice and the Declaration of Laeken), but also a challenge to the territorial model designed by the national constitutions in as far as it connects with one of the key elements of the theory of the State: the territory or space where the European political power must carry out actions with respect to European citizens.[31] In addition, the competence/territory challenge shows a high level of transversality with respect to the other challenges involved in the constitutionalization of the EU, such as:

- In the first place, in connection with the statute of the Charter of Fundamental Rights of the Union (Part II TEC), the possibility should be raised of a "European referendum" on "constitutional" issues (such as reform of the Community treaties or the territorial expansion of the EU).[32] In this way, asymmetries in the condition of European citizens as a result of their being French, Italian, German, Danish nationals, etc. and depending on whether the respective Member State had the political will or legal obligation to call a national referendum, would be avoided.[33] As is known, the European Constitutional Treaty includes the popular legislative initiative (Article I-47.4), but does not recognize the European referendum.

In addition, providing Europe with internal cohesion requires the avoidance of disorderly internal proposals formulated in a confused way, such as that launched in 2002 by the Prime Minister of the Basque Country (the so-called "Ibarretxe Plan"), attempting (among other things) to call a regional referendum in order to set up a "associated Free State" with respect to Spain and France. Unfortunately, this formulation is closer to destabilizing proposals such as the spurious "Padano constituent

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30 *Luis-María Díez Picazo*: "Glosas a la nueva Carta de Derechos Fundamentales de la UE", Tribunales de Justicia, no 5, mayo 2001, p. 26: the author has warned that "it will be difficult, even in non-Community cases, for national judges not to follow the Charter when it is more generous".

31 With this approach, *Stelio Mangiameli*: "Integrazione europea e Diritto costituzionale" (note 1), p. 26. Also, *Luis Jimena Quesada*: "Los ciudadanos como actores en el proceso de construcción europea. Hacia una Teoría del Estado Europeo", Cuadernos Europeos de Deusto, no 24, 2001.

32 Cf. *Andreas Auer / Jean-François Flauss* (Coords.): Le référéndum européen, Bruylant, 1997.

33 See the criticism formulated by *Miguel Ángel Alegre Martínez*: "Cultura de derechos, deberes y participación", Revista de Derecho-Tribunal Supremo de Justicia, no 5, 2002, p. 9.

process" in Italy[34] than to valid references, such as the practice of the referendum in Quebec (Canada).[35]

- Secondly, the challenge of the greater role of the national Parliaments in the European construction and their interaction with the European Parliament should not be reduced merely considering State legislative assemblies. On the contrary, this unavoidable challenge involves considering seeking solutions that provide participation for the regional parliaments or, more broadly, for the assemblies of other infra-State bodies. Along these lines, do not forget that, for example, within the Euro-chamber, movements such as "intergroups" are created (sometimes real pressure groups or institutional groups) and, among them, it is worth mentioning the *Group of Local and Regional Representatives*, which, founded in 1980, attempts to establish more fluid exchanges and participation between infra-State organizations and the European Communities, taking advantage of the experience of some Euro MPs in the regional or local sphere in their respective countries. In addition, and considering that it is the highest level formal instrument of its kind in Community legal organization, the role of the EU's Committee of the Regions should be enlivened.

- Finally, the challenge of the simplification of European Union Law is also related to the condition of citizens, that is, to the dictates of legal security as a fundamental principle of a Community of Law. So, the very fact of drawing up a "European Constitution", with a single or consolidated text, as opposed to the dispersion caused by the Community treaties and their successive reforms, will favour the emergence in citizens of a "European constitutional sentiment".

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[34] On the "Padano" constituent process, compared with the failed "Roman" constituent process of the Bicamerale, see *Alessandro Pace*: "Los procesos constituyentes italianos (1996-1997)", Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, no 20/21, 1997.

[35] See a critical study in *Pablo Pérez Tremps*: El marco (a)constitucional del debate sobre la secesión de Québec, Fundació Carles Pi i Sunyer d'estudis autonòmics i locals, 2004.

Remarks on the system of the sources of law in the Treaty establishing a Constitution for Europe: complementary issues and framework of reference

Angelo Rinella

I. Introductory remarks and scope

The system of sources of European Law set out in the *Treaty establishing a Constitution for Europe* (TEC) answered a number of questions and problems already raised in the literature and case law. These questions and problems mainly related to the role of the European Parliament and its relations with the other institutions, particularly the Commission and the Council of Ministers, but also relations between the Union and the Member States.

To examine the new system of sources of law in the present phase, in which the system is not yet effective, we have to address the issues related to the underlying plan of the system. This paper will deal with two questions that are complementary to the issue of the sources which can shed light on the system elaborated by the Convention: firstly, the type of relations that exist between the Union and the Member States, and secondly, the institutional architecture that has been put in place. A discussion of these two issues, which will only be addressed in broad outline, will be followed by a number of remarks regarding the new system of the sources of law, with the caveat that any attempt to discuss sources that are not yet effective must necessarily be done in a non-systematic manner, focusing on the critical points.

II. A "federal" context for the system of sources?

The Convention on the future of Europe has introduced the expression "federation of Nation States" into the Community glossary. This is a formula whose real meaning should be more sharply defined or a generally agreed meaning should be found for it. For as often happens with expressions that have a complex meaning, the use made by different political leaders of this formula would seem to indicate that they have rather different ideas of what it means.

Even though this paper makes no pretence to exhaust the scientific and institutional issues which this formula raises, if we look at the context in which it was

first broached, based on some of the features of the European Union integration process, we can identify certain facets of its meaning. The implications this might have in terms of the issue of the sources of law are obvious.

How to define the European Union – whether it should be described as an international organisation, or a confederation, or a federation, or something else – has occupied the minds of hosts of scholars.

According to a first approach, which is quite common among scholars, the European Union model lies somewhere between a confederation and a federation. Stated more clearly, the difference between these two types of *pact* (*feodus*) between states lies in the fact that a confederation creates a less intense bond than a federation. The European Union is therefore closer to the one or the other model, depending upon the purposes pursued and the actions taken to pursue them.

A second school of thought sees the European Union as an institutional form in its own right, a *"tertium genus"*, which is quite different from any other known model and which therefore requires a new glossary, and original conceptual categories.

Those who have adopted this approach describe the experience of the European Community as a system of "multi-level governance" system, "governance without government", a "post-modern grouping", or a "non-sovereign, polycentric, neo-mediaeval post-national" organisation.

Those who support the idea of its *exceptional* character (in comparison with traditional models) say that it cannot easily be fitted into the mould of any of the typical concepts of the State. It possesses none of the features normally associated with the idea of the Nation-State as this has developed since the *Treaty of Westphalia*. For it has no clearly-defined authority, no central hierarchy, no distinct sphere of powers and authority, and no stable territory, no exclusive recognition by other political entities, no collective identity, no monopoly over legitimate force-use, no single capacity to impose its decisions, and no exclusive relationship with its citizens.

Yet the European Union is able to take decisions that are binding on its Member States and on individuals; it can settle internal disputes and conflicts, coordinate and regulate the conduct of private individuals, regulate the markets, call for elections, respond to pressure from vested interest groups, generate income, allocate expenditure, and so on. In other words, it can do many of the things that are normally prerogatives of a States.

We are obviously dealing with an experience that is not wholly federal, nor wholly confederal, yet nothing like the model of a nation State, although it does possess some of its features. That is to say, we are faced with a hybrid, a *hircocervus*, with some of the typical features of a State, together with others found in pre-federal and federal systems.

Bearing these remarks in mind, the "federation of Nation States" formula becomes a little less fuzzy, even though, as we shall be seeing, its features remain deliberately vague.

I will only examine three aspects.

The first one is the fact that "federalism" is not something static but is constantly changing or developing. The federal character of a system can be viewed as an evolutionary federalising process.

The second has to do with the "federal principle". This principle is expressed within federal experiences in practice in terms of a series of attributes of those experiences themselves: a particular sensitivity to the breakdown of distribution of authority between different tiers of government, the provision of guarantees to ensure that relations are properly maintained between different tiers of government, the design of complex constitutional mechanisms for democracy, a tendency to organise the diversity and specific features of the political and social components, while not eschewing unitary policies.

The federal State is just one of the possible ways of expressing the federal principle, but it is not the only one. According to a well-known theoretician of federalism, *Dan Elazar*, it is a principle that can also be expressed in systems that are not strictly federal.

This being so, Europe's experience as it emerges from the "federation of Nation States" formula has the merit of implementing the federal principle in the construction of Europe.

Thirdly, it cannot be denied that the woolly meaning of the "federation of Nation States" formula, in the sense of being a weaving of more or less close links, has played a decisive part in the European integration process.

No one has ever formally stated that the ultimate model of the integration process will be a European federal State, thereby leaving the reluctant Member States at their ease; but neither has anyone excluded the possibility that the links between the Member States might gradually become closer, thereby satisfying the pro-federalist and Euro-enthusiastic Member States.

People obviously preferred from time to time looking at more immediate and intermediate goals, which are easier to achieve, rather than looking ahead towards ultimate goals, in order to be able to pursue an integration policy without causing serious political traumas.

Reading between the lines of the future European Constitution, this attitude emerges quite clearly. One only has to think of the questions relating to European law-making (which will involve the European Parliament and the Council, as if they were a First and Second Chamber in a federal system) and the matter of citizenship. These are issues that point towards a close degree of integration. Then there is the right of every Member State to withdraw from the Union - a right that can be so broadly exercised that makes it more consistent with a confederal than a federal system.

III. Subsidiarity applied to rule-making

Under the future multi-tier organisation of the European Union, rule-making will be the responsibility of a number of institutional authorities, and more impor-

tantly, an integrated macro-system of European and national sources of law is bound to be created.

Within this framework, whose features are complex and not yet clearly defined, the principle of subsidiarity is bound to play a central role with regard to the orderly and coherent exercise of the powers vested in each of the parties that, in one way or another, are in a position to affect the system of sources.

This principle is "two-headed", with different coexisting interpretations: one is that decisions should lie with the institutions that are closest to those most affected by those decisions, giving a descending movement to institutional dynamics, while the other is the reverse - upward - process, with decisions taken at the highest level because of the magnitude of the issues involved.

The principle of subsidiarity immediately emerged as an extremely flexible instrument. For despite a natural tendency to use it to justify intervention by the higher tier authority to help meet the needs of the lower tier entity or authority, ever since its emergence on the institutional European Union stage, it has been construed as giving pride of place to action by lower tier entities, when possible, rather than the larger ones (so-called *reverse* or *bidirectional* subsidiarity).

For when the principle of subsidiarity first appeared among the pillars upholding the European Union (1992) (under Art. 3B of the *Maastricht* Treaty) it was supposed to act as a "closure rule" for the benefit of the Member States: in other words, a mechanism if not to contain, at least to moderate the expansion of the Community's implied competences. And the principle of subsidiarity has indeed played this moderating function. But precisely on account of its semantic flexibility, it has also remained open to the "upward" attribution of competences.

Even though this is the present situation, we have to look more closely at the TEC in order to gain a better understanding of the place and the role that this principle of subsidiarity is bound to have.

The key principles applying to the work of the European Union are stated to be the principles of conferral, subsidiarity and proportionality (Art. I-11); this is accompanied by the principle of loyal cooperation between the Union and the Member States (Art. I-5).

The mention of the principle of subsidiarity in the TEC is later clarified in greater detail through a complex controlling mechanism, set out in the Protocol for the Implementation of the Principles of Subsidiarity and Proportionality annexed to the constitutional text (n. 2). The parties responsible for this procedure are the national Parliaments: the Commission is required to send all legislative proposals to the national Parliaments of the Member States at the time it sends them to European Parliament; every legislative proposal must be accompanied by a detailed statement making it possible to appraise its compliance with the principles of subsidiarity and proportionality; each national Parliament then has six weeks to submit a reasoned opinion explaining why they consider that it is not compliant with the principle of subsidiarity; the European Parliament, the Council of Ministers and the Commission are required to take account of these reasoned opinions.

The first remark to be made in this regard is that whereas the principle of conferral relates to the parties vested with competences, all the other principles relate

to the exercise of those competences; subsidiarity therefore has to do with the rationale of deputising its proportionality, scope and effects.

The clash would worsen in the event that the Commission decides to keep the proposed legislation unchanged giving reasons for rejecting the position of the national Parliaments. In these cases, the sole remedy available would be to take action before the Court of Justice which is competent for ruling on actions on grounds of infringement of the principle of subsidiarity of a legislative act.

The system intended to be created here would therefore appear to be based on a model of a European Union that will not voraciously take over the competences of the Member States, but will rather project the work of the Community towards forms of collaboration between the national and the supranational tiers.

It is nevertheless a useful exercise to seek confirmation of this in the provisions of the TEC.

One likely area for finding useful indications is the matter of the so-called shared competence between the EU and the Member States (one of the three types of competence, together with "exclusive" competence and "areas of supporting, coordinating or complementary action").

Art. I-12(2) provides that "When the Constitution confers on the Union a competence shared with the Member States in a specific area... the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence".

The solution indicated here is based on a typical provision of the German federal system, the so-called *konkurrierende Gesetzgebung* (Art. 72(2) GG).

Looking to Germany's experience and the terms in which the German Constitutional Court has interpreted Art. 72(2) of the Basic Law, one has the impression that the principle of subsidiarity referred to in the TEC is destined to shift the dynamics of the institution upwards. In other words, the German experience shows that there is a tendency for the role of the central government authorities to be consolidated and strengthened to the detriment of the local authorities (*Länder*).

However, the formula used in the law can also be interpreted to mean that the Community institutions are responsible for decisions relating to the exercise of what is called concurrent legislative competence. This would seem to reverse the direction taken by the principle of subsidiarity, which would end up as a kind of safeguard clause to protect the sphere of competence of the Union.

The TEC also offers other indications that would seem to confirm this reversal of direction.

In short:

1. the areas of this "shared" competence are not laid down as such, but have to be inferred negatively, from what remains of the other two types of competence (see Art. I-14(1) of the Draft);
2. whereas in the exercise of this ("shared") competence the "subsidiary" intervention of the nation State requires no conditions other than the fact that the Union is not taking action, in areas falling within the "exclusive" competence of the EU national law may not intervene autonomously but only "if so empowered by the Union"; it is therefore what we might call conditional subsidi-

arity, because it is not triggered automatically, but depends on clearance at the highest level (see Art. I-12(1) TEC);
3. the principle of typical federal systems is affirmed, namely, that the rule of the Union prevails over the national laws (*Bundesrecht bricht Landesrecht*: Art. I-6);
4. elsewhere, the Union keeps its power of "support", "coordination" and "integration" in relation to individual States, whose extension is not clear, even though it is stipulated that nation States may not substitute for the central power of the Union; in other words, it is delimited only "negatively" (see arts. I-12.5 and I-17);
5. there is also a "flexibility clause", which "recalls" the earlier Art. 235 of the EC-Treaty, and the North American doctrine of "implied powers", which are potentially able to become a "source" of law, by no means secondary, to give the Community increasingly new powers and competencies (see Art. I-18);
6. the important principle of loyal cooperation, which suggests itself the "equal" status of cooperating parties, is insistently and variously referred to in relation to the commitments undertaken by the Member States, whereas as far as the Union is concerned, this principle is set out without nuances in a generic fashion with respect to the "national identity" and the "essential functions" of the Member States (see Art. I-5).

In conclusion, the interpretation of the constitutional text would seem to provide a kind of subsidiarity which has the possibility to centralise, but looking more closely, it is not so much the rhetoric of the constitutional text which determines the role of the future European institutions as the way in which their work develops in practice.

In the perennial dialectic between the Union's institutions and the Member States, the principle of subsidiarity, facing as it does in both directions, is destined to show one side of the principle or the other from time to time, depending upon the demands and the purposes that it is intended to safeguard or pursue.

In this dialectic, the European Court of Justice is bound to play a key role. It will be responsible for ascertaining infringements of the principle of subsidiarity, particularly thanks to the introduction of the right that the Member States will have to take action against a breach of this principle. Ultimately, the case law of the Supreme Court of the Union will demonstrate the actual meaning of subsidiarity on a case by case basis.

IV. The effect of the separation of powers on law-making

The principle of the "separation of powers" forms part of the DNA of all pluralist democracies. Introduced by *Montesquieu* in "The Spirit of Laws", the idea of separating the three traditional functions of government (legislative, executive and judicial) has always been a bulwark against absolutism and the concentration of these powers in the hands of a single individual or a single institution.

The framing of the new system of sources of European law has been strongly affected by the debate on how to balance the institutions of the Union against each other; in doing so, the idea of introducing an organic and functional separation of powers closer to the *Montesquieu* model has attracted some support.

Put simplistically, this separation of powers can be achieved by having distinct and independent institutions, but each empowered to exert control over the others. Parliament discharges the legislative function, Government the executive function, and the Courts the judicial function. But in reality, in pluralist democracies, both Parliament and Government share the exercise of both the legislative and the executive functions. Separating these two powers in reality means that the Parliament has the final word on laws, while the Executive is responsible for enforcing them, albeit under the political oversight of the Parliament.

The Draft TEC has introduced a number of interesting novelties, at least from this point of view (even though they can hardly be called revolutionary) compared with what existed previously.

The first novelty, even though not reproduced in the definitive version of the TEC, was the introduction of a principle of separating powers through the composition and operation of the Council of Ministers. This organ was intended to perform two types of different functions: legislative, and policy-making and decision-taking, which is similar to that normally performed by Governments.

The legislative function was going to be vested both in the Council of Ministers and in the European Parliament, both of which would have been able to adopt the European laws and framework laws.

The novelty laid in the fact that the legislative function of the Council was supposed to have its own seat, the "Legislative and General Affairs Council", with regard to which Art. 23 of Draft TEC stated that: "When it acts in its legislative function, the Council of Ministers shall consider and, jointly with the European Parliament, enact European laws and European framework laws, in accordance with the provisions of the Constitution. In this function, each Member State's representation shall include one or two representatives at ministerial level with relevant expertise, reflecting the business on the agenda of the Council of Ministers".

In practice, a session of the Legislative Council could have had as many as 75 members. That would have made it a fully-fledged Assembly!

The Draft TEC did not take up the proposal to appoint a Minister and two national parliamentarians from each Member State as members of the Legislative Council. In terms of a federal system, an institution of that kind would have very closely resembled a second Chamber, which in federations express the political demands of the federated states.

The role of the Legislative Council was going to depend very much on the practice adopted: it would have been the national Governments deciding whom to appoint to represent them on the Council, and it would have been the national Parliaments deciding whether and how to oversee the work of these representatives.

The second important institutional novelty, which survived in the definitive draft of the TEC, is the institution of a permanent President of the European Council (Art. I-22) and a European Minister for Foreign Affairs (Art. I-28).

The President of the European Council could resemble an official comparable to that of a Head of State. However, practice alone will show what role the President will actually have. Like a constitutional monarch, perhaps, who reigns but does not govern? Or like a President of the French 4th Republic or the Italian Republic, having moral authority and striking the balance between the different branches of Government? Or a President of the 5th French Republic, an active arbitrator, the protagonist of domestic policy, and the undisputed authority in matters of foreign policy?

As far as the Minister for Foreign Affairs is concerned, the Office will simply be the successor of the Commission for the Common Foreign and Security Policy that was set up in the Amsterdam Treaty, with the difference this time that the Minister will also be a member of the Commission.

The framework that emerges demonstrates two things: first, the European Council is now for all effects and purposes an institution of the Union. Everyone knows that the Council, which is made up of the Heads of State and Government of the Member States, has hitherto always operated as a summit for ensuring checks and balances on the more complex political issues of the day while remaining outside the institutional framework of the Community. The fact that the powers of the European Council are set out in a Constitution, and that the Council has a full time President (whose functions are incompatible with a simultaneous national mandate) helps to better define the separation of powers both within the Union itself, and between the Union and the Member States.

The second interesting fact is the dual membership of the Minister for Foreign Affairs: this shows that the function of laying down and implementing the common foreign and security policy is shared by different institutions: the European Council, the Commission and the Council of Ministers.

In conclusion, when a Constitution lays down the separation of powers, this can only be done - whatever form of government is adopted - by sharing the functions between different institutions. The TEC moves in this direction, and takes the issue forward, but it would be naïve to consider that the institutional architecture designed by the Convention is radically innovative.

V. The supremacy of European law

Art. I-6 TEC enshrines a principle that has already been established in the case law of the ECJ: the supremacy of European law over the law of the Member States. This entails the disapplication of any domestic legislation that is in contrast with Community law.

The provision examined here refers to the complex issue of relations between European sources of law and the domestic sources of the Member States' law. At least two points arise in this regard.

Firstly, the explicit declaration of the supremacy of European law is unprecedented in the treaties instituting the Union; secondly, the TEC now intervenes in the relations that exist between the Union's sources of law and the Member States' domestic law (Art. I-6 literally says that "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"). This lays the foundations for a system of sources applying a hierarchical criterion with horizontal effectiveness (between European sources) and vertical effectiveness (between the European and the domestic sources).

As has already been recalled in the literature (*Sorrentino*) it would be understating the facts to see this innovation as the mere formal expression of a consolidated principle of case law, namely, the supremacy of European law. For this express provision should rather be seen as giving a constitutional value to the nature of the Treaty by immediately placing the issue of relations between European sources and domestic sources of law as a key issue, which is itself closely linked to the sharing of competences between the Union and the Member States. There seems to be no doubt that this is a typically constitutional matter.

Moreover, the reference to the supremacy of the TEC evokes the idea of a system of sources of law of which European sources and domestic sources form part. Clearly these sources differ in their scope and effectiveness, but in the material sphere of the Union – that is to say in the areas over which the Member States have ceded sovereignty to the Union – they are linked by the typical dynamics of a system of ranked sources. There is "higher law", namely the Constitution placed at the top of the system, and there are criteria for ensuring the validity of the European and the domestic rules operating within the system in order to prevent any possible clashes. In other words, the question to be asked is whether it is possible to retain the traditional principle of separation between the Community order and the national orders.

Yet positing the existence of a unitary system of sources immediately raises a number of problems and questions that cannot easily be answered at the present stage of development. Does the TEC have supremacy over the individual Constitutions of the Member States, at least in overlapping areas?

Is the incorporation of the Nice Charter into Title II supported by adequate guarantees to ensure compliance by all the Member States? This is not a trifling issue (as it might appear to anyone who merely observes that the Charter shows sensitivity to rights that are already broadly widely enshrined in the Constitutions of all the Member States) when one thinks of the political and institutional changes that have followed the 2004 enlargement, and any future enlargements.

To what extent, then, will the introduction of a European Constitution contribute to making the system federal?

VI. The "guarantees" of the European Constitution

Looking at the guarantees to ensure the paramountcy of the Constitution, one can see the full weight of the uncertain configuration of power relations between the TEC and national sources. When a Member State fails to comply with one of its obligations imposed by the Constitution, the Commission or another Member State may seek redress before the ECJ (Articles III-356 and III-357). But the ECJ has no power to strike down an act adopted in violation of constitutional obligations, or deputise in the case of a mere violation of the obligation to act. For Art. III-358 TEC provides that the defaulting State must adopt the provisions which are required to comply with a judgement of the ECJ. There is therefore no ultimate means of guaranteeing compliance, which according to the Kelsenian approach, must necessarily be the striking down of an unconstitutional act.

The supremacy of the European Constitution goes naturally beyond relations with national sources. The TEC has paramountcy over the European sources themselves. To protect the supremacy of the Constitution in relations to European juridical acts, the ECJ works as a court with constitutional legitimacy (Art. III-361) with the power to strike down an unlawful act (Art. III-363).

In this respect, the primacy of the TEC within the system comprising European sources and national sources is guaranteed asymmetrically, just as the role of both categories of sources within the system itself is asymmetrical.

Traditionally, the guarantees that are instituted to protect the paramount position of the Constitution include its rigidity. In other words, the Constitution can only be innovated (supplemented, amended, repealed) by following *ad hoc* procedures which are more burdensome than normal legislative procedures.

Art. IV-442 TEC lays down the procedure for revising the Treaty instituting the European Constitution, with a radically different set of rules than those governing the ordinary law-making or framework law-making procedure. It is not a procedure that can be defined summarily as being more complex than the ordinary procedure. It is quite a different procedure altogether. For this procedure marks a shift away from law-making by a political authority (as is the case with the ordinary European law-making procedure referred to in Art. III-392 TEC) to treaty law, which is specific to the international order.

For the procedure ends with an Intergovernmental Conference, and with the ratification of the changes by all the Member States.

The latter ones, the European Parliament and the Commission have all the power to initiate proposals for revising the Constitution. The proposal must be submitted to the Council of Ministers and notified to the national Parliaments.

Even though no reference is made to the way in which the European Council is actually involved, it is at this stage in the procedure that the European Council emerges as the protagonist. For with a simple majority vote, the Council can resolve whether the proposal is worthy of being entertained. If it is, the President of the European Council convenes a Convention composed of the Heads of State and Government (in other words, the European Council), the representatives of the national Parliaments and the European Parliament, and the Commission (and

whenever the matter has to do with governing the currency, the European Central Bank is also convened).

The deliberations of the Convention conclude with the adoption of a Recommendation which is put to the Conference of Representatives of the Governments of the Member States. It is the responsibility of this Conference, which is convened by the President of the Council of Ministers, to exercise its power to revise the European Constitution. It can only be revised with a unanimous vote.

It should be noted that:

1. the participation of the actors of the European institutional system, including the national Parliaments, in the deliberations of the Convention leads to the drafting of a Recommendation with no binding effect whatsoever on the work of the Conference, except as a means of bringing political pressure to bear;
2. there is absolutely no reference to the timing of the procedure, almost as if the Constitution were indifferent to the time-limits required; the lack of any provisions addressing this point seems to point to concertation between States;
3. since the agreement needed for the Convention Recommendation and the "common agreement" of the members of the Intergovernmental Conference make the revision conditional on unanimity, individual Governments are handed such a wide-ranging power of veto that any discussion of the revision procedure merely being a matter of its greater complexity in comparison with the ordinary procedure becomes a futile exercise.

VII. The new typology of sources. A number of questions

Article I-33 TEC specifies the legal acts of the Union, that is to say, the instruments through which the Union exercises the competences vested in it by the Constitution.

Primary legislation is reserved to European laws and European framework laws, replacing regulations and the directives, respectively. A provision is also set out for law-making powers to be exercised by the Commission if the legislator delegates it to do so. Art. I-36 provides that the Commission can be delegated with powers under a law or framework law which sets out the objectives, the content, the scope and duration of the delegated powers, to adopt delegated regulations designed to supplement or amend non-essential elements of the law or framework law.

Decisions, recommendations and opinions complete the framework of the European legal acts. Together with regulations, these form part of the vast and complex area of secondary legislation.

The substantive issues that the new type of European sources of law brings to mind have to do with the degree of democratic legitimacy of European rule-making. This is an institutional issue, to which only a few brief remarks can be made here.

1. The European Constitution vests the legislative function jointly in the European Parliament and to the Council of Ministers, acting at the initiative of the Commission (Art. I-34). The ordinary procedure for approving a European law and a European framework law (Art. III-392) is essentially a bicameral procedure (co-decision) in which there is a mandatory first reading, which can be followed by a second and a third reading if necessary, with a Conciliation Committee acting in between.
2. The Commission, which alone can initiate legislation, retains an advisory function throughout the ordinary procedure. It intervenes in the conciliation procedure with the main purpose of trying to bring differing positions closer. Any negative opinions issued by the Commission regarding amendments proposed in the approval procedure can nevertheless superseded by the unanimous vote of the Council of Ministers (Art. III-395(9) TEC).
3. The ordinary legislative procedure seems to be based on quasi-perfect bicameralism criteria. For there is a margin giving the Council some advantage over the Parliament: the silence of Parliament in a second reading can be interpreted as concurring with the position adopted by the Council. Only the Council is empowered to reject the opinions of the Commission.
4. In a pre-federal perspective, the type of bicameralism indicated here would seem to reflect the traditional two-way split of federal Parliaments. In reality, the status of what should be the second Chamber, namely the Council of Ministers as the expression of the Governments of the Member States, has a markedly superior role to play than is normally the case with federal second Chambers. One has only to think of the basically exclusive role that the government of the Member States of the Union have in relation to the revision of the TEC. In the theory of federal systems the degree of participation of the Member States in revising the federal Constitution is the yardstick for judging the federal nature of the system.

In conclusion, the system of sources provided by the Convention takes up many of the features and regulating criteria governing national systems of sources of law. But there are doubts as to the adaptability of these features and criteria to a legal order that is quite different from that of a State, and which cannot yet be wholly described as federal.

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The Supremacy of European law in the Treaty establishing a Constitution for Europe in the light of Community experience

Enzo Di Salvatore

I. The supremacy of European law in the Treaty-Constitution

1. Subject matter and scope

Art. I-6 of the Treaty establishing a Constitution for Europe (TEC) (formerly Art. I-10(1) Draft TEC)[1] provides that "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". [2]

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[1] The provision was originally in Title III of Part I of the Draft, entitled "Union Competences." But the consolidated version of the Treaty Establishing a Constitution for Europe (IGC 87/04) transferred the provisions of the previous Art. I-10 to Art. I-6 and I-5(2) 2nd sentence. In order to facilitate comparison between the different positions in the literature regarding this issue – except in cases where no amendments were introduced – this paper will refer both to the numbering originally adopted in the Draft Treaty Establishing a Constitution for Europe (in brackets) and in the consolidated version of the TEC. All the quotations, however, will be taken from the consolidated version.

[2] According to the Treaty, the Union acts on the basis of the principle of conferral, that is to say "within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution." According to the provisions of Art. I-11(2) (formerly Art. I-9), any other competence that is not expressly conferred on the Union remains with the member States. Art. I-12 (former Art. I-11) draws a distinction between exclusive, shared and supporting, coordinating and complementary competences: see also arts. I-13 (formerly Art. I-12), I-13 (formerly Art. I-14) and I-17 (formerly Art. I-16). In this connection see *F. Pizzetti*, Le competenze dell'Unione, in: *F. Bassanini, G. Tiberi* (Eds.), Una Costituzione per l'Europa. Dalla Convenzione europea alla Conferenza intergovernativa, Bologna, 2003, 47 et seqq.; *F. Clementi*, Il «semi-passaggio» delle competenze dell'Unione, in: *A. Lucarelli, A. Patroni Griffi* (Eds.), Studi sulla Costituzione europea. Percorsi e ipotesi, Napoli, 2003, 245 et seqq.; *A. Biondi*, Le competenze normative dell'Unione, in: *L.S. Rossi* (ed.), Il Progetto di Trattato-Costituzione, Milan, 2004, 123 et seqq.; *M. Schröder*, Vertikale

This provision – under which for the first time in the history of the process of integration an *ad hoc* clause introduced on the supremacy of European law – will inevitably give rise to controversy; indeed, public law literature is already divided regarding the problems of interpretation that arise in relation to this point, in terms of the subject matter, the scope of its effectiveness and the effects that this provision is expected to have.

As far as the subject matter is concerned, the provision makes it clear that supremacy will relate both to the "Constitution" and to "Union law". Moving from a systematic interpretation of the provisions of Art. I-6 and Art. I-5(2) 2nd sentence – and bearing in mind therefore that Art. I-5(2), second sentence, provides that "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union" – the conclusion must be that the expression "Union law" relates to every legal act of the Union of an obligatory and binding nature.[3]

The second question which arises regarding the prevalence of European law has to do with the scope of the effectiveness of this provision, which can only be defined in terms of the system of competences set out in Art. I-12 of the Treaty, even though it is quite clear that Art. I-6 does not, in itself, refer to the sector in which the Union is required to exercise its own law-making competence. For in the case of exclusive competence, whenever a State intends to exercise its own competence, replacing that of the Union, a problem of primacy would not arise because,

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Kompetenzverteilung und Subsidiarität im Konventsentwurf für eine europäische Verfassung, in: JZ, 2004, 8 et seqq.; furthermore, even though this is not directly concerned with an analysis of these provisions, *M. Fromont*, Le compétences respectives de l'Union européenne et des États membres, in: TDS, 2003, 149 et seqq.; with regard to the work of the Convention, of particular interest are the references in *G.G. Floridia*, Il Cantiere della nuova Europa. tecnica e politica nei lavori della Convenzione europea, Bologna, 2003, in particular 96 et seqq., 147 et seqq., 191 et seqq., 217 et seqq., 301 et seqq.

[3] The reference here is to Art. I-33 (formerly Art. I-32) TEC entitled "*The legal acts of the Union*", which provides that, "To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions." According to this approach, one may infer that by virtue of the non-binding effects that continue to express recommendations and opinions, primacy does not refer to such acts. With regard to the new system of "legal acts" of the Union see *E. Rossi*, Le «nuove» fonti comunitarie, in: Quad. cost., 2003, 395 et seqq.; *V. Cerulli Irelli, F. Barazzoni*, Gli atti dell'Unione, in: *F. Bassanini, G. Tiberi* (Eds), Una Costituzione, cit., 147 et seqq.; *G. Tiberi*, La semplificazione degli atti dell'Unione Europea e il metodo di coordinamento, in: *A. Lucarelli, A. Patroni Griffi* (Eds.), Studi, cit., 221 et seqq.; *A. Anzon*, La delimitazione delle competenze dell'Unione europea, in: Dir. pubbl., 2003, 787 et seqq.; *A. Celotto*, La «legge» europea, cit., 209 et seqq.; *P.-Y. Monjal*, Simplifiez, simplifiez, il en restera toujours quelque chose..., in: RDUE, 2003, 343 et seqq.

since only the Union is authorised to "legislate and adopt legally binding acts" in one of the sectors indicated in Art. I-13, the State law would be unlawful, quite apart from any other consideration, because it would violate the rules of competence.[4]

A similar conclusion should be drawn with reference to shared competence pursuant to Art. I-12(2).[5] For in this case, despite the fact that the article would seem to consider two different types of competence, namely, shared (in the Italian sense) and concurrent (in the German sense),[6] if the Member State were to *directly* legislate over one of the sectors considered by Art. I-14, the legal act would in itself be unlawful because it would have been made outside the cases provided and permitted by Art. I-12(2).

On this basis, then, it would appear that the provision regarding supremacy applies whenever there is a clash between European law and national law, on the understanding that the rules regarding shared competence have been kept.

But this conclusion raises further problems of interpretation specifically with regard to the scope of the provision, because Art. I-6 expressly provides that the Constitution and the law adopted by the institutions of the Union prevail over the law of the Member States only "in exercising the powers conferred on it". But this does not explain whether the prevalence of European law applies when there is a clash between European law and national law following the exercise of the "exclusive" competence of the Member State.[7] In this case, there are two possible interpretations: a) the Union would not be lawfully empowered to pass any legislation governing sectors falling within the "exclusive" competence of the Member State, yet despite that, European law would at all events prevail over national law if the law of the State were to be *de facto* in contrast with Union law;[8] b) the Un-

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4 Art. I-12(1) TEC (formerly Art. I-11(1) Draft TEC): "When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

5 Art. I-12(2) TEC (formerly Art. I-11(2) Draft TEC): "When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence."

6 ... since the Union can decide to govern the whole of the sector affected by a European law, or it can cease to exercise its competence there. The possibility of predicating the existence of two types of competence is also proven by the fact that this provision links this "category" to two different ways of exercising competence, namely, the possibility for it to be exercised by legislation (a European law or a European framework law) or through legally binding acts (for example a European Regulation) of the Union or of the member States.

7 Art. I-11(2) TEC (formerly Art. I-9(2) Draft TEC): "Competences not conferred upon the Union in the Constitution remain with the Member States."

8 In the Italian literature it has been claimed that in reality every *type* of competence would fall within the implicit scope ("general presumption") of the principle of preva-

ion would not be authorised to perform any direct activity in areas over which the State had "exclusive" competence, and prevalence would at all events not be applicable in this case because – to quote a leading authority[9] – in that case *"lex specialis vor der lex generalis"*, as expressly stated in the Treaty.[10]

lence, such that the competence (or rather the sharing) would never be exclusive. This is discussed in reference to relations between the Central Government and the Regional Governments in *M. Mazziotti Di Celso*, Studi sulla potestà legislativa delle Regioni, Milan, 1961, 40, 61 et seqq. It is hardly necessary to add that since this author assumes the premise that the existence in any given national system of the principle that local norms do not yield to general norms clashes with the very nature of the federal State, because it is in opposition to its political unity, and that there is no essential difference between the federal State, the Regional State and unitary State, he considers that in the Italian legal system the principle of supremacy is implicit in Art. 5 of the Constitution regarding *political* unity; he therefore admits that Central government laws can legally contribute to setting limits on constitutional competence, but by so doing he fails to fully appreciate the fact that the approach of the Constitution and the special regional Statutes regarding shared competence bear no similarity to the German federal experience of the *konkurrierende Gesetzgebung*, which is a type of "shared" competence between central government (which lays down the fundamental principles) and the regional government (which is required to deal with the other legal aspects). Any overlapping of competence by the central government would inevitably and always give rise to a problem of unconstitutionality; for a critique of *Mazziotti*'s position see *F. Cuocolo*, Le leggi cornice nei rapporti fra Stato e Regioni, Milan, 1967, 286 et seqq.; see also *A. D'Atena*, L'autonomia legislativa delle Regioni, Rome, 1974, 15 et seqq., 51 et seqq.; *Id.*, Regione (in generale), in: Enc. dir., XXXIX, Milan, 1988, 317 et seqq., now in: Costituzione e Regioni. Studi, Milan, 1991, 3 et seq, 15 et seqq.; recently, see also *S. Mangiameli*, Il riparto delle competenze normative nella riforma regionale, in: La riforma del regionalismo italiano, Torino, 2002, 117 et seqq.

9 *P. Laband*, Das Staatsrecht des Deutschen Reiches, 2, 5. Aufl., (Tübingen 1911) Stuttgart, 1964, 114 et seqq., 123.

10 See the conclusion reached by *F. Sorrentino*, I fini dell'Unione europea nel progetto di trattato costituzionale, in: Auf dem Weg zu einer europäischen Wissensgesellschaft/Verso una società europea della conoscenza, Villa Vigoni, VIII, 1/2004, 16: "As regarding the extension of the proclaimed supremacy, it should take into account the type of allocation (teleological or material) of competences between the Union and the Member States: in fact the principle *Europarecht bricht Staatsrecht* may be effective only in the sphere of exclusive and concurrent competences of the Union, while, in the sphere of competence of the Member States, it will be their law to prevail over Union law."

2. The effects of the supremacy of European law

The third issue regards supremacy and its effects. Now that the principle of the prevalence of Union law is enshrined in a provision of the Treaty,[11] it remains to be seen whether this is only intended to codify the experience that has become consolidated in the course of over fifty years of applying Community law (in which case the provision of Art. I-6 would continue to postulate the typical effects of the *primauté* of Community law, such that any contrast between Community sources and domestic sources would once again be resolved by applying the criterion of the *non-application* of the domestic law provisions)[12] or whether the provisions of Art. I-6 are perhaps qualitatively different, and do not postulate similar effects to those that emerge from the supremacy clauses enshrined in federal Constitutions.[13] [14]

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[11] *F. Sorrentino*, I fini, loc. cit.: "the assertion of primacy of community law has been always led back, in the experience of national legal systems, to their respective constitutional norms. There's no doubt, then, that the acceptance on behalf of the Member States of an explicit supremacy clause of Union law would allow to build on the norms of the Treaty the foundation of that primacy."

[12] See, among some of the earliest comments in the literature, *F. Pizzetti*, Le competenze, cit., 56: "the provision deals with aspects which are already effective in the Union framework. In fact, it 'constitutionalises' the principle of supremacy of community law, which has been already formalized by the case-law of the European Court of Justice (para. 1) and repeats substantially what has already been provided for by Art. 10 TUE (para. 2)"; cf. Also *A. Biondi*, Le competenze, cit., 136 et seqq.: "the codification of the supremacy principle will be indeed subject to critics. In particular, it is foreseeable that the formulation of Art. 10 will be deemed too general and therefore it will be possible that the traditional contrast among the national constitutional courts and the European Court of Justice will be rekindled. Actually, the text of the Constitution seems to be quite careful confirming the respect for the various legal systems where it is affirmed that the principle of supremacy applies only in regard to the Constitution and to law adopted by Community institutions *'in the exercise of competences which are conferred upon it'*;" in the same perspective cf. the *Declaration on Art. I-6*, adopted by the Convention and annexed to the TEC, and also the recent judgements of the constitutional Courts of France (*Décision* n° 2004-505 DC of 19 november 2004) and Spain (DTEC 1/2004 of 13 december 2004, where a distinction is drawn between the "*primacía del Derecho de la Unión*" and the "*supremacía de la Constitutión*").

[13] This would seem to be the opinion, for example, of *G.G. Floridia*, Il cantiere della nuova Europa, cit., 147, according to whom the principle of conferral is not a "dual" development of the principle but rather "the reprise of the rule *Bundesrecht bricht Landesrecht*, which obviously implies at least a partial overlap between national and 'federal' competences, either for area or for type of competences." According to this distinguished writer, "art. 8, p. 2 (nowadays Art. I-6 TEC) uses the terms of 'primacy of Union law in the exercise of competences which are conferred upon it': in the new framework though this seems to go beyond the inter-legal system logic of the *primauté* of community law over national law, and places itself as a criterion in order to evaluate the

In reality, this is by no means a new problem because it was already raised by *Eberhard Grabitz* in his book written in 1966 entitled, significantly, "*Gemeinschaftsrecht bricht nationales Recht*".[15] According to this writer, the tension that exists between Community law and national law raises a question of the nullity (*Nichtigkeit*) rather than disapplication of the domestic provision.[16] But this is not a convincing solution because if that principle were to apply as a constituent part of positive Community law[17] it would mean that, as is the case with the federal experiences,[18] there exists one single normative system in which all sources of law

conflict and validity of sources of a legal system, relating directly to the much know formula of the German federal tradition" (fn. 66); cf. also *F. Sorrentino*, I fini, loc. cit. who, while not making any further observations regarding the effects that should be inferred from the clause on the prevalence of European law nevertheless uses the expression "*Europarecht bricht Staatsrecht*" (v. *infra sub* nt. 10); for *A. Celotto*, Legittimità costituzionale e legittimità comunitaria (prime considerazioni sul controllo di costituzionalità in Italia come sistema 'misto'), in: *A. Lucarelli, A. Patroni Griffi* (Eds.), Studi, cit., 47 et seqq., 60, the system of the widespread control of compatibility between domestic law and Community law by ordinary courts is (already) comparable to the control stemming from the supremacy clauses, performed by constitutional courts or any similar authority ruling on invalidity; cf. also *S. Cassese*, La Costituzione europea, in: Quad. cost., 1991, 487 et seqq., in part. 493, where the author argues that the supremacy of European law would lead to the introduction of the principle "*Bundesrecht bricht Landesrecht.*"

14 It is obvious that depending upon the attitude one takes up in this regard, both of these positions could overlap because, as far as the effects are concerned, the "non-application" of domestic law could essentially be equated with its "disapplication", which exists in the systems with widespread control by a Constitutional Court or its equivalent. But what still has to be seen is whether a result of this kind is required by European law or whether European law is totally indifferent to it. This will be discussed further in this paper.

15 *E. Grabitz*, Gemeinschaftsrecht bricht nationales Recht, Hamburg, 1966.

16 *E. Grabitz*, Gemeinschaftsrecht, cit., 113 et seqq., who considers more specifically that, while in the case of the law of the Treaties and of regulations the "nullity" (*Nichtigkeit*) would resolve in the "repealing effect" (*Aufhebungswirkung*) as much as in the "preclusive effect" (*Sperrwirkung*), in the case of "recommendations addressed to the States according to the ECSC Treaty" (*an Staaten gerichtet Empfelung nach dem EGKS-Vertrag*) (117 et seqq.) and of "individual decisions" (*individuelle Entscheidung*) (119 et seqq.) it would only involve a preclusive effect (*Sperrwirkung*).

17 *E. Grabitz*, Gemeinschaftsrecht, cit., 113.

18 Although see *contra A. Peters*, Elemente einer Theorie der Verfassung Europas, Berlin, 2001, 328 et seqq., who reads *Grabitz*'s thought in the light of the federal model (the one suggested by the "*föderalistischen Integrationstheorie*"), to be more precise – even though there would be a legitimate doubt about it – in the second aspect of that model (that would be "supremacy due to the loss of competence" [*Vorrang kraft Kompetenzverlust*] and not supremacy due to conflicting norms [*Vorrang kraft Kollisionsnorm*], and then sustains that the consequences of supremacy in the German federal system are not related to the use of the hierarchic criterion, though it is true that

are hierarchically ranked.[19] But – as *Grabitz* himself seemed to admit[20] – the relationship between Community law and domestic law did not give rise to any such possibility, but, on the contrary, and posited the existence of two distinct and autonomous systems. In such a case, any contrast between the provisions of one or other system would therefore raise a question of precedence in terms of application (*Anwendungsvorrang*),[21] but not a question of precedence regarding validity (*Geltungsvorrang*).[22]

"there are sectors in which the *Bund* seems to be superior to the *Länder*; though there are also sectors in which the *Länder* stand 'on top'" and thus "their constitutional spaces" – as the *Bundesverfassungsgericht* has stressed (BVerfGE 4, 178, 189) – "basically coexist one juridical system besides the other." On this matter, though, it ought to be observed that if the specific set of relations between *Bund* and *Länder* is not governed in any way by a supremacy rule of the *Bund*'s constitutional space (*Bund*'s *Verfassungsraum*) to that of the *Länder*, it could depend only on a decision taken in the *Grundgesetz* and not by the *Länder*; that decision – since it resolves itself in a delimitation of the supremacy – should be considered as a *derogation* to the principle of Art. 31 *Grundgesetz*. On an ultimate analysis, the limitation of the effectiveness of the supremacy clause would gain even results as the application of the competence rule in the stance of the hierarchic rule.

19 Cf. *K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland. Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung, Band I, 2. Aufl., München, 1984, § 19, 720, who emphasied that "the fundamental principle emerges as a rule of organisation or of conflict resolution in a juridical system build by degrees"; a critical stance was adopted by *M. Zuleeg*, Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich, Köln-Berlin-Bonn-München, 1969, 126 et seq; on this point see also *M. Niedobitek*, Kollisionen zwischen EG-Recht und nationalem Recht, in: VerwArch, 2001, 58 et seqq., 61.

20 *E. Grabitz*, loc. cit.

21 *H.P. Ipsen*, Über Supranationalität, in: Festschrift für *Ulrich Scheuner* zum 70. Geburtstag, Berlin, 1973, 110 et seqq., now in Europäisches Gemeinschaftsrecht in Einzelstudien, Baden-Baden, 1984, 97 et seqq., who holds that the *Anwendungsvorrang* of Community law and its *Durchgriffsfähigkeit* are additional (albeit necessary) elements of supranationality: "In this sense, in order to consider the primacy of community law as an element which confers the significant meaning to supranationality, there is no need of the national norm derogation, which means there is no need for the application of the principle 'Gemeinshaftsrecht bricht nationales Recht', which is characteristic of the most part of federal juridical system, as a coalition rule."

22 *G. Hoffmann*, Das Verhältnis des Rechts der Europäischen Gemeinschaften zum Recht der Mitgliedstaaten, in DÖV, 1967, 433 et seqq., 439; more recently, *M. Zuleeg*, Die föderativen Grundsätze der Europäischen Union, in NJW, 2000, 2846 et seqq., 2849: "The supremacy is not a matter of validity, but of application"; but see also *M. Niedobitek*, Kollisionen, cit., 62 et seqq., who holds that: "(...) a difference between supremacy of application and supremacy of validity (is) not recognizable, so that in the end is absolutely correct describing the effect of supremacy of application with the principle: 'Gemeinschaftsrecht bricht nationales Recht'."

However, judging from what is done in actual practice we know that this route has never been taken in Community case law or domestic case law. At least not formally, because in the Italian experience, for example, there have been contradictions in the thinking of the courts judging the laws which, consciously or otherwise, has come very close to the model envisaged by *Grabitz*.

3. The effects of supremacy in the Italian constitutional case law

The Italian constitutional Court has always applied the principle that the two systems are "separate and autonomous"[23] "albeit coordinated".[24] From a given moment in time, perfectly consistently with the case law of the European Court of Justice (ECJ),[25] the constitutional Court began to rule that Italian courts[26] must "disapply" any domestic law provisions that conflict with Community law, because any other remedy – such as repealing the domestic provision or declaring its non-constitutionality – would indicate the existence of wholly non-existent errors in the law.[27] Despite that, in this instance the Court was not content with declaring the "non-application" of the domestic law provision,[28] but felt duty-bound to urge parliament to repeal the domestic provision in contrast with Community law in order to comply with the prescription enshrined in Art. 10 EC Treaty, in the presence of an inconsistency between the two systems.[29]

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[23] Corte cost., 7 March1964, n. 14, in: Giur. cost., 1964, 129 et seqq.

[24] Corte cost., 27 December 1973, n. 183, in: Giur. cost., 1973, 2401 et seqq.

[25] Cf., in particular, Corte giust., 9 marzo 1978, causa 106/77, *Amministrazione delle finanze dello Stato c. SpA Simmenthal*, [1978] ECR I-629 et seqq.

[26] Indeed, the Constitutional Court has ruled that all the parties having competence within the State system for implementing and enforcing the law "whether empowered to declare what the law is, or without these powers, such as the administrative organs" are obliged to comply.

[27] Corte cost., 8 June 1984, n. 170, in: Giur. cost., 1984, 1098 et seqq.; for abrogation and a judgement of unconstitutionality would presuppose the existence of a system of relations between sources belonging to one and the same system.

[28] Corte cost., 18 April 1991, n. 168, in: Giur. cost., 1409 et seqq., 1414: "art. 11 acknowledges the possibility of limits to national sovereignty, as an effect of 'non application' of the national law (rather than 'disapplication' which evokes a vice of the norm which do not really exist on the basis of the autonomy between the two legal systems)"; but on the "non application of the national norme in the concrete case of application" see the comments by *H.P. Ipsen*, Die Rolle des Prozeßrichters in der Vorrang-Frage, in: EuR, 1979, 223 et seqq., now published in: Europäisches Gemeinschaftsrecht, cit., 231 et seqq., 234.

[29] Corte cost., 31 March 1995, n. 94, in: Giur. cost., 788 et seqq., 798; see also the earlier judgment Corte cost., 11 July 1989, n. 389, cit., 1767; the conclusion stems from the ECJ ruling that the application of the provisions of Community law, and the resultant disapplication of national law, is only "a minimum guarantee" which "is not sufficient

But it is patently obvious that this contradicts the basis for the reasoning of the Court and distorts[30] the underlying dualistic approach,[31] for if the two systems were really separate and distinct, albeit coordinated – as the constitutional Court maintains – the requirement of "sincere cooperation" set out in Art. 10 EC Treaty would be already met by not applying the national provisions. But there is more to it than that: in one case, the Court went so far as to declare the unconstitutionality of a regional legislative resolution, arguing that if the Court were to declare the question inadmissible, this would enable the domestic provision in conflict with Community law to be enforced, and consequently create a state of legal uncertainty while simultaneously violating the obligation on the Italian State to bring its own legislation into line with Community law.[32] On that occasion, the Court was not acting as a constitutional judge, but as any other national authority required to disapply domestic law.[33] However, the consequence of this is that the effects stemming from that judgment were typical of invalidity, and not of non-application: for the non-application of a law does not affect its survival but merely makes it impossible for it to be applied to one specific case, whereas the judgment of unconstitutionality removes the law from the system.

II. Supremacy of European law and federal systems

1. The effects of the supremacy of European law and the distinction between this and the effects of the supremacy clause in federal systems

The principle that Community law prevails over the domestic law of the Member States, as enshrined in the TEC, would seem not to concern itself with the downstream effects on national legal provisions in conflict with European law. This conclusion is based not only on the fact that according to Art. I-29 the ECJ is only

in itself to ensure the full and complete implementation of the Treaty": ECJ, 15 October 1986, Case 168/85, *Commission v. The Italian Republic* [1986] ECR I-2945.

30 *S. Mangiameli*, Il Governo tra Unione europea e autonomie territoriali, in: La riforma del regionalismo, cit., 191 et seqq., 202.

31 Very relevant to this point are the works of *H. Triepel*, Völkerrecht und Landesrecht, Leipzig, 1899, and *D. Anzilotti*, Il diritto internazionale nei giudizi interni, Bologna, 1905, now published in: Opere, II, Scritti di diritto internazionale pubblico, Padova, 1956, 281 et seqq.; *contra*, *H. Kelsen*, Das Problem der Souveränität und die Teorie des Völkerrechts, Tübingen, 1920.

32 Corte cost., 10 November 1994, n. 384, in: Giur. cost., 1994, 3449 et seqq.

33 In judgment 94 of 1995, cit., 798, the Italian constitutional court ruled that the obligation to repeal any domestic statutory provisions that were incompatible with Community law was not only binding on the authorities with the power to declare law but also those without this power (such as the organs of the public administration) and the Constitutional Court itself.

competent to pronounce on the *validity* of acts adopted by the institutions,[34] but above all that where Art. I-5(2)3rd sentence provides that in accordance with the principle of sincere cooperation, "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives", it essentially repeats what is already provided by Art. 10 EC Treaty, doing nothing to change the terms of the problem.

For the time being there is no serious legal basis for the contrary view, even though this could be upheld one day by a (new) ruling of the ECJ placing a different construction on the supremacy of European law, given that European law merely prescribes that European law prevails over national law, but does not specify how and by whom the invalidity of the national legal provision is to be declared.[35]

Although the European Court of Justice has always taken a typically monist approach, even going so far as to rule that the principle of the supremacy of Community law implies both that domestic law in contrast with Community law may not be applied, and at the same time prevents the valid formation of any new national legislative act incompatible with Community law,[36] the less-than-complete comparability of the *desired* effects of the European rule with the supremacy rule in federal systems is because the *ratio* underlying the European rule resides *principally* in the need to ensure that the law adopted by the Union's institution is equally certain and effective throughout the whole area to which European law applies.[37]

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[34] Art. I-29(3) TEC (formerly Art. I-28(3) Draft TEC): "The Court of Justice of the European Union shall in accordance with Part III: [...] give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions."

[35] But see also the remarks in note 14.

[36] ECJ, 9 March 1978, cit., 643, point 17.

[37] *H.P. Ipsen*, Europäisches Gemeinschaftsrecht, Tübingen, 1972, 277 et seqq., 282 et seqq., who emphasises that "the legitimacy of the principle must be construed *materially from the objectives of the Treaties*" and that "*the aim* which community law tends to fulfil with the realisation of *juridical equality in the Community*, and therefore with the exclusion of the application of several national derogatory provisions as a peculiar means for the security of its functioning capacity, results finally from Art. 100 EEC Treaty. In fact, that principle does *not* rely on the security of the functioning of the *Community as such*, but on the direct effects instead through which the different administrative and juridical provisions may compromise its functioning."; this is also the assumption underlying the principle of the *gemeinschaftskonforme Auslegung* of domestic law: on this point see also, for example, *M. Nettesheim*, Auslegung und Rechtsfortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts, in: AöR, 1994, 119, 261 et seqq.

2. The example of the German Constitution: Art. 13 of the Weimar Constitution and Art. 31 of the Grundgesetz

The non-equivalence between the *effects* produced by the supremacy clause enshrined in the TEC and the effects of supremacy clauses typical of certain federal systems only becomes evident when considering the experience of *certain* federal States in closer detail. One good example is Germany's experience, particularly with the 1919 *Weimar* Constitution and the 1949 *Grundgesetz* (GG).

Art. 13 of the 1919 *Weimar* Constitution set out in great detail the consequences stemming from its supremacy clause, and provided that the *Reich law* would "break" the *Länder law* (paragraph 1).[38] This not only expressly broadened the scope of the clause beyond that of the Art. 2 of the 1871 *Reichsverfassung*, specifically extending the effects of it to apply to the whole corpus of *Reich law*,[39] but it also made it clear, leaving no further ambiguity whatsoever,[40] that any violation of *Reich* law would have different and more serious effects than merely disapplying or suspending the *Land* law. Indeed, any violation caused by a *Land* law

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[38] On this provision see, for example, *R. Grau*, Vom Vorrang der Bundeskompetenzen im Bundesstaat, in: Festschrift für *Ernst Heinitz*, Berlin, 1926, 358 et seqq.; *G. Doehl*, Reichsrecht bricht Landesrecht, in: AöR, 1927, 37 et seqq.; and *G. Anschütz*, Die Verfassung des deutschen Reichs vom 11. August 1919, 14. Aufl., Berlin, 1933, 101 et seqq.

[39] Art. 2 of the 1871 *Reichsverfassung* (RV) provided that "the laws of the Reich have precedence over the law of the Land" (die Reichsgesetze den Landesgesetzen vorgehen), and § 66 of the 1849 RV spoke in the same terms; for the (extensive) contruction placed on it by the literaure of the time, see at all events *P. Laband*, Das Staatsrecht, cit., 115: "Supremacy does not refer, then, merely to the laws issued from the Reich, that is after the approval of the Reichstag, but also to all regulations of the Reich, as much as they have been validly issued and promulgated. On the other hand, it makes no difference if the juridical norms of the Land are constitutional provisions, simple laws or customary principles."

[40] On the effects of the provisions of Art. 2 of the 1871 RV, see again *P. Laband*, Das Staatsrecht, loc. cit.: "through the issuing of a law of the Reich every provision of the Land which is in contrast with the law of the Reich loses *ipso iure* its validity", and also *E.R. Huber*, Deutsche Verfassungsgeschichte seit 1789. Bismarck und das Reich, III, Stuttgart, 1963, 796 and 912; on the different wording of Art. 13 *ReichsWeimarVerfassung* (RWV) cf. *C. Schmitt*, Dottrina della Costituzione, Italian translation, Milan, 1984, 497 et seqq., who explains that "the awkward expression of Art. 13 may be explained with the history of German law: a juridical formula, in which it was disciplined the relationship between local and territorial law with common law, was referred to the public relationships, of a totally different nature, between the federation and its members and a stereotypical locution was adopted in order to express something different, which is the fact the federal law into force must be applied and observed as laws which come from the authority and the public employees of the member State even in the State, as soon as federal law comes into force, without the need for a particular conversion act."

enacted prior to the *Reich* law automatically repealed the *Land* law; but, if the *Land* law was enacted after the *Reich* law, it was merely null and void.[41]

This is also clear from the particular provisions of paragraph (2) of that same article, which provides in the event of doubt or even differences of opinion on the existence of a conflict between *Reich* law and *Land* law, the competent central authorities of the *Land* or the *Reich* must refer the question to a *Reich* supreme Court following the procedures of *Reich* law. This provision therefore introduced another type of direct and centralised control by a supreme Court of the *Reich* – in addition to the prior control that had been exercised until then by individual courts as incidental to a civil, criminal or administrative action which could only disapply, but not abrogate or annul the *Land* law[42] – which could also ascertain the *conformity* of the *Land* law with the *Reich* law, and even declare its *invalidity*.

In the 1949 *Grundgesetz* Art. 31 provided that "*Bundesrecht bricht Landesrecht*", confirming that model and rejecting any other, weaker, solutions.[43] Here again, the verb "*brechen*" (break/crush) was used to make it patently clear that whenever the *Bund* adopts an act, the effectiveness of the *Land* law always ceases, and can never be revived at any time in the future.[44] Competence to rule on con-

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41 Cf. *G. Anschütz*, Die Verfassung des deutschen Reichs, cit., 103.

42 *G. Anschütz*, Die Verfassung des deutschen Reichs, cit., 105.

43 At its 57th session on 5 May 1949, the *Hauptausschuß* adopted the present wording of the Constitution and rejected the other proposals that had been table, such as "the law of the Bund has precedence over the law of the Land" (*Bundesrecht geht vor Landesrecht*) (with 11 votes against and 10 votes for) and "the law of the Bund breaches the opposite law of the Land" (*Bundesrecht bricht entgegenstehendes Landesrecht*) (on the ground that the word "opposite" (*entgegenstehend*) was pleonastic. At the 9th session of 6 May 1949, the Assembly therefore confirmed the decision of the *Hauptausschuß*; cf. JöR, n. F. 1, 1951, 298 et seqq.

44 "Breaching means a radical elimination of the validity of the existing law of the Land or the law which may come in the future", according to *P.M. Huber*, Art. 31, in: *M. Sachs* (ed.), Grundgesetz Kommentar, 2. Aufl., München, 1999, 1000 et seqq., 1004; but also for *K. Stern*, Das Staatsrecht, cit., 720: " 'Breaching' in Art. 31 GG is not intended in the sense of an elimination, but in the sense of an abrogation, derogation, rejection, being stronger, taking precedence, making ineffective (...). The law of the Bund acts, in the past, as an abrogation, and in the future as a preclusion." It should also be recalled that while there is a widespread opinion (not always consistently conscious of the effects of the different ways in which a law ceases to be effective) the idea that any clash between Bund law and Land law always entails the *Nichtigkeit* of the Land law, some legal writers hold that different juridical effects can stem from applying it, such as the mere suspension of the Land law, and hence the possibility of reviving it later. In this regard – but on the basis of different assumptions – see *C. Pestalozza*, Thesen zur kompetenzrechtlichen Qualification von Gesetzen im Bundesstaat, in DÖV, 1972, 181 et seqq., 190; *H. v. Olshausen*, Landesverfassungsbeschwerde und Bundesrecht, 1980, 128 et seqq.; *W. März*, Bundesrecht bricht Landesrecht, 1989, 184 et seqq.; see also BVerfGE 36, 342, 365 et seqq.; on this point see *J. Pietzcker*, Zuständigkeitsordnung und Kollisionsrecht im Bundesstaat, in: *J. Isensee, P. Kirchhof* (Eds.), Hand-

flicts between the legal provisions of both systems is vested in the *Bundesverfassungsgericht* when the conflict originates from the *Land* law.[45] Whenever the conflict is with sub-legislative sources, conversely, all courts are competent.[46]

3. Art. 31 of the Grundgesetz and European law

The general rule that the supremacy clause is always the source for declaring the *Nichtigkeit* of a *Land* law where it clashes with the *Bund* law is by no means weakened by the possibility that there are certain important exceptions to the rule, when it is the constitutional Court itself which rules on this and hence lays down the scope of application.[47]

For our purposes here, the possibility that as far as *Land* law is concerned, *Bund* law and Community law are on parallel planes and offer different solutions – in the first case raising a problem of validity/invalidity and in the second case the application/non-applicability of the *Land* law – would give rise to the risk that even if a *Land* law is consistent with Community law but inconsistent with *Bund* law, it might be declared invalid.[48]

But such a conclusion is impossible under the Constitutional Charter which, by adopting a specific "*Europaartikel*",[49] has ended by authorising exceptions to many of the principles and institutions it envisage, precisely to legitimise the effect and the effectiveness of European law.

Seen from this point of view, the non-applicability of the supremacy clause – that is to say, the impossibility of removing a provision of a *Land* law from the legal system because it conflicts with *Bund* law even though it is at all events compliant with European law – would appear to be authorised by the final sentence of Art. 23(1) GG, which provides that European law can modify or supplement the substance of the Fundamental Law, or simply make such modifications and supplements possible; and where it says that the legitimacy of such possibilities must be covered by a law enacted pursuant to Art. 79(2) and (3) GG.[50] What this means, in other words, is that since *Anwendungsvorrang* is a general principle of Community law, the reference made in Art. 23 to the determinations of Euro-

buch des Staatsrechts der Bundesrepublik Deutschland, IV, Heidelberg, 1990, 693 et seqq., 711 et seqq.; *R. Uerpmann*, Landesrechtlicher Grundrechtsschutz und Kompetenzordnung, in: Der Staat, 1996, 428 et seqq., 438.

45 Art. 93(1)(2) and Art. 100(1)(2) GG.

46 Cf. Art. 47 VwGO; see on this point, *P.M. Huber*, Art. 31, cit., 1005.

47 See the cases cited by *P.M. Huber*, Art. 31, loc. cit.

48 On this problem, cf. *A. Egger*, Bundesstaat und EU-Recht: verfassungsrechtliche Probleme der Durchführung in Deutschland, in Der Staat, 1999, 449 et seqq., 470 et seqq.

49 For the literature that has developed around this Article, see *E. Di Salvatore*, Integrazione europea e regionalismo: l'esempio tedesco, in: DPCE, 2001, 513 et seqq.

50 Regarding the problems of interpretation raised by this provision see a *E. Di Salvatore*, I Länder tedeschi nel processo di integrazione europea, in: *A. D'Atena* (ed.), L'Europa delle autonomie: le Regioni e l'Unione europea, Milan, 2003, 117 et seqq.

pean law – that is to say the possibility that European law can lawfully affect national constitutional law – is tantamount to accepting the typical effects linked to this principle and to the simultaneous delimitation of the scope of application of the *Bundesrecht bricht Landesrecht* principle.

If this reconstruction is correct, it is obvious that any conflict that might arise between *Land* law (which is compliant with European law) and *Bund* law (which conflicts with European law) would have to be resolved by applying the *Land* law.[51] For whereas, in a federal system, a rule of law of a Member State is always declared invalid as a consequence of an express provision imposed by the federal Constitution, in the case of European law – after excluding the possibility of inferring a consequence of this type from the TEC – a different and more serious solution would necessarily have to rely on a decision based on domestic constitutional law.

III. The problem of the non-applicability/invalidity of Community law

1. Article 117(1) of the Italian Constitution[52]

The Italian constitutional system, which was radically innovated in 2001 with the amendments introduced to Title V of the second Part of the Constitution (IC), seems to have followed this approach, to resolve the problem of conflict between European law and domestic law in terms of invalidity.

Art. 117(1) IC, as now reframed, provides that "the legislative power is exercised by the Central Government and the Regional Governments in compliance with the provisions of Constitution and subject to the constraints deriving from the Community legal system and international obligations".[53]

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[51] Regardless of whether or not one shares the conclusions reached in this paper, it should be noted that it is surprising how the scientific debate around Art. 23 GG says nothing about the problem of relations between Art. 23 and the relevant clause of Art. 31 GG.

[52] At the moment in which this article was handed to the publisher, the Italian Parliament was passing a law (Law 4 February 2005, n. 11) which sets down the general norms on the participation of Italy to the normative process of the European Union and on the execution of community duties ("Norme generali sulla partecipazione dell'Italia al processo normative dell'Unione europea e sulle procedure di esecuzione degli obblighi comunitari). The following sections, though, do not take into account the new provisions introduced by the aforementioned law.

[53] In relation to this provision, the following writers – among others – have adopted various different positions: *D.-U. Galetta*, La previsione di cui all'art. 3, comma 1, cpv. 1, della legge di revisione del Titolo V della Costituzione come definitivo superamento della teoria dualista degli ordinamenti, in: Problemi del federalismo, Milan, 2001, 293 et seqq.; *A. D'Atena*, L'adattamento dell'ordinamento interno al diritto internazionale, in: Lezioni di diritto costituzionale, Torino, 2001, 177 et seqq.; *Id.*, La nuova disciplina

According to a narrow reading of this article, as proposed in some of the literature[54] – which was very recently upheld by the judgement of the Court of Cass-

costituzionale dei rapporti internazionali e con l'Unione europea, in: Rass. parl., 2002, 913 et seqq.; *F. Pizzetti*, Le "nuove" Regioni italiane tra Unione Europea e rapporti esteri nel quadro delle riforme costituzionali della XIII legislatura. Nuovi problemi, compiti e opportunità per il potere statutario delle Regioni e per il ruolo del legislatore statale e regionale, in: Le Regioni, 2001, 803 et seqq.; *L. Torchia*, I vincoli derivanti dall'ordinamento comunitario nel nuovo Titolo V, in: Le Regioni, 2001, 1203 et seqq.; *E. Cannizzaro*, La riforma 'federalista' della Costituzione e gli obblighi internazionali, in: Riv. dir. intern., 2002, 921 et seqq.; *M.P. Chiti*, Regioni e Unione europea dopo la riforma del Titolo V della Costituzione: l'influenza della giurisprudenza costituzionale, in: Le Regioni, 2002, 1401 et seqq.; *F. Sorrentino*, Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario, in: DPCE, 2002, 1355 et seqq.; *P. Bilancia*, Regioni e attuazione del diritto comunitario, in: Ist. fed., 2002, 49 et seqq.; *B. Conforti*, Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari, in: Foro it., V, 2002, 231 et seqq.; *P. Caretti*, Potere estero e ruolo «comunitario» delle Regioni nel nuovo Titolo V della Costituzione, in: Le Regioni, 2003, 555 et seqq.; *G. Gerbasi*, I vincoli derivanti dall'ordinamento comunitario nel nuovo Titolo V Cost.: difficoltà interpretative tra continuità e discontinuità rispetto al precedente assetto, in: *S. Gambino* (ed.), Il 'nuovo' ordinamento regionale. Competenze e diritti, Milan, 2003, 312 et seqq.; cf. also Art. 1(1) of law 131 of 5 June 2003 implementing the constitutional reform of Title V; on this provisions see the comments by *C. Pinelli*, in: Legge "La Loggia." Commento alla legge 5 giugno 2003, n. 131 di attuazione del Titolo V della Costituzione, Rimini, 2003, 19 et seqq.; for more considerations on the "La Loggia Act", also in reference to Law 86 of 1989, see *T. Groppi*, Regioni e diritto comunitario: il disegno di legge di modifica della Legge La Pergola, in: Ist. fed., 2002, 259 et seqq.

[54] *C. Pinelli*, I limiti generali alla potestà legislativa statale e i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario, in: Foro it., 2001, V, 194 et seqq.; the reconstruction of this problem raised in this work – and the decision of the Court of Cassation that followed it – is decisively affected by the interpretation that it gives of the new constitutional order resulting from the reform. For this writer – relying on Art. 114 of the Constitution – the recent constitutional system is very similar to the *dreigliedrige Konstruktion* dealt with in reference to the federal State by *H. Kelsen*, Allgemeine Staatslehre, Berlin, 1925, 199 et seqq. (Teoria generale del diritto e dello Stato, Italian translation, Milan 1963, 309 et seqq.); *Id.*, Die Bundesexekution. Ein Beitrag zur Theorie und Praxis des Bundesstaates, unter besonderer Berücksichtigung der deutschen Reichs- und österreichischen Bundes-Verfassung, in: Festgabe für Fritz Fleiner zum 60. Geburtstag, Tübingen, 1929 (L'esecuzione federale. Contributo alla teoria e alla prassi dello Stato federale, con particolare riguardo alla Costituzione del Reich tedesco e alla Costituzione federale austriaca, in: La giustizia costituzionale, Italian translation, Milan, 1981, 75 et seqq.); for further debate on his position, see his later work, *C. Pinelli*, L'ordinamento repubblicano nel nuovo impianto del Titolo V, in: *S. Gambino* (ed.), Il 'nuovo' ordinamento regionale, cit., 149 et seqq.; *contra M. Olivetti*, Lo Stato policentrico delle autonomie (Art. 114, 1° comma), in: *T. Groppi, M. Olivetti* (Eds.), La Re-

ation[55] – the provision merely constitutionalises, in the sense of confirming, the relationship between the domestic system and the Community system previously established by legislative and case law practice. This being so, reference to "constraints stemming from the Community system" applies not so much to relations between the various sources but rather "with reference to the *sedes materiae* ... to the relationship between systems: firstly, (a) the relationship between the "general system" of the Republic, whose source is the Constitution, and the "partial systems" of Central Government and Regional Governments (namely, in accordance with the new constitutional plan set out by Art. 114(1) IC as replaced by Art. 1 of Constitutional Law 3 of 2001, which provides that 'the Republic comprises municipalities, provinces, metropolitan cities, Regions and the State'; secondly, (b) the relationship between each of these latter two (the State and the Regions) and the Community and international systems. In no way, however, does the provision intend to immediately and specifically re-draw relations between the sources of the respective Community and the international systems."[56]

But apart from the fact that it is hard to see how Art. 117 IC can only apply to relations between systems but not to relations between sources, when the objective law of the Republic (in other words the legal order of the State and the legal order of the Regions) is made up precisely of provisions from sources at both these levels, and when the provision itself relates to the exercise of the legislative power of Central Government and Regional Governments, and hence to both State and Regional sources, the greatest doubts that arise with a reconstruction of the problem in terms of substantial continuity between the previous system of relations and the system resulting from the constitutional reform relate to a number of quite different exegetical considerations.

According to the constitutional Court, "the new version of Art. 117(1) IC (where it speaks of '... compliance... with the constraints stemming from the Community system' and not of 'compliance with Community law' *tout court*) would seem to confirm that the constitutional basis for the significance and the preceptive substance of these 'constraints' should be sought elsewhere, in the proper *sedes materiae*: that is to say, in the provision which the Constitution, as the source of the general order of the Republic, dedicates to relations between the sources of the State law and the sources of Community law, namely Art. 11(2) IC which, 'by limiting the sovereignty' of the State, which is (also) expressed through the exercise of the legislative function, 'permits' Community law to prevail (within the limits indicated in the case law of the constitutional Court) over do-

pubblica delle autonomie. Regioni ed enti locali nel nuovo Titolo V, Torino, 2001, 37 et seqq.

[55] Corte Cass., 10 dicembre 2002, n. 17564, in: Giur. cost., 2003, 459 et seqq.; on this deicision, see *A. Guazzarotti*, Niente di nuovo sul fronte comunitario? La Cassazione in esplorazione del nuovo Art. 117, comma 1, Cost., ivi, 467 et seqq.

[56] Corte Cass., 10 dicembre 2002, n. 17564, cit., 465.

mestic law in contrast to it, and hence governs the effects of this recognised primacy".[57]

But even if, for the same of argument, the Constitutional basis and the preceptive significance of the constraints must continue to be found in Art. 11 IC, and assuming that the contents of these constraints can only be clarified in terms of the Community law, and not domestic law,[58] it is still necessary to explain how the constitutional requirement – that legislation must be compliant with Community constraints – is to be linked to the substance of those constraints when the Community system and the TEC merely require the Community rule to 'prevail' over, and have 'direct effect' on domestic law.[59]

To put it another way, if the substance of the constraints is equivalent to respect for the supremacy and direct effect of Community law over domestic law there would be absolutely no sense in requiring the Central Government and Regional Governments to legislate in respect for the supremacy and direct effect of Community law because, save in cases where State law and regional law expressly refuted it, this legal consequence would automatically apply, precisely because it is authorised by Art. 11 IC, and precisely because it is simultaneously a provision of Community law.[60]

If the premise is correct, it should also be agreed that where the provisions of Art. 117(1) IC link respect for the constraints to an act of 'positive' exercise of legislative power, deems that the constraints have been respected only if the legislative activity of the State and the Region are *consistent* with Community law.[61] It

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57 Corte Cass., 10 dicembre 2002, n. 17564, cit., 466.

58 But see also the clarification *infra, sub* note 61.

59 Not to mention the opinion that Art. 117 would confirm, without in any way being innovative, relations between the domestic system and the Community system would ultimately appear to be contradictory, because the Constitutional Court has ultimately weakened the dualist approach it originally followed, by asking whether the act of non-application needed to be followed by action by the legislator or even replaced by a judgment unconstitutionality. Even if one wished to maintain that this provision merely confirms past practice, what it would confirm in this case would in fact be the most recent thinking! On the significance of the principles of the supremacy and direct effect of Community law see mostly recently, *A. La Pergola*, Il giudice costituzionale italiano di fronte al diritto comunitario: note su un incontro di studio, in: Giur. cost., 2003, 2419 et seqq.

60 But also if a law of the State or a Region contained a provision limiting the constraints, enacting provisions relating to the supremacy and direct effect of Community law, it should at all events be deemed a violation of Art. 11 of the Constitution (which authorises these effects) and should therefore be challenged before the Constitutional Court. Cf. also *A. La Pergola*, Il giudice costituzionale, cit., 2433.

61 It might be inferred from Art. 117 of the Constitution that requiring compliance with the constraints stemming from international obligations, the constitutional legislator did not intend to confer an automatic priority on the obligations to which the constraints refer over the law created by the Constitutional Charter. This conclusion is based on the circumstance that by providing that the legislative power of the State and the Regions

follows from this that any act inconsistent with it should therefore raise an issue on the *validity* of domestic law.

2. Cases tried by the ordinary courts

But this solution is not without its practical drawbacks, because it still remains to be seen how, and through which decision-making procedure, a domestic legal

must *also* be exercised in compliance with the Constitution, Art. 117(1) of the Constitution appears implicitly to exclude the possibility that international conventional law may have a greater effectiveness *per se* than the provisions of the Constitution; this would seem to imply that the constraints must be constitutionally lawful. This would also seem to fit in with the literal wording of Art. 138 of the Constitution, which seems to exclude the possibility of any other procedures for revising the Constitution except the ones indicated there, and the possibility of revising of the Constitution subject to the condition that it must be done in compliance with international obligations. Lastly, by providing that the authorisation for ratification *must* be granted by Statute where the international Treaty entails amending a Statute, Art. 80 of the Constitution *expressly* admits that the law of implementation is able to repeal an ordinary law and even a constitutional law (thereby enabling the provisions of the Treaty to govern areas reserved by the Constitution to a constitutional law) but *implicitly* excludes that, even if it takes the form of a constitutional law, it cannot amend the text of the Constitution. Having said that, however, one must conclude that in the event of a conflict between a provision of the Constitution and a provision of an international Treaty, the legislator wishing to comply with the obligations undertaken should first proceed to amend the Constitution where it conflicts with the international Treaty and subsequently enact an authorisation law (if necessary) implementing the Treaty (cf. at all events Art. 39(1) of the constitutional Bill approved by the House of Deputies on 15 October 2004 (AS 2544-B) deleting the reference in Art. 117 of the Constitution to constraints stemming from international obligations). The reasoning does not seem to change if it refers to constraints stemming from Community law. In this case, too, if the substance of the constraints, following a decision adopted when treaties are being revised, introduces qualitative changes and raises the problem of the invalidity of national law, it would be necessary, beforehand, to change the Constitution (notwithstanding that in this case the extreme limit of this action would continue to fall under the so-called "supreme principles"); as this shows, this case is totally different from the one considered in the text, which states that the remedy for invalidity applies not to the substance of the constraints (which are still limited to the supremacy and direct effect of Community law) but rather to a constitutional decision adopted freely by the Italian State. For these reasons, then, it seems that the opinion of *A. Celotto*, Legittimità costituzionale, cit., 61, note 46, is wrong, where he maintains that domestic law consistent with the Constitution but inconsistent with Community law, is at all events unconstitutional; whereas if it is inconsistent with the Constitution but consistent with Community law, it becomes constitutional at all events! And that in matters falling within the sphere of Community competence, the problem of the constitutional legitimacy of national law is subsumed into the problem of Community legitimacy.

provision can be declared invalid in the grounds of non-compliance with the provisions of Art. 117 IC.

To approach this problem properly, a preliminary distinction must be drawn between the case of a conflict emerging in the course of a trial before an ordinary court, and a conflict arising in the course of a dispute between Central Government and Regional Governments. In the first instance there are three theoretically possible avenues:

(a) First approach

If the court rules that there is a clash between the domestic provision and a Community provision directly applicable to the case before it, invalidity might be resolved by referral to the constitutional Court. A solution of this kind would appear to be perfectly consistent with a constitutional system in which the examination of constitutionality has to be referred to a court specifically established for the purpose of ruling on the *validity* of a statute enacted by Parliament or by a Region. However, as has already been properly pointed out, restoring the system of the centralised control of constitutionality would *ipso facto* violate a Community commitment that has been rationalised for a long time by firmly consolidated Community case law, of which the Italian constitutional Court has recognised normative power, which Art. 117(1) IC now confirms to be *quodammodo* 'paraconstitutional'.[62] That is to say that the reason why this solution is impracticable lies in the fact that if the substance of the constraints stemming from the Community system consists precisely in the obligation to primarily respect the paramount nature of Community law and hence the jurisprudence of the ECJ, which logically implies that Community law is to be directly and immediately applied by the ordinary national courts when it is structurally able to be applied,[63] it is evident that the courts cannot delay the application of any such provision by referring the question to the constitutional Court, which would probably frustrate a legal right which Community law vests directly in the individual. This, it should be noted, is not so much by virtue of the provisions of Art. 117(1) IC which only examines the legislative power of Central Government and the Regional Governments, and hence does not address the diverse issue of observance of constraints by the ordinary courts of law but rather – as the Court of Cassation has (at least in this respect) emphasised – because of the conflict that would arise with Art. 11 IC. For, despite the reform introduced by the 2001 constitutional law, Art. 11 IC continues

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62 *A. Ruggeri*, "Tradizioni costituzionali comuni" e "controlimiti" tra teoria delle fonti e teoria dell'interpretazione, in: "Itinerari" di una ricerca sul sistema delle fonti, VI, 2, Torino, 2003, 36.

63 Cf. Corte giust., 5 febbraio 1963, causa 26/62, *Van Gend & Loos c. Amministrazione olandese delle imposte* [1963] ECR I-3 et seqq.; Corte giust., 15 luglio 1964, causa 6/64, *Flaminio Costa c. E.N.E.L.* [1964] ECR I-1141 et seqq.; Corte giust., 9 marzo 1978, causa 106/77, *Amministrazione delle finanze dello Stato c. SpA Simmenthal* [1978] ECR I-629 et seqq.

to be the parameter to be used for legitimising Italy's participation in the process of European integration, which makes it possible for the implementation law to take over the constraints imposed by Community law and hence also the obligation to unconditionally enforce Community acts and the construction placed on them given by the ECJ.

(b) Second approach

One might therefore think that by virtue of being obliged to comply with the provisions of Community law under Art. 11 of the Italian Constitution, the ordinary courts of law are required to immediately enforce the Community law provision while simultaneously raising the question of the constitutionality of the domestic provision before the constitutional Court for a ruling on the issue of its inconsistency with Art. 117 of the Italian Constitution, arguing that the remedy of "non-application" is not in itself a sufficiently complete way of complying with the provision of the Constitution, which now seems to consider compliance with European law to be a constitutional formality requiring verification in terms of the validity of a legislative act of the Central Government or a Regional Government. But this solution would give rise to a number of blatant contradictions,[64] not so much because, were the Court to declare that the question could not be entertained, demonstrating that the legislative power has been exercised in compliance with Community constraints, both solutions would appear – though only appear – to be in open conflict,[65] but rather because once the ordinary court had implemented the community provision, and hence closed the case in progress, if it were then to refer the question to the constitutional Court, the latter would declare it to be inadmissible on the grounds of irrelevance[66] (if not manifestly inadmissible, because with the judgement already handed down the whole question would have been raised outside the context of a case).[67]

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[64] This is a partial modification of the writer's earlier conclusione in *E. Di Salvatore*, Rome Capitale e l'Europa, in: L'ordinamento di Rome Capitale, Napoli, 2003, 113 et seqq., 121.

[65] Such a case would refer the problem to the previous remedy of "non-application", because even though the domestic legal provision may have successfully passed through the Constitutional Court it could still not be applied if it were inconsistent with Community law.

[66] Art. 23(2) of Law 87 of 11 March 1953: "If the case cannot be tried without first resolving the question of constitutionality..."

[67] Art. 23(1) of Law 87 of 11 March 1953: "In the course of a judicial proceeding, any party to the case or the Public Prosecutor ("Pubblico ministero") may enter a plea of unconstitutionality..."

(c) Third approach

Having discarded (a) and (b), it is logical to suppose that the problem has to be resolved by disapplying the domestic legal provisions deemed to be constitutionally unlawful. In this case – even though its effects are similar to those that would be obtained by the "non-application" of the domestic law – what changes in reality is the *ratio* of the remedy. For as occurs in legal systems where the control of constitutionality is diffused,[68] the remedy here would be intended to ascertain that the legal domestic provision is in conflict not with Community law but with Art. 117(1) IC, and this would be sufficient for it to be disapplied. It is obvious that the *ratio* of this measure ultimately resides in a different and more clear-cut perspective.[69] By removing past ambiguities in one fell swoop it ultimately regains ground precisely in terms of the dualistic nature of relations between the two systems: the domestic legislative act in that case would be disapplied, not because that is what Community law requires, but because that is what the Italian Constitution demands.[70]

3. Constitutionality cases brought by the Central and Regional Governments

The second of the cases mentioned earlier is the possibility open to the Central Government (but not a Regional Government) to institute proceedings before the constitutional Court against a Region deemed to be in breach of Community obligations.

However, a solution of this type would seem to be *prima facie* prevented by Art. 127 IC, as reframed following the constitutional reform of Title V, which has placed Central Government and the Regional Governments on a totally equal footing,[71] consequently restricting recourse by the Central Government against a re-

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[68] Deeming the "non-application" remedy to be equivalent to a diffuse judgment of constitutionality, see *F. Sorrentino*, Le fonti del diritto, rist. agg., Genova, 1992, 111; on the same issue see also *A. Celotto*, Legittimità costituzionale, cit., 60.

[69] On the ambiguities in the approach adopted by the Court, see recently, *A. Celotto*, Legittimità costituzionale, cit., 58 et seqq.

[70] On this point it must be assumed, therefore, that the "constitutional decision" taken up in Art. 117(1) of the Italian Constitution authorises a derogation of the system of control performed by the Constitutional Court on the basis of the provisions of Art. 134 of the Italian Constitution: "The Constitutional Court shall pass judgment on controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions."

[71] Under the previous version of Art. 127 of the Italian Constitution, the Constitutional Court ruled that, unlike the Regional Governments, the Central Government could challenge a regional law on the basis of any constitutional criterion; this thinking was based on the different expressions used by Art. 127(3) of the Italian Constitution (excess of powers) and Art. 2(1) of Constitutional Law 1 of 1948 (encroachment of powers).

gional law deemed to *exceed* the competence of the Region and recourse by the Region only when a Central Government legislative act *encroaches* on the sphere of Regional competence. This would therefore make it inadmissible for any challenge to be mounted by the Central Government against a Regional law violating Community obligations, because it would have no direct interest in doing so.

But, as the constitutional Court has recently ruled, in the new constitutional order resulting from the reform, the Central Government always holds a peculiar position in the general order of the Republic, which may be inferred not only from the proclamation of the principle enshrined in Art. 5 IC but also from the reiteration of reference to a single authority, manifested by the demand to respect the Constitution, and the constraints deriving from the Community system and international obligations as limitations on all law-making powers (Art. 117(1)) and by the recognition of the need to protect the legal and economic unity of the constitutional order (Art. 120(2), such that "even after the reform, Central Government can challenge a regional law directly on the ground that any constitutional parameter has been violated".[72]

If this approach is accepted – and bearing in mind the provisions of the present Art. 117(5) IC vesting the State with powers to deputise for the Regions and the Provinces of Trent and Bolzano in the event of breach by them, namely, whenever they fail to implement or enforce the acts of the European Union in matters falling within their competence[73] – it is clear that this problem has to be approached differently, and must be resolved by saying that if a Regional Government violates Community obligations the Central Government has a two-fold duty:[74] if the Regional Government fails to act in order to implement Community law, the Central Government is required to act in its stead by issuing its own legislative act. For since it is wholly irrelevant as far as Community law is concerned how the competences are distributed domestically,[75] any failure on the part of the Central Government to take action in such cases would render it liable with respect to the Union. But also if a Regional Government takes action, but exercises its legislative power inconsistently with what is required by Community legislation, the Central

[72] Corte cost., 24 July 2003, n. 274, in: Giur. cost., 2003, 2238 et seqq., 2249 et seqq., with notes by *A. Anzon*, *G. Gemma* e *R. Dickmann*.

[73] For further detailed considerations on this matter, see *G. U. Rescigno*, Attuazione regionale delle direttive comunitarie e potere sostitutivo dello Stato, in: Le Regioni, 2002, 729; most recently also *A.M. Nico*, Le direttive comunitarie tra Corte costituzionale e giudice comune, in RIDPC, 2004, 1 et seqq.

[74] From this point of view, it is wholly irrelevant whether a Regional Government fails to act by a given deadline set by a Community directive (breach by omission) or complies by the deadline but does so wholly inconsistently with the prescribed measure (breach by commission). For both are instances of breaches, because the constitutional obligation is only meaningful if referred to the prescriptions of Community law.

[75] See, for example, Corte giust., 12 giugno 1990, causa C-8/88, *Germania c. Commissione* [1990] ECR I-2321 et seqq.; most recently see also Corte giust., 8 novembre 2001, causa C-143/99, *Adria – Wien Pipeline GmbH e Wietersdofer & Peggauer Zementwerke GmbH c. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365 et seqq.

Government is required to challenge the Regional legislative act before the constitutional Court, requesting the Court to judge it on constitutional grounds.

In other words, in either instance the Central Government would not be acting to protect its own powers but, as a distinguished legal writer has said, *to protect the overall legal system*: in other words, to safeguard an objective public interest and perform a function which might be adequately defined as an 'oversight' function.[76]

IV. The supremacy of European law and the Constitutions of the Member States

For the first time in the history of the process of European integration the principle of the supremacy of European law has now been codified in the Treaty establishing a Constitution for Europe. According to Art. I-6 of the Constitution, the prevalence prescription refers both to the Constitution and to the laws adopted by the institutions of the Union, that is to say, any legal act which is intrinsically mandatory and binding, and which is issued in the exercise of the competences of the Union.

It is already widely held in the literature that the supremacy clause that has been incorporated into the TEC creates similar effects to those produced by the supremacy clauses in federal systems, and that the prescriptive provision relating to it, in the case of conflict between European law and domestic law, would therefore directly determine the invalidity of the domestic law provision.

But as this paper has tried to show, this argument does not seem to be entirely convincing, because at the present time – and in the absence of a future ruling to the contrary which will lead Community practice and case law to adopt interpretations based on effectiveness criteria – it does not yet seem to be convincingly grounded on a literal, and above all a teleological-systematic, interpretation of the Constitution.[77]

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[76] *V. Crisafulli*, Lezioni di diritto costituzionale, II, 2, Padova, 1984, 307 et seqq., 308, who reaches more or less the same conclusions that have become established in constitutional case law without, however, giving any decisive value to the different language used in Art. 127(3) of the Italian Constitution and Art. 2(1) of Constitutional Law 1 of 1948 (see also below note 70); furthermore, according to this writer, for the Central Government, the 'right' to refer to the Constitutional Court and the 'interest' to do so are identical, since the Central Government is legitimised to challenge any Regional laws, ... and *is presumed to have a legitimate interest in doing so under all circumstances* (p. 309).

[77] When construing European law, the teleological-systematic criterion takes precedence over all other available criteria, because even after the entry into force of the Constitution, and with very few exceptions (for example the sector of fundamental rights) the Union order seems once again to be structured in order to attain specific objectives. The detailed provisions of European law therefore require constant verification and clarifi-

The preferred opinion, conversely, would seem to be that, by rationalising what is already known and effective in Community law, the clause set out in Art. I-6 TEC once again merely requires any conflict between European law and the domestic law to be settled by the usual remedy of the "non-application" of domestic law, since the fate of the non-applied state law is wholly irrelevant.

This conclusion – namely, that for the time being, any other solution would depend solely on a constitutional decision by the Member State – is perfectly consistent with the state of progress in the process of European integration which, despite all, is still run through by an underlying unresolved ambiguity.

For on the one hand, despite the greater degree of autonomy of the constitutional systems of the Member States that the European legal system has acquired across the years, "European constitutional law" does not yet seem to be entirely mature and in a condition to overrule national law, overcoming the dualism that has characterised relations between these two tiers of law since the beginning.[78]

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cation in the light of the principles governing the whole structure of the Union and which underpin its work; on this issue see also *M. Zuleeg*, Die Auslegung des Europäischen Gemeinschaftsrechts, in: EuR, 1969, 97 et seqq.; *J. Anweiler*, Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften, Frankfurt a. M., 1997; *S. Grundmann*, Die Auslegung des Gemeinschaftsrechts durch den Europäischen Gerichtshof: Zugleich eine Rechtsvergleichende Studie zur Auslegung im Völkerrecht und im Gemeinschaftsrecht, Kostanz, 1997 and *E. Di Salvatore*, Principio di non discriminazione, diritto comunitario e Carta dei diritti fondamentali dell'UE, in: TDS, 2002, 91 et seqq., 96, note 21.

78 The signing of the Treaty establishing a Constitution for Europe allowed the debate on the existence of a European Constitution, that is the debate on the necessity of providing Europe with a Constitutional text, to change into an investigation on the nature of the act. Besides from the different solutions which have been identified, the impression which can be deduced is, though, that the scientific comparison moves from the same assumption: the term *Constitution* brings along an historically given concept of *Constitution*, in other words that between the notion of *constitutionalism* and of *Constitution* does exist a cause and effect relationship (see, for instance, *M. Dogliani*, Può la Costituzione europea essere una Costituzione in senso moderno?, in www.costituzionalismo.it: "This approach is obviously polemic with those who consider the inapplicability of the categories of classic constitutionalism to the European events"). The debate which is taking place in the literature, in fact, is led with the intent of verifying the applicability or not to the "European Constitution" of the historically achieved results of *constitutionalism*, that is to say, of the juridical categories and concepts which constituted the historical and juridical paradigm of national Constitutions (see, as an example, *D. Grimm*, Trattato o Costituzione?, in Quad. Cost., 2004, 163 et seqq., who holds that a Constitution must meet at least five requirements which are: 1) it has to be "a complex of juridical norms"; 2) it should discipline "the basis and the exercise of the political power/domain"; 3) it should "pose itself at the top of the hierarchy of the sources of law"; 4) it should "discipline public powers organically"; 5) it should "come from the community, either the people or the society or the nation, which constitutes a political entity". The author concludes that, "in the light of this approach, the Draft Treaty estab-

On the other hand, however, the phased-in construction of the European system has gradually affected the internal structures of the Member States by creating a boomerang effect in relation to the law originally underlying the European unification process, thereby setting in motion a process of continual change in the national Constitutions,[79] drawing them gradually closer together.[80]

lishing a Constitution for Europe meets all the requirements but the last one", because "the Convention was not elected by the citizens of the Union. They did not have any role in the process. The latter cannot be led back to them". In the same order of thought, see *M. Fioravanti*, Il processo costituente europeo, in Quad. Fior., 2002, 273 et seqq., who thinks that one could talk about a European constituent process and a European Constitution only if two conditions are met, that are "popular means of ratification of the Member States and the breach of the unanimity rule"). A perspective which can be considered more adherent to reality should take into account: 1) that the abovementioned relationship is historically mediated by the role of national Constitutions, 2) that the European integration process has well developed, in the course of time, its own "constitutionalism", elaborating peculiar juridical categories and concepts which cannot be easily reconciled with the usual patterns and schemes of national constitutional law or international law.

79 On the notion of "*Wandelverfassung*" regarding relations between State constitutional law and the "European Constitution" see the remarks by *H.P. Ipsen*, Europäische Verfassung – Nationale Verfassung, in EuR, 195 et seqq.

80 With regard to the circular process of the production-reception of European law which ensures communications between the individual national systems, see *P. Häberle*, Problemi attuali del federalismo tedesco, in: *A. D'Atena* (ed.), Federalismo e regionalismo in Italia, Milan, 1994, 107 et seq, 112.

European Financial regulation

Bernhard Friedmann

Financial regulation is an integral component of the constitutions of modern democracies. As yet, the EU does not have a constitution; all it has is the Treaty on the European Union (TEU), a type of basic treaty. The normative legislation applicable to EU finances in the broadest sense has developed over the course of almost 50 years out of interinstitutional agreements concluded between the bodies of the EU (*soft law*) and is very difficult for outsiders to understand. Therefore, it would seem obvious to see the creation of a European Constitution as an incentive to develop a modern, comprehensible financial regulation for integration in the Constitution. From an objective point of view, the draft Constitution for Europe is anyway an economic constitution. Essentially, it is the successor to the EC-Treaty, which in turn evolved from the 1957 Treaty establishing the European Economic Community. The Constitutional Treaty is also devoted virtually exclusively to economic matters. It is extremely unfortunate that the Growth and Stability Pact, the importance of which is increasing daily, has not been incorporated therein. The Charter of Fundamental Rights, which has been incorporated, has virtually no binding effects, and the provisions concerning non-economic matters, such as for example a Common Foreign and Security Policy, are really little more than non-binding declarations of intent.

The financial regulation should in particular regulate the following:

- the future financing of the EU (pattern of revenue),
- the future spending of the EU (pattern of expenditure),
- the responsibilities for the establishment of the revenue and/or expenditure,
- the rules applicable to the budgetary procedure,
- the methods and responsibility for financial control and approval.

I. The current financing of the EU

In the 2002 financial year, the finances of the EU were derived from:

- agricultural levies (approximately 2 %),
- customs duties under the Common Customs Tariff (approximately 14 %),
- a share (from 2004 = 0.5 %) of the so-called adjusted VAT base (VAT component) (approximately 28 %),
- a sum resulting from the application of a rate to be specified during the annual budgetary procedure to the total amount of the gross national product (calculated uniformly according to Community rules) (GNP component) (approximately 56 %).

Agricultural levies and customs duties are the traditional own resources of the European Communities. Their significance in the financing of the budget of the EC has declined greatly. Although the VAT component and the GNP component are often also referred to as own resources of the EC, they are more correctly national contributions. As far as income is concerned, recent years have seen a pronounced change of emphasis away from the VAT component in favour of the GNP component. This is considered to be more equitable because the wealth of a nation is best reflected by its GNP. The total of all revenues must not exceed 1.27% of the Union's GNP, i.e. a ceiling has been set.[1] This leeway has never been used to the full so far. Even the imminent eastward enlargement will require no more than 1.09% (although it should be borne in mind that 1/10% accounts for approximately 10 billion euro!). The EU budget must not, even partially, be financed from debts. Any attempts in this direction, such as, for example, happened when *Jacques Delors* was the President of the Commission, have always been blocked by the Member States.

At the time, the Italian Minister for Finance, *Guilio Tremonti*, proposed to finance large infrastructure projects, such as the construction of a bridge from the Italian mainland to Sicily across the Straits of Messina, with credit from the European Investment Bank (EIB). This credit was to be given to private corporations that were expressly founded to carry out these construction projects. Therefore, the credit would not be a burden on either the budget of the European Communities or the budgets of the Member States and, superficially at least, nor would it affect the Growth and Stability Pact. Nevertheless, *Tremonti's* proposal did not arouse any great enthusiasm in the other Member States (see the Thessaloniki Summit). For example, it is highly conceivable that the EIB would have demanded safety guarantees to the detriment of the budgets of the EU or the Member States. In addition, the EIB's share capital would have had to be increased at the expense of its shareholders – and these are primarily the Member States of the EU.

Whenever the EU is active on the capital market nowadays, this generally takes the form of the issuance of bonds for refinancing loans which it passes on to Member States at the favourable conditions granted to it.

As yet, there is no such thing as a European tax. The faults with this system are as follows:

1. it is exclusively expenditure-oriented: expenditure is determined first and then the revenues raised accordingly. The GNP component is conceived as a pure residual amount to close the gap between the sum total of the other categories of income and the previously settled expenditure. This is hardly an incentive for the efficient employment of means.
2. the European Parliament has no influence on the income for the budget. Therefore, it does not have the option of taking political action as the national parliaments do within the scope of their fiscal policies.

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[1] Council decision of 29 September 2000, OJL 253/7. This decision sets the upper limit for our resources at 1.27% of the Union's GNP (1.24% according to the new system of calculating economic resources).

3. regarding the expenditure from the EC budget, the European Parliament only has the final say in the case of non-compulsory expenditure. On the other hand, the Council has the final decision regarding compulsory expenditure, which includes, for example, agricultural expenditure, which on its own accounts for almost half the total expenditure.
4. the system is not transparent to citizens and taxpayers. Neither the members of the European Parliament nor the national parliaments are held accountable to the public.

II. Future financing

The Convention's "Own Resources" Discussion Circle dealt with the question as to whether and to what degree it will be possible to further develop the own resources system. Opinions on the subject differed:

Some members of the Circle spoke out in favour of converting the Union system into a tax revenue system. European taxes would make it easier to secure the stability and transparency of the system, but should not, under any circumstances mean an increase in the overall tax burden borne by taxpayers. However, the circle was split regarding whether the introduction of own resources from taxes would need to be provided for in the Constitution. Some argued that traditional own resources (levies and taxes) and the VAT resource are also fiscal in nature and these are not mentioned in the Constitution. Others consider the current own resources system to be sufficiently fair and sound and some member argued that the GNP resource should play an even greater role in the system. Overall, the Discussion Circle came to the conclusion that the current legal base allows the creation of new resources, including fiscal resources.[2]

Article I - 54 of the Treaty establishing a Constitution for Europe provides as follows:

(1) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

(2) Without prejudice to other revenue, the Union's budget shall be financed wholly from its own resources.

(3) A European law of the Council shall lay down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. The Council shall act unanimously after consulting the European Parliament.That law shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

(4) A European law of the Council shall lay down implementing measures of the Union's own resources system insofar as this is provided for in the European

[2] Cf. final report of the Discussion Circle "Own Resources" of 08/05/2003, CONV 730/03, Cercle III 7, pp. 6/7.

law adopted on the basis of paragraph 3. The Council shall act after obtaining the consent of the European Parliament.

Consequently, this means that:

1. in future, the Union budget will still be financed exclusively from its own resources; loan financing is not envisaged.
2. new categories of resources, for example European taxes, may be established and existing categories abolished by unanimous decision of the Council. However, the expression "European tax" is not explicitly used.
3. the ratio of the resources (e.g. the proportion of the VAT or GNP component) may be changed by a majority decision of the Council and therefore against the will of one of the Member States affected. If the GNP component were to play a greater role, one or other of the so-called richer Member States could, against its expressed will, be more greatly encumbered than previously. It is not conceivable that this situation will remain.

III. Future structure of expenditure

The expenditure side of the EU budget is essentially geared towards the EU's policy sectors. This will not change in future. New evaluations of particular policies, such as, for example, the agricultural and structural policy, in connection with the eastward enlargement of the EU, will still not veer from this principle.

There will be a certain modification as a result of the increasing significance of the Common Foreign, Security and Defence Policy (CFSDP). Although this policy sector is assigned to intergovernmental cooperation, Article 28 (2) and (3) TEU as well as Article III-313 TEC already contain concrete specifications. This states that administrative expenditure entailed by the institutions under the terms of the CFSDP will be charged to the Union budget. This also applies to operate expenditure unless it is related to military or defence policies or cases where the council unanimously decides otherwise (Art. III-313.2.1 TEC). In cases where expenditure is not charged to the Union budget, it will be divided among the Member States in accordance with the GNP scale (Art. III-313.2.2 TEC).

However, it has been found that from time to time the CFSDP necessitates emergency financing that is not possible or too complicated using the normal procedure. Therefore, a special budget item will be created for this (Art. III-313.3 TEC).

A "start-up" fund with contributions from the Member States will be established for operations with military or defence implications that cannot be financed from the Union budget. The authority to draw on and administer the fund will be transferred to the Minister of Foreign Affairs, whose office has still to be created (Art. III-313.3.2 and 3 TEC).

It appears that it still remains to be clarified who will bear the costs of the European rapid reaction force currently deployed (62,000 troops) on peacekeeping and peace-enforcing missions.

IV. Improving the budget procedure

The responsibility of the Parliament and Council for the Union budget – and they will continue to make up the so-called budgetary authority in future – is expressly mentioned in the new Constitution, although the wording is different. For example, it states in

Article I - 20(1): "The European Parliament shall, jointly with the Council, *exercise legislative and budgetary functions* ..."

and in

Article I - 23(1): "The Council shall, jointly with the European Parliament, *exercise legislative and budgetary functions.*"

Both passages are primarily of a declaratory nature.

Important changes or improvements:

1. Financial perspective

This is currently the subject of an interinstitutional agreement. Since its establishment in 1988, it has made an essential contribution to the stability and observance of budgetary discipline. However, it does not have any legal force, although the institutions concerned (Parliament, Council, Commission) comply with it to a large extent. It has now been incorporated in the Constitution under the heading "Multiannual Financial Framework" (Art. I - 55, III - 402) and hence acquired legal force. It will have to cover a period of at least five years. The multiannual financial framework will specify ceilings for both commitment appropriations and payment appropriations for a limited number of categories. If no new financial framework is established before the end of the previous financial framework, the ceilings and other provisions corresponding to the last year will be extended (Art. III-402.4 TEC). The incorporation of the financial perspective in the Constitution as the "multiannual financial framework" represents a significant step forward. It introduces planning stability and perspectives. Article I-55.3 TEC expressly specifies that the Union's budget will be issued in compliance with the multiannual financial framework. It is crucial to note that this will not be extended annually like, for example, medium-term financial planning in Germany.

2. Right of legislative initiative for the budget

Up to now, the Council has based the draft version of budget on a preliminary draft provided by the Commission and presented it to the Parliament by 5 October at the latest. Now, the Commission will submit the draft instead of the Council (Art. III-404.2 TEC). Therefore, the initiative now lies with the Commission. This will enable the Commission to amend the draft budget even during the current procedure. It remains in charge of the procedure until the budget is adopted or, where applicable, it is necessary to convene a meeting of the Conciliation Committee. This will also shorten the budgetary procedure.

3. Shortening the budgetary procedure

Since the draft budget now has to be submitted to the European Parliament and to the Council by 1 September (Art. III-404.2.1 TEC), the time now available for the budget debates in Parliament is longer than a month. This is in compliance with a long-standing, justified request on the part of Parliament. However, it was necessary to ensure that the reports from the European Court of Auditors are available at the same time so that the conclusions therein may also be included in the budgetary debates. To this end, it was necessary to change the time-consuming debating procedure, which precedes the adoption of the Court of Auditors' reports, in the Budgetary Regulations.

4. Distinction between compulsory and non-compulsory expenditure abolished

This distinction will be abandoned since it is not based on unequivocal criteria and is one of the main reasons why the budget procedure is so complicated. The elimination of the distinction is substantially related to the incorporation of the financial framework in the Constitution and the basic principle according to which the budgetary authority and the Commission are obliged to ensure that the Union has at its disposal the financial resources needed to fulfil its legal obligations in respect of third parties. This is ultimately only a re-definition of the concept of legally compulsory expenditure. The decisive factor is that the abandonment of the distinction between compulsory and non-compulsory expenditure boils down to the reinforcement of the rights of the European Parliament. However, the consequences of this extension of the parliamentary rights will be limited since the Council will retain the whip hand with regard to budgeting.

5. Greater co-responsibility of the Member States in the implementation of the budget

The Commission always refutes any critical comments on the part of the European Court of Auditors regarding mistakes in the implementation of the budget with the argument that Member States had behaved incorrectly while it itself was blameless. Article III-407.1 TEC places greater emphasis on the co-responsibility of the Member States but without removing the Commission's own responsibility ("the Commission shall implement the budget *in cooperation with the Member States* ... on its own responsibility"). However, approval by the European Parliament still only applies to the Commission, but not to the Member States (Art. III-409 TEC).

6. Evaluation

Article III-408(2) TEC specifies that the Commission must submit to the Parliament an evaluation report "based on the results achieved, in particular in relation to the indications given by the European Parliament and the Council (of Ministers)". This should reinforce the democratic control of the implementation of the budget.

7. Meetings between the President of the European Parliament, the Council and the Commission

Article III-414 TEC specifies that in future regular meetings between the Presidents of the European Parliament, the Council of Ministers and the Commission shall be convened on the initiative of the Commission under the budgetary procedure. The purpose of these meetings is to promote the harmonisation and convergence of the institutions' positions. Although it is a matter of course, it can have a positive influence on the negotiating structure.

8. Budgetary regulations

According to Article I-56 TEC, the budgetary regulations, which have recently been subject to a thorough revision, will be adopted as a law even though they are still the subject of criticism.

V. Financial control

Internal financial control will remain the responsibility of the Commission in future. The decision as to whether this control will be performed by a central financial controller or decentrally in individual executive boards belonging to the Commission will be left to the authority of the Commission.

In future, the European Court of Auditors will continue to have the role of an independent external auditor. However, it will no longer have the status of a main institution such as the Parliament, Council, Council of Ministers, Commission and Court of Justice, but according to Article I - 31 TEC it will be assigned the status of one of "the other" Union institutions, like the ECB. Is it possible that the hidden motive behind this correction to the Maastricht Treaty is to repress the frequently onerous financial control?

Surprisingly, Article I - 31(3) TEC provides that Court of Auditors will consist of one national of each Member State. In the EU 25 it has already the same number of members as Member States, but the text of the Treaty does not make any reference to nationality. According to my professional experience, 25 members are too many for the smallest EU organ. If this will remain the case the organisation

of the Court of Auditors will have to be radically changed. With good cause, the competent Convention Discussion Circle has discussed a possible alternative, namely of abolishing the principle of "one member per Member State" in favour of the establishment of a steering committee.

In this context, as a former President of the European Court of Auditors, I would like to address a few words to the subject of the fight against fraud. The Union budget is primarily a subsidy budget. It is therefore highly susceptible to fraud. Whenever there is money to be handed out, the inventive power of the human mind springs into action. It is not intended to make any essential amendments to the content of the regulations relating to fraud exposure in the new financial regulation (Art. 280 TEU, Art. III-415 TEC). I regret this. Nevertheless, I have come to the conclusion that even on the basis of the existing regulations, Courts of Auditors should, and could, make more efficient contributions to the exposure of fraud. All this requires is for the texts of the laws to be interpreted more strictly in accordance with their intended purpose. In the case of the EU, for example, the financial impact of statistics is greater than it has ever been. For example, the GNP, i.e. a statistical parameter, is the decisive factor for determining the contributions to be paid by the Member States to the EU (GNP component) and for restructuring aid from the EU to the Member States. In addition, the GNP is important for calculating the convergence criteria within the framework of the monetary union. What could be more obvious than to cast a critical glance at the statistical offices or EuroStat? In addition, Courts of Auditors should make more effort than they have previously to double check whether the processes on which the payments are based are correct. Formal inspections of the bookkeeping operations are not sufficient. Even the most enormous frauds can be entered inconspicuously and correctly in the books!

On the recommendation of the Council, approval will remain the responsibility of the European Parliament in future. The Parliament will base its decision on "the invoice" and the newly introduced evaluation report from the Commission and above all on the annual report, the special-purpose reports and the statement of assurance (attestation) from the European Court of Auditors (Art. III-409.1 TEC). In future, the Parliament will also be able to request information from the Commission regarding the execution of expenditure or the operation of financial control systems in relation to the approval (Art. III-409.2 TEC). If used correctly, this right to information may prove to be an extremely efficient tool.

VI. Conclusion

For the foreseeable future, Europe will continue to be defined primarily by the economy. There is no cause to lament this. The reason that the history of EU is such a success story is due to the philosophy of economic integration on which it was based. To put it briefly, it is largely dependent upon competition.

From an economic point of view, integration may be achieved in two ways. If it is achieved through competition, it will develop from the actions of the citizens, who

are not controlled by a remote, anonymous European Headquarters. Competition is not only an economic system it is also a social system. Integration by intervention, on the other hand, is the exact opposite of this: namely an attempt to steer the unification process from above in accordance with collective objectives. The most obvious example of this is the Common Agricultural Policy. Its main tools, namely the organisation of the agricultural market and direct grants to increase production, verge on economic mischief; to all intents and purposes they bear the hallmarks of a planned economy. Interventions of this kind result in distribution disputes and impede integration.

The European financial regulation is also in the first instance a reflection of policy decisions. The financial regulation cannot bring about a change of policy on its own – but neither can it prevent one.

The EU as a federal commonwealth

Ulrich Fastenrath

After the closure of the debate in the European Convention the academic comments were primarily devoted to the question as to whether and to what degree Europe is a commonwealth. Less emphasis was placed on the federal aspect of the subject. This is no cause for surprise. If a federal commonwealth means "united in diversity", there is little need to worry unduly about diversity in Europe at the present time. It is fully safeguarded under the EU- and EC-Treaties and this will remain the case after the entry into force of the Treaty establishing a Constitution for Europe, for example: Article 6 (3) of the TEU which guarantees respect for the national identities of the EU Member States is incorporated in an expanded form with reference to respect for political and constitutional structures and state functions maintaining law and order and safeguarding national security in Article I-5 (1) TEC; the conventional principles of conferred powers (Art. 5 TEU, Art. 5.1 EC-Treaty) and subsidiarity (Art. 2.2 TEU, Art. 5.2 EC-Treaty) have been incorporated in a prominent position in the Treaty establishing a Constitution for Europe (Art. I-11.1); in addition, the principle of subsidiarity is better safeguarded in a procedural manner by the "Protocol on the Application of the Principles of Subsidiarity and Proportionality" through timely notification of and a right of action for national parliaments.

Therefore, the question regarding the degree to which the Treaty establishing a Constitution for Europe will establish a European commonwealth is more pressing. *Streinz* attempts to answer this question in a largely historical and abstract way in his paper taking the form of a general analysis of the concept of a constitution and the significance of constitutions for integration. However, he also looks at details worthy of note.

I should like to concentrate on how the constitution derives its legitimacy. The first thing to strike me is the use of terminology. While Part I only ever refers to a "Constitution", Part IV, "General and Final Provisions", refers to a "Treaty establishing a Constitution". Although the latter term is undoubtedly correct from a legalistic viewpoint, it lacks the overriding political intention expressed in Part I. Although there is no attempt to deny that the intergovernmental treaty is the source of the legitimacy of the EU, first and foremost its legitimacy has a different origin, which may be traced back to the citizens of Europe. It was on their behalf that the Convention prepared this Constitution (sixth sentence of the preamble) and the establishment of the European Union by the Constitution "reflects the will of the citizens ... to build a common future" (Art. I-1.1 TEC). This should not be understood as a statement of fact and, if it were, it would definitely be false because the citizens of Europe have hardly been aware of the activity of the Convention, hidden as it is behind by an exclusive group of experts and politicians, let alone developed the will to build a common future. However, legitimacy is based

not on facts, but on assignments that give rise to acceptance; so, in the end, it is nothing more than an assumption. Since it also derives its legitimacy from the citizens of Europe, the Treaty establishing a Constitution for Europe is in part an attempt to overcome the division of Europe into states and to create a community cutting across state boundaries. The intention is not to create a European people and in this way clear the way for the establishment of a federal European state. The Treaty restricts itself to an attempt to reduce the significance of peoples' perception of nationality and the significance of the states with their reciprocal demarcations by specifically targeting an amorphous mass of people that does not have its own distinct identity.

Similarly, the European Parliament should no longer be viewed as an assembly of representatives of the peoples of the EU Member States (as in Art. 189 EC-Treaty). Instead, it should be composed of representatives of the Union's citizens who elect the Parliament (Art. I-20.2 TEC). It is logical that, in contrast to the draft version of the Constitution, which still refers to "European citizens", the term used at this point is the "Union's citizens", since the active and passive right to elect a representative to the EP is one of the identifying features of citizenship of the Union (Art. 19.2 EC-Treaty, Art. I-10.2 lit. b TEC). However, this could give rise to associations with a (non-existent and unwanted) concept of a Union nation. After all, the concept of Union citizenship introduced with the Maastrich Treaty suggests more than it can deliver. This does not mean a uniform civic society in Europe, it does not endow equal civic status in all Member States; it is rather that, now and henceforth, citizenship of the Union automatically brought about by nationality of a Member State (Article I-10.1 TEC) will only confer individual rights, in particular the right of residence, the right to vote in municipal elections in the place of residence and the right to vote in elections to the European Parliament; in individual cases, it also establishes the basic right of citizenship of the Union. However, the term also has a clear political significance overriding its legal content.

I should also like to refer to a second point that is raised in *Streinz's* paper: Citizens' identification with the EU. This is made easier by the symbols and people representing the EU. In this context, a constitutional charter summarised in a book would probably be better able to establish an identity than numerous obscure treaties. It will be easier for the EU to have a President who is not simultaneously a head of state or government of a Member State (Art. I-22 TEC), and a Minister for Foreign Affairs who is not simultaneously a minister for foreign affairs in a Member State (Art. I-28 TEC). These office bearers will make Europe identifiable as a unit. A similar effect is achieved by the common currency, which is now in use in twelve Member States and is not only responsible for the simplification of practicalities and significant cost savings, but also means that we no longer feel as though we are going abroad when we visit another Member State.

However, as far as I am concerned, the problems with identification are not solely a matter of symbols of unity which evoke an emotive response in the citizens. EU law also provides a common framework of action for all citizens and hence a point of identification, as *Lepsius* explains. However, we cannot and must not leave the formulation of this framework of action, which has for a long time

no longer been restricted to the economic sphere but now encompasses social and environmental aspects and numerous other areas, to the experts alone. In a democratic commonwealth, citizens are not simply presented with a framework for action, they are assigned responsibility for its formulation.

Ridola deals with the democratic formulation of the commonwealth on the basis of the Constitution in his paper. He stresses that the European Parliament cannot be compared with national parliaments. It has no opposition or governing majority; decision-making in the EU tends rather to follow a bureaucratic, consensual model than a democratic model. It is no wonder that the turnout for elections to the European Parliament is so low, because the elections do not actually decide anything or at least anything that can be identified by the citizens. The parties and their candidates do not stand with electoral manifestos let alone pan-European manifestos coordinated between parties with similar ideologies and hence have virtually no chance of contributing to the formation of a European political awareness and to the expression of a European will, as they are required to under Article 191 EC-Treaty and Article I-46 (4) TEC. This situation may improve if the main political groupings put up one European front runner candidate cutting across state boundaries in future elections. The Council of Europe will then have no choice but to propose to the European Parliament the leader of the successful party alliance as a candidate for the post of President of the Commission pursuant to Article I-27 (1) TEC. It could even be the case that the same person would also be nominated for the post of the European Council President, which is quite feasible pursuant to Article I-22 TEC (the concept of "wearing two hats").

However, this would then give rise to the risk to which *Lepsius* refers: the citizens have increased expectations of the President of the Commission, but the President is unable to meet these for two reasons. On the one hand, the Member States have to have an influential voice in political decisions through the Council of Ministers, but on the other, and for me this is more important and is my third point, the EU is not competent to provide the commonwealth constituted under European law with a democratic existence. Since its powers are restricted by the principle of subsidiarity and frequently limited to inter-state relationships and complicated problems relating to the harmonisation of laws, European secondary legislation remains so detailed that the citizens pay hardly any attention to it. According to Article I-13 TEC, the fields in which the Union has exclusive competence in political discussions are rather marginal. In the areas of shared competence according to Article I-14 TEC and in the areas of coordinated policies and complementary action (Art. I-15, 17 TEC), the demarcations of political competence will tend to remain blurred.

As *Friedmann* points out in his paper, political decision-makers do not even have any genuine financial accountability at EU level that could result in their being voted out office in the case of frivolous use of tax revenue. However, as long as no important policy decisions are taken in the EU and in the European Parliament, there will be no transnational political discourse and front runner candidates will stand for nothing (or at least nothing important). Europe will implode unless it is given responsibilities that motivate the citizens. This will require the abandonment of the final competence structure which is aimed at the

establishment of the internal market and of the principle of subsidiarity as a restriction on the exercise of competences so that the EU assumes responsibility within clearly wide-ranging fields of legislation, for example in the fields of residency rights, company law, employment law, commercial law and liability law and, together with a wide range of economic instruments, for the economic development of Europe and the consequences of competition in the internal market. By way of balance, the EU's competences will have to be greatly curtailed and the subjects in question fully surrendered to the Member States for exclusive regulation. Naturally, the Member States will have to be subject to a sort of general clause restricting the exercise of competences to avoid any disruptions to the internal market: on the model of the directly effective rules concerning basic freedoms under Community law, "conflicting" national law would have to be declared inapplicable.

If we want to see a democratic Europe, not only the EU must be empowered, but the nature of the power with which it is endowed must be of relevance and interest to the people. This is applicable not only with reference to the electorate but also equally to the political players. The powers of the EU must incite the best politicians in Europe to fight for their principles on the European stage in front of a European public in a public exchange of views – and not to see themselves in the national arena as the representatives of the interests of their own states and give preference to backroom negotiations in order to secure national advantages and avoid having to capitulate under pressure.

Therefore, the allocation of competences should be considered to be the most important problem facing a federation and is proposed as a bridge to the federal aspect of our subject as I outlined in brief at the beginning. We in Germany have accustomed ourselves to discussing the subject primarily from the perspective of the Member States and the safeguarding of their autonomy. However, it is easy to overlook the fact that the federal integration of the Member States will have to be given a political entity. A technocratic juggernaut which, with its frequently very selective and therefore "difficult to politicise" measures and its not insignificant but poorly transparent use of funds, permeates virtually all spheres of politics and hence deprives the Member States of any scope for political manoeuvre and, with its objective of obtaining free competition in an internal market without internal frontiers (Art. I-3.2, III-130 TEC), burdens the Member States with significant follow-on costs, for example in the social sphere, cannot be deemed acceptable in the long run. If the EU is to survive, it requires an injection of democracy with terms of reference, which can be discussed in detail without all too soon coming up against the boundaries of the field of competence in question, within which pan-European public opinion can be formed and within which it is accountable to the European public with regard to the fulfilment of its tasks.[1]

[1] See in this regard *Ulrich Fastenrath*, Struktur der erweiterten Europäischen Union, in: *U. Everling* (ed.), Von der Europäischen Gemeinschaft zur Europäischen Union, Europarecht, Supplement 1/1994, pp. 101, 114-120.

The parliamentarisation of the institutional structure of the European Union between representative democracy and participatory democracy

Paolo Ridola

I. The "democratic life of the Union" and the problem of democracy in the post-national political organisations

Title VI of the first part of the Treaty Establishing a Constitution for Europe (TEC) dedicated to "The democratic life of the Union" addresses that much debated question of the democratic legitimation of the institutional structure of the EU, setting it in the framework of the dialectic between the principle of representative democracy (Art. I-46) and the principle of participatory democracy (Art. I-47). This paper deals specifically with this issue, which is essential for any discussion of the meaning, significance and likely developments of the parliamentarisation of the EU. However, it should not be forgotten that the central issue underlying the new provisions of the TEC on the "democratic life" of the Union has long been the core subject of debate, which is yet another reason why the draft produced by the Convention has to be seen as part of a much broader and more comprehensive set of issues in a longer timeframe.

The question of the democratic legitimation of the EU, and the supranational (or post-national, to use the more preferable terminology of *Habermas*) organisations in general, raises an issue which has been somewhat controversial since the beginnings of 20th century democratic constitutionalism: the adequacy of the political form of the nation state to guarantee the full implementation of the democratic principle. This question has a long history behind it, also in the political cultural debate on European unification, hinging around whether, and to what extent, it is a viable proposition to transfer the "models" of democracy which were elaborated in the course of the constitutional evolution of state systems to a broader plane and in a dimension that transcends state borders. As I have just said, this is not a new issue in Europe's political and constitutional culture as it developed between the two world wars, and which went so far as to theorise constitutional models that proposed grafting social democracy onto the trunk of a supra-statal federalist structure, on the specific understanding that the historical experience of the nation state as it had developed in Europe over the course of a century, proved to be an obstacle to the full implementation of the democratic principle. I would merely like to mention here the federalist project in *Rossi* and *Spinelli*'s

"Ventotene Manifesto", and in more general terms the schools of European anti-fascism and the attention they devoted to this, with such outstanding constitutionalist writers in the inter-war period as *Deguit*, *René Capitant* and *Silvio Trentin*.

But whereas over half a century ago the debate was about the virtuality and the limitations of the link between nation statehood and democracy, new questions were raised by the impact of the globalisation and internationalisation of the *constitutional state* model on the resilience of democracy (*A. Negri*). These questions are related in particular to supranational integration. For many years, the question of the democratic character (and the democratic deficit) of supranational organisations has been one of the central issues in the contemporary constitutional debate. For whereas the question of relations between democracy and the legitimation of sovereignty became a key issue in the analysis of the changes in the structure of states in the 20th century, as a consequence of broadening the social base on which sovereign power stands, the increasing globalisation of the tasks that had previously been an exclusive prerogative of the nation state urged necessarily to think of new political procedures and modes of action, and to ensure that the post-national political organisations possessed democratic legitimacy. For while it was possible, in principle, within the narrow confines of the nation state to draw a sharp distinction between foreign policy, dominated by the rules governing relations between states, and domestic policy that was being increasingly exposed to the demands for democracy, the development of political organisations that could not be forced into the mould of the archetypal state organisation, broadened the sphere of *Weltinnenpolitik,* and consequently the problem of their democratic legitimation. In short, compared with the historical form of the nation state throughout the period of its development, there seems to be a crisis today in the idea that a territory, as the ambit of state sovereignty, coincides with the dimension of the political community, which had previously formed the basis for the consolidation of the democratic constitutional state.

As far as the European Union is concerned, further problems have arisen. I would just like to mention two particular aspects here. The first has to do with the difficulty that arises when examining the history of 20th century European constitutional experiences in an attempt to set the democratic principle within the context of Europe's constitutional patrimony, and identify a *constituent* physiognomy that is common to Europe's constitutional traditions. A variety of different models of democracy have been implemented in the course of Europe's history, which therefore form part of Europe's constitutional patrimony. I would just like to recall the main standoffs that split the different sides in Europe's 20th-century constitutional history: the contrast between procedural democracy and substantive democracy, to which the dispute about the adequacy of parliamentarisation as a way of overcoming the democratic deficit refers, among other things; the contrast between representative democracy and plebiscite democracy, which is now expressly referred to in the draft, but which makes it essential to consider the overall European government structures in the light of enlargement in a multilevel dimension; and lastly, the contrast between *Volksdemokratie*, in the sense of democracy whose subject is a people configured as a unitary magnitude overarching its various

component parts, and *Bürgerdemokratie*, as a model stressing pluralism as well as a multiplicity of ideas, interests and identities as the basis of our democracy.

II. Democracy in the European order: between the democratic deficit and democracy "mediated" by the parliamentary democracy of the Member States

A second group of issues has to do with the ways in which the political process has developed at the level of the European institutions. Here, discordant approaches and positions have been taken up. According to one school of thought, the Community system has not created democracy, at least in terms of the suggestions offered by the main contemporary theories of democracy. I would just like to offer, without any attempt to be comprehensive, the main arguments that have been adopted to support this conclusion: the totally imperfect way in which the basic elements of democratic constitutions have been implemented (legitimation, control, the transparency of the sovereign power, popular participation), to the point of giving a glimpse of an "abyss" opening up between the holders and the receivers of Community powers; the fact that, despite the increased tasks of the European Parliament (EP), and the fact that it is now directly elected, it has not yet acquired a comparable role to that of the national Parliaments, and that the "government *versus* opposition" pattern, which is of central importance in parliamentary democracies and is a constituent part of their systems of government, are still essentially unrealised in the forms of government of the EU; the large hiatus and gap between the increased regulatory powers of the Community and the regulatory areas over which decisions are continuing to be democratically taken by the EU countries; the marked tendency towards a kind of "endogenous devolution" of democratic procedures and structures onto agencies of experts, independent authorities, bureaucracies etc, with the resultant outcomes in terms of informalisation, deparliamentarisation and the oligarchic degeneration of the decision-making processes. In reality, the European "form of government" would appear to have created a "consociate" type of model which, unlike the one designed by Lijphart, has been the result of an intricate interweaving of specialised decision-making bodies and councils, bureaucratic rather than democratic. In addition to this, underlying the causes of the democratic deficit from which the institutional arrangements suffer, there are still a number of critical elements in the political system and the social fabric, such as those that are linked to the constraints on the process of the "Europeanisation" of European public opinion and the formation of the political will of European *Öffentlichkeit*; the incomplete fulfilment of the basic conditions of a polyarchy (in *Dahl*'s sense of the term), and more specifically of participation and liberalisation of the political process; and lastly, the weakness of the European political party system because of the lack of vitality of the European system of intermediate institutions despite the reference made in the EC-Treaty (Art. 191) and now in Art. I-46(4) TEC to the role of the political parties at the European level.

The responses made to such a radical approach to the question of the democracy of the European system have followed two pathways. The first was the one taken based on the basis of the *Maastricht-Urteil* of the 1993 Bundesverfassungsgericht. It is based on the argument that the democratic legitimation of the Community structures is "mediated" by the democratic nature of the Member States' constitutional structure. Even though the institutional structures of the EU are flawed by an unresolved democratic deficit, the democracy of the political process within the Member States percolates down to the structures of the EU, indirectly giving a democratic character to its organs and decision-making processes: this is achieved through the indirect democratic character of the representative bodies of the Member States, the non-mediated democratic nature of the body representing the "peoples of the States" (the EP), and the democratic and parliamentary oversight over the executive body, the Commission. These are important indicators of a development towards a democratic system, albeit within an overall framework characterised by the fact that, ultimately, it is the "democracy" of the Member States that permeate the Community system. This is the *Unmittelbarkeitslehre* approach that has been taken up in the German *Bundesverfassungsgericht* which left in the background the question of any further constraints deriving, in the community system, from the linkage between the democratic political process and the majority principle, because of the veto rights of the Member States and the restrictions placed on majority voting.

The second pathway was based on the argument of "gradual approximation" which, in the historical development of the European institutions ever since Maastricht, and even since as long ago as 1979, took up many indicators of the gradual increase in the democratic elements in the Treaties, which could be put down to the tendency to parliamentarise the institutional structures, among other things. It has also been observed that as the treaties have developed, the problem of democracy in the Community system has not merely been limited to the question of the "form of government". However, here there are still a number of ambiguities: the tendency to democratically rationalise the role of the EP, relations between the EP, the Council and the Commission, enhancing the role of the European Council and its visibility, and the difficulties in linking the Community's political process and single currency institutions with regard, in particular, to the oversight of the European Central Bank, and its transparency.

III. The democratic principle in the EU: institutional dynamics and the physiognomy of European *Öffentlichkeit*

There is, however, no doubt that today, the democratic principle in the EU has acquired a power to spread beyond the question of the "form of government". I would merely like to mention the issues relating to the construction of a *bürgernahe Demokratie* and a "Europe of the Regions", the potential of the "descending" interpretation of the principle of subsidiarity; and the social-democratic outreach

implicit in the broadening of the objectives of the European Community since the 1986 Single Act and the Delors plan. These are issues that have acquired increasing visibility since the Maastricht reforms in the preambles and the provisions of the treaties laying down the purposes and the fundamental objectives of the European Communities prior to the EU, and subsequently, and that have been taken up and developed in the Constitutional Treaty. For example, after placing "democracy" among the "universal values" which are the product of the European cultural identity, the TEC explicitly refers to the "democratic and transparent nature of its public life" (TEC Preamble), as being one of the specific features of the integration process. Subsequently, when defining the objectives of the EU, reference to the "value" of democracy is indissolubly linked with the image of " a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Art. I-2 TEC).

These are declarations statements of principles that I feel should not be underestimated, because they place the democratic functioning of the European institutions within the broader framework of a Europe in which decisions are taken as closely as possible to its citizens, and in more general terms place democracy among the founding values of the EU and the factors for recognising common membership of it. It is a fundamental factor in the integration process, in the sense of *Smend*'s "Integrationslehre": although there may not be a single European *demos*, within Europe's constitutional patrimony that is gradually being codified by the Treaty reforms there is nevertheless a substrate of integration factors with an intrinsically pluralist European *Öffentlichkeit*. Within this broader context, it becomes abundantly clear from the draft that an effort has been made to strengthen the centrality of parliamentary democracy within the European institutional structure. This effort was very clearly set out in the Praesidium's preface submitted to the Convention at Thessaloniki on 20 June 2003, which stated that the project proposed "measures to increase the democracy, transparency and efficiency of the European Union by developing the contribution of the national Parliaments to the legitimacy of the European design, by simplifying the decision-making process, and by making the functioning of the European institutions more transparent and comprehensible", strongly underlining the role of the representative institutions against an overall background characterised by reference to the role of social groups and parties as factors of the "democratic life" of the European Union.

However, it should be noted that the approximation of the European order to principles of democracy has developed gradually through a process that began with the Maastricht reforms and, in some respects, predates them. I am referring to the provisions regarding political and citizenship rights which had been set out before the Nice Charter and the Constitution, which merely developed them further in the same direction, essentially as a container of political rights (Art. I-10 TEC). Like the definition of the European political parties as important as factors for integration, and for "forming a European awareness" and expressing the "political will of the citizens of the Union" (Art. 191 EC-Treaty), which was developed by the EP, particularly identifying political affinity as the basic criterion for forming groups prevailing over the territorial criterion (EP Regulation, Art. 29).

However, the penetration of the democratic principle into the institutional system has had a rougher ride. The concurrent importance of the intergovernmental and the functionalistic authorities withstood the tendency that was already present in 1979 following the introduction of direct elections to the EP, to strengthen parliamentary democracy in these structures, of which it is possible to see significant indicators in the growth of the controlling powers of the Commission (the vote approving the appointment of members of the Commission: Art. 214(2) EC-Treaty ; censure motion: Art. 201 EC-Treaty; power of inquiry: Art. 193 EC-Treaty) and the extension of the co-decision procedure (Art. 251 EC-Treaty). It should nevertheless be noted that even though these latter powers place the EP and the Council on an equal footing along the lines of the bicameral experiences in federal systems, these developments have nevertheless given rise to a number of problems. The fallout from the multiplication of deliberative and decision-making processes in terms of democracy must be carefully appraised because, as studies of the linkage between democracy and procedure and on the role of *audi alteram partem* in a democracy have fully shown, the "decision-making maze" can reinforce the "discursive" function of the procedure (*J. Habermas*), but it can also operate less, or not only, as a factor for redistributing social complexity (*N. Luhmann*) and more of a complicating factor reducing the transparency of the decision-making process. The ambiguities that continued for so long regarding the form of government perhaps explain the attempt to emphasise the insistence on the linkage between "democracy" and "transparency" and the theme of democracy developing as closely as possible to the citizens, not only has an ambitious foretaste of a new "dimension of European democracy" but as a factor to compensate for the democratic deficit in EU institutional dynamics.

Moreover, once such a broad configuration of the democratic principle has been set out, not only as an element running through the European "form of government" but also as a major thrust of European *Öffentlichkeit*, the unresolved problems of relations between democracy and the opening-up of the Treaties to new economic and social objectives emerged problematically – problems that, with reference to the well-known issues relating to the constitutional experiences of the 20th century, had to do with establishing social democracy. For in the historical deployment of these experiences, a central place was occupied by the problem of integrating democracy as a method, and democracy directed by the guideline values designed to guarantee the promotion and effectiveness of rights and substantial equality, which were also considered to be essential conditions for fully establishing political democracy. From this point of view, there is no doubt that the attention given by the European Union's "constitutional law" to the issues of high employment, balanced and sustainable development, economic and social cohesion, solemnly enshrined in the Constitutional treaty (Art. I.3(3) TEC) in combating social exclusion and discrimination, promoting justice and social protection and solidarity, are all issues forming part of the constitutional heritage of the EU, the legacy of the linkage between the development of democracy and the spread of "citizenship rights", which became increasingly narrow in the 20th century European constitutions. I think, however, that it is difficult to deny that this approach is not without its grey areas. This is mainly due to differences and uncer-

tainties regarding "European social rights" which are anything but resolved, despite the openings provided by the Charter incorporated in the second part of the TEC: because the wavering and the widespread recessive tendencies in government policies regarding the welfare state hamper progress from social "policies" to social "rights" at the European level that began in the latter half of the 1980s, and much more difficult to move away from the setting of EU objectives in the economic/social sphere (and the synergies between the action of the EU and the action of the Member States) to translating the new tasks in the social field into European rights to receive specific services. Secondly, because of the uncertainties that still surround the case law of the European Court of Justice, whose role in this field remains decisive and "creative" in releasing prospects for developing the democratic principle on the basis of the economic freedoms enshrined in the treaties, in the direction of multiplying channels of access to the market as a factor for decentralising economic power and pluralism, particularly in the field of information and communication.

IV. Democracy in the EU as a problem and as a challenge

The difficulties and contradictions that have accompanied the painstaking establishment of the democratic principle in the European order have evidently been the result of constraints stemming from the way in which the European unification process has historically taken place. It should not be forgotten that opposition to the emergence of an autonomous level of democracy at the level of the European institutions has been largely due to the fear that an enhanced democratic legitimacy of the political process at the European level would be parallelled by the erosion of the political process at the state level. Neither should we forget that in the history of the European integration process, Europe's governments have played a front-line role that is not comparable with the role of European *Öffentlichkeit* in all its many different forms, and that the main thrusts of the Member States' policies over half a century has substantially conditioned prospects that have been adopted from time to time and solutions that have been chosen to give tangible form to the firmament of the underlying "values" of the integration process. All of this makes it important not to realistically undervalue the weight of statehood in the European integration process, and in more general terms not to forget that statehood was firstly the framework within which the democratisation of the political process became established and developed, subsequently followed by the democratisation of the equalisation institutions, the *Ausgleich* of the *de facto* inequalities that have hampered the full implementation of the democratic principle. Nevertheless, the process of EU constitutionalisation is also a powerful challenge thrown down by history to make scholars critically rethink the conceptual categories and developments that are firmly rooted in the development and the consolidation of the nation state in Europe.

It is amazing that, in two recent papers, two outstanding international law scholars (*B. Conforti* and *A. Tizzano*) criticised the tendency to construe the develop-

ments in the European integration process in terms of the categories of constitutional law, and have advocated the need to avoid throwing away the reconstruction results achieved in the framework of the law of international organisations. It is not a question of defending disciplinary "orchards" or "preserves" against improbable expansionist or colonising tendencies on the part of European constitutional literature. But while it is hard to deny that this has exercised undoubted cultural hegemony in the debate on the reforms since Maastricht (for example, one only has to think of such writers as *Ipsen*, *Herzog*, *Häberle*, *Grimm*, *Weiler*, *MacCormick*, *Pernice*, *Tsatsos* and *Amato*) it has been due not only to the type of problems that have been addressed from time to time (the supremacy of community law, the dissemination of quasi- or pre-federal practices, the increasing "generalist" character of the catalogue of European rights, the democratic character of the community institutions), but even more so by the effort to critically rethink, in the light of history and without any dogmatic preconceived ideas, one's own consolidated conceptual apparatus in the "Europe-laboratory". I think that this is the really decisive issue that is not being addressed by generic references to the "scientific rigour" of the study of EU law, or not making a *tabula rasa* of the earlier scientific developments. Since the current process of changing the EU is placing the responsibility on law scholars – of international law no less than of constitutional law – to keep pace with history without appealing to dogmatic certainties and to stave off criticism of the conceptual apparatus of their disciplines, whose development has accompanied the process of consolidating the nation state in Europe. And there is no reason why, in this connection, the comparison between the constitutionalisation process of the EU and the genesis of the federal systems, for example, or consideration of the modalities and forms of democracy in a supra-statal political process should not constitute common ground for a critical rethink for and fruitful interdisciplinary dialogue.

For the reason why democracy is still largely and unresolved "problem" in the European Union depends above all on the historical constraints imposed by the linkage between the development of the nation state and the establishment of democracy within their national borders, and more specifically the realisation that the democratic principle has been historically implemented in the experience of the nation state, built up on the archetype of the sovereign State unit characterised, from the socio-structural point of view, by comparative homogeneity, by the *Selbstverständnis* of a common identity, and by a public sphere which is already solidly constituted and capable of expressing itself in political/institutional terms. It should be added, however, that further difficulties and problematic aspects arise as a result of the abstruseness of the institutional structure of the Community and subsequently of the Union, which took on board and combined different inspirations, and therefore became susceptible of being construed in terms of different paradigms, with the result that each of the configurations of the nature of the Community system has given a different emphasis or interpretation of the democratic principle. For this principle takes on a different physiognomy depending upon whether the *functionalist* paradigm prevails at any one time, entrusting the resources of democracy to the widespread control of public opinion on the "functional management agencies" network, and on the presence of interests, and hence

the dynamics, of corporate democracy which gives pride of place to transparency rather than participation as a paradigm of democracy; or whether the *federalist* paradigm prevails, which is incompletely developed and then "by imitation" *(als ob)*, places stress on both the "dynamic" virtuality of the experiences of "federalism" (*C.J. Friedrich*) and the centrality of the relationship between the EP and the Council in the decision-making processes, viewed as a prelude to a federal structure in the true sense of the term; or, lastly, whether the *intergovernmental* paradigm prevails which, as already mentioned, gives the Member States – thanks to the resources of their own constitutional orders and in particular the resources of the parliamentary principle – the task of "mediating" democracy and incorporating it into the European political process.

Considering such a piecemeal picture, it is hardly surprising that the *responses* envisaged in the literature as possible ways of resolving the European Union's democratic deficit have followed different pathways, even though they have decidedly broken out of the constraints of the linkage between democracy and parliamentarisation. I think that this is the common feature of the main positions that have emerged in recent years. Firstly, there is the *sceptical* position of those who start with the assumption that democracy is inseparable from the birth of the European people as a " politically relevant magnitude" underpinned by powerful factors of political unification, and has concluded that because of a lack of a common substrate of expectations and collective political mythologies (*E.W. Böckenförde*) or linguistic and cultural preconditions of a communicative universe (*D. Grimm*), democracy in the EU cannot be otherwise than *ein knappes Gut*: this is a position which decisively shifts the centre of gravity of the debate from the field of the democratic potential of parliamentarianism to that of the resources developed by the democratic "added value" of direct manifestations of the "will" of the European people, above all in a constituent capacity.

But on the other hand, even though the schools of thought that have tried to see European integration as a "workshop" of a *multiple demoi* democracy, typical of complex societies in which popular sovereignty is not based on the *demos* alone but requires unprecedented forms of organising coexistence in a pluralist fabric (*J.H.H. Weiler*) have ultimately evaded the parliamentarisation stages, in so far as they tend to place the permanence of consensual and contractualistic elements at the heart of the question of democracy rather than confidence in the resources of the majority principle, which postulates a fairness between the partners that is not wholly compatible with the lack of homogeneity of the *demos* (*T. Fleiner*).

The linkage between democracy and parliamentarianism appears to be more problematic in the final approach to which I shall now rapidly refer. I am alluding here to the idea that the resources of democracy in the European Union are multilevel responses deriving from the integration of different constitutional levels and the linkage between levels of governance differing in breadth underpinned by the principle of subsidiarity (*P. Häberle, I. Pernice*). This approach both restores and re-elaborates the concept of *Teilverfassung*, which is familiar in the elaborations of the federal state in Germany, which is used to underpin a subsidiary type of structure, in which the emphasis is placed on the constituent potential of a democracy based on the allocation of decisions at the level closest to the grass roots. It

should be recalled that even though, in its praiseworthy attempt to set the principle of subsidiarity in a procedural framework, the Constitutional Treaty has closely linked the democratic virtuality to the linkage between the EP and the national Parliaments, in the theoretical elaborations of *multilevel constitutionalism* and the principle of subsidiarity and given it a broader significance which is bound to be developed more in the area of relations between the EU, the Member States and the levels of territorial decentralisation rather than in purely functional terms for the purpose of parliamentarisation.

V. The tendency towards the parliamentarisation of the institutional structures in the Constitutional Treaty. Parliamentarisation and economic governance

In the light of these general considerations, we can now carry out an initial assessment of the basic underlying decisions incorporated into the Constitutional Treaty. Through a whole series of emblematic indicators, it shows that there is an enhanced tendency towards the parliamentarisation of the institutional structures. Primarily, in the definition of the Union's "institutional framework" the EP is given a priority place (Art. I-19(1) TEC). This does not mean that the European Parliament can also be configured as an organ at the peak of the institutional framework, but rather – as we shall be seeing shortly – it forms part of a complex and unprecedented system of checks and balances which not only conditions its overall role in the form of European governance, but above all it introduces major elements of contradiction and ambiguity into the parliamentarisation process. But the bumpy path to the establishment of the parliamentary-representative principle in the European order, which has met with much opposition and many difficulties, is something new, and not only in nominalistic and formal terms, that must not be underestimated. Secondly, the EP is at last described as the organ representing "the Union's citizens" (Art. I-20(2) TEC) and no longer the "peoples of the States". This is a demonstration of the tendency to overcome the ambiguity of the representative status of the EP, which the present version of the EC-Treaty (Art. 189) leaves suspended between general political representation and representation on a state-territorial basis. This being so, the principle that the representation of citizens is guaranteed in a regressively proportional manner, with a minimum threshold of six members for each Member State, is in response to the demand of the small Member States to be protected, as a corrective measure for a system of representation which, in principle, is based on the equality of the votes of Europe's citizens, thereby approximating as closely as possible to the equality that is compatible with the need to preserve the small states. Thirdly, it is becoming increasingly clear that a federal type of bicameralism is emerging, in the framework of which the legislative function and the budget-setting function are exercised "jointly" by the EP and the Council (arts. I-20(1), I-34(1) TEC) while the codecision procedure is the "ordinary legislative procedure" for adopting European laws and framework laws (Art. III-396(1) TEC).

Lastly, mention should also be made for the parliamentarisation of the institutional structure of the tendency to reach as far as making provision for linkages to be established between the EP and the national Parliaments. From this point of view, the two Protocols on the role of the national Parliaments of the EU and the implementation of the principles of subsidiarity and proportionality are contributing to spelling out the physiognomy of a "national-community Parliament" as the fulcrum, and above all as the method, for decision-taking and for the operation of parliamentary democracy in Europe. I should like to point out above all the codification of the principle of "interparliamentary cooperation" (paragraph 9 of the protocol on the role of the national Parliaments), under which the EP and the national Parliaments jointly decide how to organise and effectively promote and regulate interparliamentary cooperation within the EU. Then there are the procedures for formalising the principle of subsidiarity set out in the second of the two protocols on the EP and the national Parliaments, in a number of stages ranging from the submission of legislative proposals by the Commission to the national Parliaments to the obligation to submit the grounds for the proposal in relation to subsidiarity, the right of national Parliaments to express their opinions, the provision relating to the paralysing effect of the negative opinion procedure (with the obligation to re-examine proposals) when these are made by Parliaments representing at least one-third of the votes attributed to the national Parliaments. Lastly, direct obligations lie with the European institutions towards national Parliaments (to transmit, inform, communicate, etc).

The picture I have sketched out here, which shows a number of significant indicators of the tendency towards parliamentarisation, appears much more problematic still when one considers the role of the EP within the overall framework of the form of European governance and above all the dynamics of economic governance. It should also be noticed, however, that the arrangement of the institutional structures of the EU as they emerge from the TEC should be considered without preconceived ideas, because the purpose is to strike a balance between parliamentary authorities, Community authorities (the Commission) and intergovernmental authorities. When assessing the solutions chosen for the draft Constitutional Treaty, I believe that it is important to set aside any methodological illusion that "parliamentarianism" at the EU level can be envisaged in terms of the models that have been tried out in the history of parliamentarianism in the nation state systems; and it is also important to realise that it creates a wholly original and peculiar model of checks and balances, because it is inextricably conditioned by the genetic features of the European integration process itself.

It should be added that it is also a system of checks and balances which, while enhancing the role of the EP as European co-legislator and as a source of oversight and control functions, it sacrifices its ability to take part in the framing of policies. For on the one hand, through the European Council, the Member States retain the power to propose a candidate for the Presidency of the Commission, "taking account of the elections to the European Parliament" (Art. I-27) and it is the EP which elects him, and it is to the EP that the President and the whole of the membership of the Commission is politically accountable (Art. I-26(8) TEC). The President of the European Council, however, is not accountable to the EP, but merely

seems to have an obligation to keep it informed, while remaining accountable to the Council (Art. I-22), with the latter holding a central position in the European form of government, by virtue of the fact that it defines the general political directions and priorities of the Union (Art. I-21(1) TEC) making it the real policy-making body, while the President is vested with the powers of the external representation of the Union (Art. I-22(2) TEC). It is certainly possible to see the configuration of the role of the President of the European Council as a means of personalising the political leadership, a trend that has been present for decades in developments towards evolving democratic forms of government. But this tendency is offset by considerable constraints: firstly, the President of the European Council has to share the function of the external representation of the EU with the Minister of Foreign Affairs of the Union on matters relating to the common foreign and security policy (Art. I-22(2) TEC); the Minister of Foreign Affairs, while appointed by the European Council, is also a member of the Commission, and is therefore subject to its rules of operation and the accountability regime (Art. I-28). Secondly, the legitimation and political leadership of the President of the Council is, to a certain degree, concurrent with that of the President of the Commission, with whom he is elected by the EP and to whom he is linked by a fiduciary relationship (Art. I-26(8) TEC): a fiduciary relationship, let it not be forgotten, which seems to be justified by the general political representation which hinges around the EP, since the independence of the Commission is essentially guaranteed by the prohibition on the governments of the Member States to issue instructions and imperative mandates (Art. I-26(7) TEC). From these remarks, one has the impression that even though the EP has an enhanced function expressing political representation, it is still left in the background of the process which leads to the policy-making of the EU, which takes place through the circuit in which the EP has an oversight function, but is completely left out of the decision-making phase. The functionality of the checks and balances framework that should guarantee the balance of the policy-making circuit is therefore left to the resources of a "triumvirate" at the summit (the President of the Council, the President of the Commission, and the Minister of Foreign Affairs), which the EP can condition in various ways, but whose work essentially depends on procedures designed to prevent any one of these three from prevailing over the others.

Somewhat more problematic is how to judge the degree of parliamentarisation of the form of European government, when one considers that the Constitutional Treaty has continued without deviation with policies that are indissolubly rooted in the beginning of the integration process, and has not substantially changed the mechanisms of economic governance, and in particular has not given the EP the functions that would enable it to act as a vehicle for democratising it. The procedures for the economic governance of the EU resemble more a form of management through independent authorities rather than a political decision-making process based on democratic foundations, which is really alien to Europe's common constitutional traditions. *Jean-Paul Fitoussi* has effectively pointed out that European economic governance is becoming similar to, and is becoming indistinguishable from, governance by an enlightened despot, "protected from popular pressure, but seeking the common good by applying a rigorous doctrine – *laissez-faire*

economics – which is superior to all the others in terms of economic efficiency": it is therefore a "benevolent dictator", "whose collective choices would be rational and would guarantee the maximum economic freedom, while at the same time restricting political freedoms, that is to say, the electorate's capacity to influence its decisions". This is a ruthless diagnosis, but it does put its finger on the sensitive issue of the relationship between parliamentarianism and democracy in the institutional dynamics of the EU, and focuses on a fundamental theoretical question, because democracy is not merely a matter of voting, but also demands accountability procedures and transparency, while the Constitutional Treaty makes no provision to make the European Central Bank to a political assembly endowed with powers to impose sanctions on national governments which fail to implement the policies it lays down, but carefully protect it from the oversight of European *Öffentlichkeit*. The model of European economic governance which vests what is essentially an independent non-accountable agency with decision-making and policy-setting powers of a breadth that is wholly unknown in the experience of comparative lawyers. There is no plausible parallel between the position of the European Central Bank and that of the American *Federal Reserve* both because the latter has, amongst its statutory objectives, not only price stability but also full employment, but also because it has to be accountable to Congress for the attainment of these objectives, and Congress, furthermore, is empowered to modify the constitution of all the independent agencies: this is a condition that makes the obligation on the President of the European Central Bank to attend hearings whenever the EP requests so, pale into insignificance. On the latter aspect, the TEC therefore merely copies what already exists, disappointingly, precisely when the effort to rationalise relations between the EP, the Council and the Commission with a network of checks and balances should also have been seized on as an opportunity to redefine the role of these institutions, which represent the democratic, intergovernmental and functional authorities that underpin the system of power relations within the EU in terms of economic governance and price stability policies.

VI. Parliamentarisation and the democratic deficit. Representative democracy and participatory democracy in the EU

The matter of defining economic governance clearly reveals the limits on the prospects for completely solving the question of overcoming the democratic deficit in the EU through parliamentarisation. Parliamentarisation has certainly been an essential stage in the democratisation of the European integration process, and at all events there is now no turning back. But perhaps it is not sufficient to fully take account of the complexity of a democracy which has to be deployed in a European social environment with multiple *demoi* living together within it, and against the background of an institutional reality with the weight of the nation state which it has not yet superseded. Other aspects of the democratic legitimation of the EU that

have long been looming on the horizon seem to have been sidelined by the Convention and in the text of the Constitutional Treaty. I am thinking here of the question of the integration of political democracy through social and economic democracy: in short, the question of social rights as a fundamental factor for the development of European democracy; or of the issue of linking democracy and local government, which recent and innovative experiences in the Member States that cannot be put down to entrenched archetypes of devolution or decentralisation, have been proposing once again with some force, and which at all events constitute an essential condition for developing the principle of subsidiarity as an instrument of democracy. Lastly, it must be borne in mind that the more the European political process is driven by the citizens of the EU rather than the citizens of the Member States the more will it become necessary to introduce minority identity protection clauses; for in a political organisation of many different *demoi* the linkage between democracy and opposition rights must be as strong as the linkage between democracy and the majority principle.

My conclusions therefore lead to a number of initial reflections on title VI of the first part of the Treaty, on the "Democratic Life of the Union". I feel that this provides a number of emblematic indications to take up the approach adopted by the Constitutional Treaty towards solving the problems connected with the democratic deficit of the EU. There we can see two basic principles of the democratic life of the Union, set in a dialectical tension giving pride of place to the former, namely "representative democracy" over the latter, "participatory democracy" (arts. I-46 and I-47). For while the operation of the EU "is founded on" the principle of representative democracy (Art. I-46(1) TEC) the principle of participatory democracy is only important in itself as a constituent part of a commitment vested in the EU institutions to encourage dialogue between the different parts of a pluralist fabric, transparency and consultations by the institutions of the Union (Art. I-47). The right of European citizens to participate in the democratic life of the EU, which is an instrument of a fully fledged *bürgernahe Demokratie,* is set and ultimately functionalised in the framework of the representative principle just as the European political parties are, configured as an instrument of representative democracy rather than being seen in democratic-plebiscite terms. In this regard, it is hardly surprising that Parliaments are given a central position as the keystone to representative processes: the EP is where the European citizens are directly represented, the Member States are represented on the European Council, while the Council of Ministers is the organ representing their governments, which are accountable to their national Parliaments, which are elected by their citizens (Art. I-46(2) second sentence). It is therefore clear that the "parliamentary principle" is powerfully present in the Union's constitutional order, and draws its strength from the overall balance between the direct legitimation of the EP, which has historically represented one of the strengths of the federalist battles, and the *Unmittelbarleitslehre* of "state-mediated democracy", which is the legacy of the *Maastricht Urteil.*

However, this order leaves the problem of the balance between the representative components and the plebiscite components of democracy basically an open, and unresolved, issue. But this is an essential balance, because in a pluralist de-

mocracy (and the European democracy cannot be anything but pluralist, made up not of a unitary *demos* but a multiplicity of *demoi*), representation must be driven by bottom-up authority; conversely, the provision of plebiscite elements that have required greater importance in the constitutional orders of the Member States and are visibly and immediately reflected in the European Council, cannot let the democratic investiture overwhelm the articulation of the pluralist fabric of society. In my opinion this is the underlying dilemma in the physiognomy of democracy in the EU in the framework of the common constitutional traditions, within which the demand for oversight and accountability belonging to the legacy of modern constitutionalism lives side-by-side with the demand for legitimation, as the legacy of the constitutional experiences of the 20th century democracies.

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The balance of power between the European Council, the Council and the Commission in the draft European Constitution

Juan Fernando López Aguilar

I. Introduction

The Preamble to the *Treaty establishing a Constitution for Europe* (in its version of 13 October 2004) declares the desire "to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world". Before this, the Draft Constitution which Giscard d'Estaing presented to the Council in Salonika in June 2003 stated in its Preamble: "*Our Constitution is called democracy because power is not in the hands of a few, but rather in the hands of the majority*" (Thucydides II, 37).

And this appears to be the objective driving this whole process of greater European integration which we have called the Convention, whose result was that definitive text of 13 October 2004 known as the "European Constitution": creating a Constitution so that democracy should be the form of government of this new reality we call the European Union.

The task has been costly and has been marked by debates and discussions on each and every point submitted for study. So much so that Giscard d'Estaing himself, when presenting the Draft, asked the heads of government "not to upset the balance supporting the solidity of the institutional construction underlying the Draft Constitution": that difficult balance of power designed between European institutions; between regional powers, national states and the European Union; between citizens and European institutions, and between European citizens and national institutions. Otherwise, the validity of the most classical solutions provided over the last two centuries concerning the achievement of a viable separation of powers in order to meet the new needs of society in the 21st century would be called into question. In the approval and subsequent ratification stage of the European constitutional text which we are now involved in, the question should be asked: will this balance be respected?

This is not a trivial issue. On the contrary, awareness of its importance provides support for a necessary effort aimed at counterbalancing the defects of the interiorization of the EU's institutional complexity in the daily life of European citizens. However, although this has been the constant of the European intellectual task of integration, we can say that from a legal point of view, and even more so from the point of view of constitutional law, this deficit has never been – however much this was suggested by the "wise men" in the Convention – a deficit of European

law making due to lack of legitimacy of the sources of Law, nor a defect of the democratic legitimacy of the European institutions creating this Law. The new text of the European Constitution (agreed at the Brussels European Council meeting in June 2004 and solemnly signed in Rome in October 2004 by the Heads of State and/or Government of the Member States of the European Union) will clarify and reinforce the institutions, overcoming the deficit of ambition at the centre with which the original European Construction was conceived, and this will work for the benefit of democracy. However, we still cannot consider the process for the real "Constitution for Europe", to be completed, particularly when the process of ratification of the European Constitutional Treaty will be prolonged for several uncertain years.

This is demonstrated by the accumulated experience of the last fifty years of European construction. When we examine this process carefully, the point to which European integration has, from the beginning, been based on an essential assumption can be seen: the primacy of Law and its consideration as a crucial, definitive instrument from which this construction that today we call the European Union (a conceptual innovation and not comparable in terms of classical international law), comes to be possible and can be undertaken for the first time in continental history. The recent European Constitution responds to this desire.

The sequence of progressive integration we have witnessed since the beginning of the fifties, firstly with the Coal and Steel Community (1951), then successively with the Atomic Energy Community and the European Economic Community (1957) and the European Union (Treaty of Maastricht 1992 and successive reforms through the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001), and now the new European Constitution (2004), can be interpreted and understood thanks to respect for the rule of law. Law is the interpretive key that explains the durability of this experiment over time and its success. Europe is made and has been made through Law. This time it has not been wars or architectures imposed by force (constant in the successive Carolingian and Holy Roman Empires), nor naked military conquest (of which there are still scars from the last century) that has forged this common space – initially for free trade, but also progressively for shared liberties. The European Union "is", ultimately, a work of Law, and that Law is increasingly democratically ambitious. It operates under the ethical requirement to become ever more perfectly democratic Law.

So, all the intellectual effort of the last decade have focused on seeking this democratic robustness, and this work has produced very interesting results in recapitulating the Europe that we want and need. However, we have "summarized" as a single truth that the famous "democratic deficit", on which we blame the alienation of Europeans with respect to the government of Europe – the *governance of Europe* – stems from an original defect at the source or the root of the creation of Law. In other words: we attribute to a hypothetical defect in the democratic legitimacy of European institutions the consequent democratic deficit of its law making.

With a similar understanding, we have attempted successive reforms of the law-making institutions in the European Community, such as those introduced by the Single European Act (1986), and subsequently by the Treaty of Maastricht

(1992) and by the Treaty of Amsterdam (1997) with respect to the European Parliament, increasing their legislative powers and creating increasingly complicated legislative collaboration mechanisms that are less and less similar to the national systems. Thus, we have developed mechanisms that are increasingly distant from the national conceptions that are, ultimately, the elements of comparative reference we Europeans use to see whether or not we feel represented. And, in this way, we have arrived at the process of the *constitutionalization of Europe*, whose final phase we are now in, reconsidering the position, powers and composition of all the European institutions and creating new "balances or institutional counterweights" against established levels of institutional power, in order to provide a response to the imperious needs of the Europe of the Twenty-Five which we achieved on 1st May 2004.

The source of Law, the creation of the Law under which Europe is governed, can be strengthened and improved, and this is included in the new European Constitution. But we must continue to think about the introduction of "other" integration mechanisms – social and political ones, not only legal ones – that enable better and greater democracy to be achieved.

II. Work prior to the Constitution

It is precisely the achievement of constitutionalization and democratization that made up the ultimate objective pursued by the European Council in Laeken (December 2001), when the Convention was called to reflect on the main issues raised by the future of the European Union; that is, to provide options and recommendations to the inter-governmental conference held in 2004 to decide on the revision of the Community treaties.

The calling of this Convention began the second phase of the procedure for the latest reform of the Treaties, which had already been agreed in December 2000 in the Declaration of Nice and whose objectives were: better distribution and definition of the powers of the European Union; the simplification of the instruments of the Union; the achievement of more and better democracy; the transparency and efficiency of the European Union and the route towards drawing up a Constitution for Europe. Clarification and simplification of the European system, ultimately, to put an end to the deficit highlighted by us Europeans, feeling ourselves to be an economic power working together in the international market, but at the same time a political dwarf incapable of making joint decisions in the internal political or international spheres.

To do this, it was considered essential, as an initial objective, to bring together the existing treaties and carry out the institutional reforms allowing integration to go ahead. This was not so much because there was a problem with the institutions, but rather to prevent dysfunctions in the operation of the institutions when faced by the greater complexity required by the integration of the new members (unanimous decisions, qualified majority and simple majority). Problems of co-ordination and inter-institutional relations had to be solved. And, above all, new

instruments for security and justice, common defence and common foreign policies had to be created.

From the beginning, this work has met with a very European obstacle of nomenclature: are we making a "Constitutional Treaty" or a "Constitution"? The objective, however, was broadly taken up; whatever the format a balanced, coherent construction had to be presented, achieving an equilibrium between the role of the Union and that of the Member States. In fact, it seems to have been assumed by everyone that if the European Constitution project was going ahead it was because everyone had accepted that their favourite solution was not necessarily acceptable to all the others. In addition, faced with the lack of legitimacy that would be produced by a normal constituent process, with a constituent power made up by representatives of all the citizens involved in this political process, the actual option decided on was the following route: the Convention would achieve authority when it achieved consensus on a single common project. There were a total of 48 plenary sessions and 11 working groups, with the work of the Presidium and the Secretariat particularly outstanding.

III. A brief comparison between the current institutional design of the European Union and the design of the "new" European Constitution

The first and most outstanding feature is that the new institutional design of the European Constitution respects the traditional design of the European Union, laid down in Maastricht, which corresponds to a general recognition of its original dual nature: as a union of States and as a union of citizens. It has been considered essential to uphold and fix in the constituent texts the originality of the European integration project, which, as we all know, cannot be compared with other political systems: a non-federal and non-confederal European Union with its own legal nature, without precedents in the history of political organizations. Because of this, it is declared that its origin stems from the double legitimacy conferred by the States and by all the citizens making up this Union (union of peoples/union of States).

Additionally, along general lines, there has been a desire to preserve the balance of existing inter-institutional forces, strengthening their functions and preparing them to confront the needs of a Europe with twenty-five States. It has been decided to strengthen the European Parliament, a direct forum of representation for European citizens and a counterweight to the power of the States, by designing a new legislative procedure in which co-legislation is accepted as a general procedure. Currently this procedure is reserved for thirty-seven areas. In the text of the European Constitution it comes to cover eighty areas, but in future all matters corresponding to the most important policies will be regulated by the new co-decision procedure in which the Council will vote with qualified majority. Excluded from this (Council-Parliament) procedure are matters that affect the internal constitutional order of States (for example, citizenship) and those forming part

of the "national agreement" (for example, distribution of constitutional duties, organization of solidarity, tax matters, aspects of social policy).

As for the institutional design of the European Constitution, in broad terms the division of power and responsibility is as follows:

1. The European Council

The European Constitution stems from the need to introduce guarantees of viability into the decision-making process. The proper functioning of the European Council is critical in order to continue moving forward in the expanded Europe. Because of this, its design is legislatively defined in the Constitution, but maintaining the line laid down in the European Union Treaty (Maastricht). The composition and functions currently established are maintained, but its mandate is extended.

Specifically, Article I-21 of the European Constitutional Treaty establishes: "1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions. 2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work. 3. The European Council shall meet quarterly, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council. 4. Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus."

2. The European Council President

Finally the President will be chosen for two and a half years and may serve up to two terms. He or she will preside over and encourage the work of the European Council, as up to now, but co-operating with preparatory and continuing work for future meetings of the Commission and the General Affairs Council. His or her main function will be to ensure the cohesion and consensus of the Council (Article I-22 TEC).

3. The Council of Ministers

Continues to be centred on the two important bodies: The Council of Foreign Affairs and the Council of General Affairs. The Council of General Affairs should be at the centre of the device of the Council of Ministers and will ensure its coherence and proper operation. Its function basically consists of summarizing,

co-ordinating and making coherent the work that is now divided between specialized Councils. The Council of Foreign Affairs will draw up the Union's foreign policy, according to the strategic lines laid down by the European Council.

Despite the rejection shown by the governments in London and Madrid of the figure of a "minister" and their preferences for a "European foreign representative", the Council of Ministers for Foreign Affairs will be presided over by the Union's Minister of Foreign Affairs. But this person will not preside over the Council of Foreign Affairs and will answer equally to the Commission and to the Council. Prime Ministers Blair and Aznar accepted this figure only if he or she had few powers and was also answerable to the Council (the governments), eliminating the possibility that he or she should be a Commission vice-president. Ultimately, a complicated double Council-Commission dependency was created.

As for the specialized Councils of Ministers, except for the "Euro-group Council", the others will be convened by direct decision of the European Council. They will have presidents for periods of a year, according to an equitable rotation system.

Finally, the distribution of power and consequent system for adopting decisions in the European Council and Council of Ministers has been defined in Article I-25 of the Constitutional Treaty, in these complex terms: "1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. 2. By way of derogation from paragraph 1, when the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union. 3. Paragraphs 1 and 2 shall apply to the European Council when it is acting by a qualified majority. 4. Within the European Council, its President and the President of the Commission shall not take part in the vote".

4. The European Commission

The European constitutional text of 2004 (Article I-26) returns to the original concept of the Commission as a body with limited high-level management functions responsible for defining and suggesting the "common European good". Its functions are the same as it has been undertaking since 1997, plus other new powers concerning justice, internal security and economic co-ordination. It only remains to point out the recognition of the monopoly it exercises with respect to legislative initiatives, and for annual programmes and those covering more than a year.

5. The President of the European Commission

The President continues to be chosen by the European Parliament, to reinforce his or her authority and legitimacy and, as such, is answerable to the Euro-chamber. He or she can choose the team of European Commissioners from a list on which seventy-five candidates proposed by the States will appear. The Commissioners will be chosen under criteria of competence and European commitment.

The European Commission will be composed according to the provisions of Article I-26, sections 5 and 6 of the new European Constitution: "5. The first Commission appointed under the provisions of the Constitution shall consist of one national of each Member State, including its President and the Union Minister for Foreign Affairs who shall be one of its Vice-Presidents. 6. As from the end of the term of office of the Commission referred to in paragraph 5, the Commission shall consist of a number of members, including its President and the Union Minister for Foreign Affairs, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. The members of the Commission shall be selected from among the nationals of the Member States on the basis of a system of equal rotation between the Member States. This system shall be established by a European decision adopted unanimously by the European Council and on the basis of the following principles: (a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one; (b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States."

The principle of equitable rotation of the members of the Commission deserves special mention. Although the chosen Commissioners will represent all States of the Union, it has been preferred that their representation on the Commission should rotate, so all Member States that have not had commissioners representing them on the Commission will have them in the next legislature.

We can suggest in advance some of the problems this kind of complex procedure for choosing Commissioners could cause. Taking into account the disparity of resources and populations of the States, the application of the principle of representing all the States and compulsory rotation, a composition of the Commission could be arrived at whose legitimacy could be called into question. Because of this, it is established that the Council can take decisions to enable the Commission to properly reflect the demographic and geographical variety of the EU States as a whole. And this, however one looks at it, is a caveat that benefits the power of the Council as opposed to the Commission. This is without forgetting the difficulties the President of the Commission must go through in answering to the European Parliament for the work of a team he or she is not free to appoint.

IV. The problems of the draft European Constitution

The text solemnly signed in October 2004 in Rome finally contains the name "Constitution". Strictly speaking, it is the *Treaty establishing a Constitution for Europe*. But is it really a Constitution?

Classically, as Article 16 of the Declaration of the Rights of Man and of the Citizen says: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." Applying this definition to the European constitutional text, then, we can conclude that, provided the principle of the separation of powers has been respected and provided the rights of citizens have been guaranteed, we will have a Constitution for Europe.

It is clear that this definition has been borne in mind while the text was being drawn up. However, although nominally we have a constitutional text with a declaration of rights and with a distribution of power between the legislative, executive and judicial arms, the European Constitution hardly seems like what we understand by a constitution within in each of our States.

As for the *dogmatic part* of the European Constitution, the first thing we see is that, far from including the basic elements making up a coexistence pact, which is in itself a Constitution, it lacks consensus. It has not yet acquired binding legal force and it has already created problems over the acceptance of certain principles. The incapability of members of the Convention to reach an agreement on these principles, which all Europeans know unite us but which we are incapable of formulating, has caught the attention of public opinion. It is a problem of dogma and of principle, but through it we can glimpse another hidden reality. We knew that we did not know "who we wanted to be", but did we know that we did not know "who we are" either? We also do not know the normative value of the declaration of rights (*The Charter of Fundamental Rights of the Union*). In principle, the European Constitution (Part II) provides it with the force of law, so that rights can be directly claimed by citizens before the courts. However, the United Kingdom did not accept that Britons could claim the right to strike or to a job other than internally, so less binding formulas were sought in this case and also for other States (including Ireland, Denmark, Latvia, the Netherlands and Sweden); in fact, the Charter lacks its own protection mechanism.

The *organic part*, the part that designs powers, by virtue of the principle of the separation of powers – a classical theme in all attempts at constitutions – has also not been properly resolved. In fact, some authors have seen in this confused language and in the difficult institutional balance achieved, a desire for centralization by stealth. The EU has exclusive authority in certain areas, such as monetary and trade policy. But authority is also shared between the EU and the Member States in sectors such as agriculture, social policy and "economic and social cohesion". In the Europe of 2009, national economic policies will be "co-ordinated" (that means harmonized and centralized), while the division of powers in the areas of employment, education and culture will be subject to "support actions".

It is essential to fight against the widespread impression that, in the face of resistance to greater centralization of all power in Brussels, the advance towards a

hypothetical European super-state could be made by the back door. In that emerging framework, every time disputes arose over the interpretation of an article, it would be Brussels that decided. And we would then be obliged to accept that what the Europhobes call "a mass of bureaucrats", not elected by anyone, would always decide in favour of greater centralization of European authority as opposed to that of the States.

The problem we have in applying the principle of separation of powers is making a new division of power between pre-existing territorial bodies with opposing interests. At the bottom of this is the old confrontation between the nation states and the Union, and any criticism of the solutions provided in the European Constitution is motivated by some kind of relative loss of power by the larger States to the medium-sizes ones, or of the smallest States with respect to the larger ones, specifically in the cases of Spain and Poland. The cause of this problem is basically rooted in the new QMV (*qualified majority voting*) which combines the criteria "Member States" and "population" in decision-making. Having already come a long way from what was initially a "naive Europeanism", Europeans have experience of multiple negotiations and of the importance that the blocking minorities have for national interests. But it was also then essential to combine the distribution of power between states with the power of citizens, in accordance with traditional democratic rules and, of course, the result could not completely meet the needs of both extremes.

As for *institutional balance* of government action which Giscard d'Estaing wanted to preserve, there are also some things that can be said about this. The Commission itself, previously presided over by Romano Prodi, had a duel which bordered on the personal against Giscard d'Estaing and the Convention. Its origins go back to the winter of 2002-2003, when Prodi presented his own draft Constitution called Penelope. Prodi's scheme was clearly centralist and openly took steps towards the federalization of Europe. Because of this, he criticized Giscard d'Estaing's constitutional project (the one that has subsequently been formalized as a new European Constitution) because of "its lack of ambition for Europe", as it settled for presenting an unstable balance and interest in greater integration was veiled. Criticisms of the institutional reform of Giscard d'Estaing's project consisted of denouncing the weakening of the Community executive as opposed to the executives of the Member States. And to a point he was right, if we look at the new European Constitution:

- Firstly, because the composition of the new Executive (European Commission) contained in Article I-26 of the European Constitutional Treaty, runs the risk of "weakening the operation of the institution" by introducing this "unequal status" among its members.
- Secondly, because the creation of the function of a permanent President of the Council could "affect the institutional balance", causing "duplications" with the role of the Commission.
- Thirdly, because resorting to the qualified majority for decision-making, which has been expanded in relation to the current Treaty, does not respond to the needs of a Union expanded to around thirty States for the next thirty years.

The Commission's position was that the unanimity rule had to be ended immediately on other matters.

- Fourthly, the advances in financial government and the external representation of the euro zone are not sufficient. The Member States that share the same currency should be able to decide among themselves, according to the community method of integration.
- Fifthly, the Convention has not introduced reform procedures or a review clause into the Constitutional Treaty that would allow certain constitutional devices to be amended through a "reinforced majority" procedure without going through new national ratifications, or through the traditional method of revising treaties through unanimity.

The battle for institutionalizing a "Mr Euro" was also a hard one. The new European Constitution (see the section concerning "Monetary Policy", Article III-185 et seqq. of the Constitutional Treaty) has not formally opened the door to this Mr. Euro – a Finance Minister who would have presided over the meetings of the ministers of the Euro-zone (Euro-Group) and of the EU (Ecofin) for two years. This would have been a kind of financial President, who would have usurped the role of the Commissioner for Financial Affairs, who today is the Spaniard Joaquín Almunia. The Commission rejected this "minister" responsible to the Council and to the national governments. As an alternative solution, the French commissioner Michel Barnier proposed a European Finance Minister, similar to the Foreign Affairs Minister, who would also be a Vice-president of the Commission, involving dual responsibility (between the Council and the Commission). But this French proposal also failed.

As for the representation of composite states, there has been little progress in the recognition of the so-called "regions" in Europe, which are real political entities with their own democratic legitimacy and broad legislative powers (also in the development of European policies). The idea of a second Chamber of regional or "federal" (a term, by the way, reviled by the British) representation was rejected. The creation of a Legislative Council which, as a second chamber in federal style, would have approved laws together with the European Parliament, was not accepted. This was another dispute in which Spain and the United Kingdom acted together. They were supported by Ireland and Sweden.

V. Conclusion

Ultimately, not all the points opened up in the exciting debate on the European Constitution have been reflected in the version of the constitutional text of 13 October 2004. The definitive text of the European Constitution was agreed on 18 June 2004 at the European Council in Brussels. This text concluded the negotiations that began in October 2003 with the Inter-governmental Conference. At this conference, only the Member States, including the ten countries of the expanded Europe after 1 May 2004, had a vote. The three candidate countries – Bulgaria, Rumania and Turkey – with which entry negotiations are continuing, took part as

observers in all sessions of the Conference. The fact is that the definitive text was therefore agreed in Brussels five days after the European elections of 13 June 2004, which brought disappointing results, with a high percentage of abstention, especially and curiously in the Eastern European countries.

The text of the draft European Constitution is, as has been made clear, dense. The balance of power achieved between European institutions, between the European Union and Member States, between large, medium-sized and small states, is a delicate one and needs underpinning if it is to have any prospect of lasting when faced with a Europe that has still not finished its integration process.

This difficult balance of power has been achieved using technical devices that operate like pieces of clockwork, so, if students find the text too technical, the four parts of the European Constitution become unintelligible to the average citizen. This is especially important given that the Constitution will stand above all national legislation (including the national constitutions themselves) and must be ratified in all the countries, in some of them, such as Spain, by referendum (was held on 20 February 2005).

For this same reason, we must explain it very well so that citizens can have the last word and adopt it on a proper basis. This European constitutional text must circulate among citizens and it must be explained, beginning by saying that most of the criticism it receives is due to the defective vision of those of us who are leading the process (whether as citizens or as part of nation states). We take as a comparative reference for the result obtained by this distribution of powers in the European Constitution, the parameters of our respective national situations. However, if there is one thing we have to remember it is that the European Union is a reality without precedent or comparison either in classical international law or in national constitutional law. Therefore, the form of government established in the European Constitution is an original form of government. It is undoubtedly democratic and its legitimacy comes from the direct election of the European Parliament and the direct election of the national governments making up the Council. This could not be otherwise, bearing in mind the double nature of the Union.

However, we cannot state that it is a similar organization to that of the Member States that can be classified as a parliamentary or a presidential system. It is a new form of government, which develops the separation of powers with a division of different functions in a way not tried until now, but which, in all cases, deliberately seeks consensus and balance in order to make it lasting. This is completely different from Montesquieu's classical positions. It is something that responds to the reality of today's European Union and to the current aspirations and expectations that we Europeans have for the Europe we want.

Of course, the European Constitution stems from a real constituent power in Europe because there is a common desire present in the States and among European citizens to move forward with integration, and this involves a new coexistence pact. However, this constituent power is not similar to those experienced either in European nation states or in other integration processes as, for example, in the recurring case of comparison with the historical configuration of the United States of America. And this is not so because, in contrast to known processes, in

the European process the coexistence pact does not precede the constitutional pact. Instead, both are growing and being created simultaneously. However, the results achieved are entirely comparable. We might even say that European integration is going faster than the American process, that in fifty years we have achieved more integration than has been achieved in a century in the USA. By way of example, monetary union around the euro has taken just fifty years to happen, while monetary union around the dollar took more than a hundred and twenty years.

Although in this essay we have dealt with the issue of how the new institutional design has turned out and how the balance of power has been achieved in the draft European Constitution, we must bear in mind that the solution to what we call the "democratic deficit in the EU" will not only come from technically refining the mechanisms for producing regulations but rather from adapting the production of regulations (by whatever procedure and whatever we call it) to the needs and ambitions of European citizens. It is therefore time to continue moving forward in the debate and to introduce other elements for discussion (not only legal or financial ones) that enable us to obtain better solutions with a view towards the construction of Europe and that enable us to visualize and predict the operation of this new institutional distribution with respect to the new ambitions Europe has established. This is the real European Constitution: one which springs from the coexistence pact between Europeans (whether they are represented by their governments or directly in the Assembly) and which for some time does not seem to have been settling simply for being a European market, but which instead aspires to a Europe united on international policies over crucial issues such as immigration, poverty and security; a Europe with a presence in the international concert and capable of contributing to putting into practice a clearly European project, to achieve a more open world that must also be more stable, more habitable and more secure.

The development of the Committee of the Regions

Enrico Borghi

I. Foreword

In order to fully appreciate the new role of the Committee of the Regions (CoR), I think it is necessary to look at the past situation and rapidly re-read the process of Italy's economic development within the context of Europe.

The 19th century was a century of collectivism in which everything revolved around the public protection of workers' interests, and on the preference given to collective action.

The 20th century, after the first fifty years which saw some of the greatest tragedies in history culminating in the two bloodiest wars in the history of humanity, saw a period of major public intervention designed to reconstruct the economy and reduce the imbalances. This phase mainly occurred in the 1950s and 1960s, when it was superseded by a ten-year period in which the Government intervened increasingly more intrusively and excessively in managing policies in the private business sector and in programming the development of local areas.

Within this framework there was a system of public finance at work, that has always been a derived financial system based essentially, if not almost exclusively at least until the 1990s, on the central Government's ability to acquire financial resources to be passed on to the various institutional levels lower down.

The 1990s marked a U-turn in this regard, mainly thanks to the emergence, and subsequently the activities, of a new player: the European Union.

The Community integration model, whose political purpose was to establish cohesion between the different local areas of the Member States, gradually sketched out an institutional system built around a new supranational entity – the European Union – which, in the cohesion model, was not a replacement of the nation-State inherited from the past, but on the contrary contributed towards defining a new institutional architecture. This architecture is built on different levels of political, territorial and economic responsibility and accountability, each vested with distinct powers.

Under the new model, it is now possible within one and the same territory to programme a variety of different actions with an impact on the local economy and on social cohesion, within a clearly defined scenario, using different instruments and with the parallel participation of distinct institutional tiers.

It is in this sense that the new institutional architecture, the new "balance of power", introduces the concept of 'governance', based on the interaction between

the different political players, the various institutional levels and economic and social groups in the territory, with a horizontal rationale, in which there is no longer any one political and decision-taking centre at the top in a pyramid-shaped hierarchical structure, from which all development and planning indications proceed.

One of the – many – successes of the European Union, and the massive deployment of its dynamics within the local government system, has been its ability to 'infect' the regions with the rationale of a new development model that no longer sees the relationship between convergence and integration as a one-way process.

The backbone of this model is the sustainability of the convergence process, with the support of an adequate institutional structure. It also includes a kind of "feedback" effect from the integration process into the convergence process. The existence and the strengthening of supranational institutions, in other words, are producing a widespread impact on aspects of convergence that have not yet been fully implemented.

A classic example of this is the Committee of the Regions which acts as a disseminator of a practice/model of implementing development policies or new concepts of social policy between the States and the Regions of the European Union.

Or to put it another way, it "used to act" as a disseminator, a sounding board, an instrument of institutional benchmarking. For in addition to its "traditional" action, it is now faced with the need to evolve, in order to keep pace with the dynamics of the changes currently taking place.

This is because, in theory, the new European development model describes a dynamic process of unification which is not stable until it manages to create a complete political and institutional structure, reaching up to the supranational level. This has to be achieved by subsequent approximations, by on-going adjustments, and by gradual reforms of the instruments to build up a model of "*the governance of governance*", in which the CoR today is not only no longer what it used to be, but it is not yet what it could (or should) be.

II. The Committee of the Regions in transition

The current transition between the Treaty of Amsterdam and the future Constitution of the European Union (TEC) does not seem to involve any substantive change to the CoR. Apart from a few cosmetic changes to the text, the TEC as it stands today only seems to have made five innovations to the Amsterdam Treaty, which cannot certainly be considered to be structural in character:

1. The number of members would rise from the 222 to a maximum of 350. This decision is obviously designed to meet the needs of an increased membership from 15 to 25 States.
2. The term of office will be 5 years in place of the present 4.
3. On the expiry of a term of office at a regional or local institution in effective on being appointed to membership of the Committee, the term will automatically

lapse and the member replaced following the same procedure with which the member was appointed (with the result that a small number of members of the CoR will spend short periods in Brussels which will thereby further weaken the institution's political weight).

4. The Committee will be made up of elected representatives to regional or local government bodies as is the present case, but also representatives of communities that have not been elected but which are "politically accountable to an elected assembly". This is a broader area of choice which could include officers or managers or similar appointees of local government authorities from outside the elected assemblies, but answerable and accountable to them.
5. The Committee is now convened by the Council and the Commission. Similarly, it addresses them opinions at their request. The European Parliament will also be involved alongside the Council and the Commission. It will be possible to establish a relationship, a dialogue between the directly-elected representatives of the people of Europe and the representatives of their local authorities, which, if properly built up between the two parties, could lead to a form of co-operation of great importance with regard to the problems and issues, as well as being a fully-fledged political alliance to deal, at appropriate times, with the other more powerful branches of the European Union.

There do not seem to be any substantial amendments, perhaps except for the latter case as far as one can only imagine at present. There is a risk that the Committee may, even in the future, remain little more than an adornment, with an organisation and a structure that are similar to parliamentary ones, but which in reality merely produce paper, using tiring and rather baroque procedures, without the certainty that any real effects are being produced.

The list of matters for which the opinion of the Committee is, or will be, required, is of scant importance, and even at the present time, the Committee can also address issues that are not requested by the other institutions, and will be able to do so in future. What does need to be verified is the importance or otherwise of the political role given to the Committee and the real effects that its opinions may have on the acts that are submitted to it.

Officials from the Directorates General of the Commission and of the Council of Ministers and the Economic and Social Council are also invited to sessions of the Committee (both the Plenary Assembly and Committee meetings). The officials on the Committees express their views regarding proposals for opinions drawn up by the rapporteurs and on the debate on them. Interesting discussions take place there that appear to be useful for understanding the different points of view.

The structure of the Committee also follows the evolution of the various documents submitted to it for opinions and regularly publishes reports on matters raised in its opinions and incorporated into the final acts.

One has the feeling that the work of the Committee does have some effect.

But, honestly, it has to be said that the elements introduced or amended are generally marginal details, and virtually never produce any substantive or politi-

cally important change. Any modification introduced by the TEC does not seem likely to change things significantly.

The little time devoted to the work of these bodies (normally two days every two months in plenary session and a few hours every two months on the sectorial committees, and a few odd meetings held in various places) makes it impossible to establish any real, permanent and constructive relationship and perhaps any real dialogue, among the members of the Committee, and between them and the officials of the Commission and of the other Community institutions. It is obvious that if more time were devoted to its work, costs would rise to a level that the Union's budget would not be able to bear, and at the same time it would lead to an excessive absence of members from their own local government commitments. However, this is the reality, and it is difficult to imagine that there will be any significant improvement in the future.

It seems paradoxical, but it is unfortunately true, to say that another element of political and functional weakness of the Committee is not due to any rule imposed from above, but from the regulations that the Committee itself has adopted. The Committee is governed by a mammoth-sized Bureau, and this Bureau works as a filter for all matters submitted in both directions:

1. it decides on which items proposed by individual members through their specific Committee can be authorised for the framing of documents, choosing the rapporteur, and which ones will be blocked. It is like the Speaker of a Parliament being able to authorise or refuse the framing of a Bill, taking the decision out of the hands of the parliamentarians.
2. It filters the requests for an opinion received from other Community institutions, and proposes the ones which are not to be addressed. It is true that from time to time some sectorial committee decides not to accept its advice, but in the vast majority of cases, the prior decision taken by the Bureau determines the agenda of the Committee.

It should also be added that what lays down the law in the Bureau is the relationship that exists between the members of the different European parties, particularly the two largest ones. The result is that certain issues, important or not, only emerge if the members concerned succeed in involving the political faction which they belong to, and if an agreement can be reached with the counterpart. Consequently, interesting issues raised by those who do not know how to negotiate the tortuous paths leading to the inscrutable decisions of the Bureau will never emerge, while certain rapporteurs continue to surface successfully at regular intervals with opinions of extremely low value or merely repeating others that have only been recently forgotten.

Although the "power" of the Bureau members is considerable, the political role of the Committee is growing increasingly weaker.

Let us look first of all at the time its work takes. Let us suppose that a member of the Committee decides to put forward a topic for an opinion and for an outlook report, and does so in December.

The member submits the proposal in writing and sends it in good time for it to be translated and circulated to the Commission to which it belongs. Let us suppose

that the Commission meets in January and resolves to agree on a proposal, and submits it to the Bureau. The Bureau meets in February before the Plenary. Let us suppose that the Bureau agrees with the proposal. The Commission meets in March and notifies the proponent who, if he immediately sets about delivering the text within a few weeks (which is not always possible), may see it given a preliminary examination at the May Commission, and a final examination (with the amendments proposed in the meantime debate) at the July meeting of the Commission.

If approved in July, the proposal may then be examined at the Plenary in October in order to be approved definitively. One can easily see that the smallest mishap can make this procedure last a whole year. This is no problem if it is mainly a technical matter, but quite clearly if it is of political importance the results often emerge after the deadline date for it to be effective.

III. The "new" Committee of the Regions

In order to enhance its political role and its capacity to have an effect on important decisions on Europe, the Committee of the Regions still has a long uphill climb ahead of it. As already indicated, the only result achieved in the draft proposal for a Constitution is its linkage with the Parliament. It is possible that the Parliament may think of the usefulness of having synergies with the Committee. Common positions adopted by the Committee and the Parliament on issues of importance, referring directly to the popular vote, can bring weight to bear on the Commission and in particular on the Council of Ministers, that is to say, the Governments of the Member States.

In order to be able to become an authoritative entity in future political actions, whether autonomously or in conjunction with the Parliament, the Committee must change its skin, the way it operates, its procedures, its ability to communicate information and debate to the regional Governments and local authorities in each member country and the whole of Europe itself, regarding its activities and its stances. But this is still a long way off. The Committee is certainly useful not only for its work in itself, but also because of the contribution it can make to the training of groups of officials and their co-workers in the Europeanisation of the approach to problems and of the capacity to channel that approach into the work of their respective institutions.

But political growth is quite another matter. The evolution of the CoR from this point of view seems to be moving ahead at a snail's pace, rather than that of a gazelle.

On how many opinions during the current term of the CoR has there been any serious argument and any serious division when the vote was taken? None, or virtually none. Is it possible that everything goes through unanimously, or at all events with majorities reminiscent of the old Soviet system?

Is this situation not perhaps an indication of a lack of any real debate, the absence of any concrete, real, politically significant issue on which political stances are certainly widely differing?

This is another area in which one can clearly see that we are still a long way from giving it that authoritative political role which is only vested in institutions are able to demonstrate that they know how to build up and express meaningful and significant positions.

Today Europe is much more present in the daily political debate within the Member States, and the practical consequences of monetary unification are producing a very visible and tangible effect on political relations within individual local areas, and between local areas and the national systems. One has only to think, for instance, of the impact of the last two programmes for the use of structural funds, and the growth of the local governing class in connection with the opportunities made available by Community financial resources.

Convergence and integration are no longer viewed as esoteric arguments for a few initiated, but form part of the daily political debate within the Member States and in the candidate States, and local authorities are playing an increasingly important part in that debate, practically everywhere fuelling the impetus towards European integration.

The radical changes taking place in European society are also tending to create powerful interdependencies between many Regions in the Union, and increasingly now it is the Regions themselves that are seeing sectorial policies as the place to find the key for action to trigger their own development.

The paths of local development are increasingly less designed by central Governments and are increasingly following the path of subsidiarity, intercepting Brussels primarily – and sometimes even dispensing of Brussels – from Rome, Berlin or Madrid. Programming development in one of the Regions requires a great deal of thought today, not only regarding the methodology of the analysis to be used, but above all the very objectives of planning which can no longer ignore the general economic situation.

In short, if bringing about development means gathering together the local demands, and transforming those demands into projects that can be financed, and identifying the ways of financing them, it is quite obvious that there is an evident decline in the power of central Government in this regard today, and a parallel weakening of the authority of the government departments responsible for the economy. All this is taking place with a transfer to the European Union of decision-making powers that had formerly been strictly the business of national Governments. The Union is acquiring and increasingly consolidating its role as a player that defines competition policies, guarantees the removal of trade barriers, harmonises, liberalises and controls state aids to business, and guarantees many other citizens' rights.

In other words we are now faced with, and are fully engaged in, a genuine process of alternative research for the dimensions of public authority. The real question that we should be asking today in this regard is not what the future of the CoR will be, but rather what role must the local communities and how will they be institutionally organised to address this process, and as the main terminals of the

principle of subsidiarity, how will they have citizenship rights within the complex governance of the EU to put across their point of view and their opinion as the tier of power which is closest to the citizens.

The European Union is inventing a wholly innovative way without any precedent in history, which consists of governing and implementing the ongoing changes not by unifying the Member States (which in past centuries also took place with bloodshed, at great cost, and with serious repercussions on the future) but by unifying the markets and consequently harmonising State intervention.

But unification would have been impossible starting with the institutions of the individual countries, which is why the process started with the markets.

The great central government apparatuses are therefore increasingly being unloaded of resources and functions channelled everywhere within the EU towards local authorities, regional authorities, agencies and functionally independent organs.

But the point of no return for the old state system can be seen in the way in which the principle of subsidiarity is being enhanced and exploited. This principle was stated for the first time in *Pius XI*'s encyclical "*Quadrigesimo Anno*", where he said that no State and no society must take the place of the initiative and responsibility of intermediate bodies. This principle, which was enshrined in the 1992 Maastricht Treaty, distinguishes relations as between central Government and local Government administrations.

The European regional and local authorities today are the grassroots aspect of democratic, civil and economic life of the Union's citizens. While the European identity is gradually being built up and consolidated, the local communities increasingly feel the need to strengthen their own specific character. Regionalism in Europe is not therefore a mere political and institutional expression, but is mainly a response to the economic and social demands that emerged following the hastening of the integration process. For Italy in particular, where exists an economic model based on small and medium firms, and the production is conditioned by its local networks, the role of regional and local government agencies is decisive to the planning of development policies.

For the regional and local government authorities can, if they function effectively, act programmatically through infrastructure, social and cultural policies, and policies to support and stimulate business. This being so, the quality of the response of local Government to the increasing demand from local businesses for services becomes increasingly more important. They are demanding services ranging from marketing their local environment to organising trade fairs and events, to cooperation with other local systems and new international contacts, being given access to types of incentives, and to new systems of financing, and vocational training.

Within the European Union, the bottom-up approach to planning local operations and activities in some countries is finding it hard to take off, despite the fact that in theory this is already consolidated. Despite this, in the cohesion model, this would appear to be the only way of responding to the economic challenges that businesses and our citizens have to face as a result of the globalisation of the economy, and to do so with a certain degree of equity.

Economic globalisation and the internationalisation of the markets has deprived the national Governments of the possibility to retain control over decisions which had previously defined their economic programme, and over which they had previously had control. We are talking here about decisions regarding capital flows and costs, setting interest rates and inflation levels, choosing investments in such basic sectors as iron and steel, energy and shipbuilding, the possibility of keeping activities based on public monopolies in such areas as transport, telecommunications, chemicals and basic research.

At the same time the new Community rules on competition and the heightened need to remain absolutely competitive against foreign rivals have strengthened the potential of local systems in which the role of "play-maker" undoubtedly belongs to local government authorities in relation to the various functions and administrative tasks they are given. Local authorities, particularly at the municipal level, are becoming all-out "institutional entrepreneurs" in the new system, able to help and underpin the constant adjustment of production systems to meet the needs of the local and international markets.

The responsibilities which Governments are now being called upon to undertake, as authorities to implement policies promoted at the European, national and local levels, consist of networking the sub-national institutional system (regional and local authorities) in a continuing relationship with the beneficiaries of the policies implemented, namely, business and the general public.

Since the end of the European integration phase which subsequently led to the Monetary Union, the problem that has arisen is how to ensure that Community policies, which have become increasingly more numerous and capable of directly affecting the lives of the citizens, can be similarly implemented throughout the Union, if possible with the same degree of effectiveness.

The EU decided to adopt two alternative approaches to foster the convergence of structures and the implementation procedures for its policies in the Member States:

1. convergence of decision-making procedures;
2. programming structural interventions.

As far as the first approach is concerned, there has been for a long time a slow but gradual convergence between decision-making procedures which can be obtained when the administrative elites interact in order to make their contribution to the Council of Ministers of the Union and of the other technical bodies which require their participation. The decisions adopted by the Council of Ministers are the fruit of intense bargaining between the representatives of the national Governments who meet in order to thrash out the details. It is from this interaction that a distinctive European decision-making culture has emerged and developed, involving the Council, the Commission, the technical organs of the Parliament, the CoR, and the Economic and Social Committee. This decision-making culture has so far emphasised the importance of technical skills in preparing the positions with which individual Member States contribute towards the final decision. This is also reflected on the CoR, where the margins for building up coalitions that cooperate in political terms on individual components are very limited, and where the desire

to appraise possibilities for striking a compromise in order to arrive at solutions that are acceptable to all, or to the majority, is mostly left to civil servants rather than elected representatives of the people. And today, in the light of the need to design a CoR with more strength, this appears more like a constraint on its actual representative capacity and political significance. It is, however, no coincidence that the politically most "visible" members have practically deserted it, evidently because they feel ill at ease attending sessions that are basically "prefabricated" as far as the decisions are concerned, with the consensus already worked out in advance. So far, the Treaties have not given the CoR the instruments it needs to be really effective and substantially penetrate the decision-making process, let alone exercising scrutiny over the implementation of the decisions taken there. From this point of view, then, the CoR is even more incomplete, as a "would-be but can't" representative assembly of the local authorities of Europe, which has remained in the embryonic stage and has failed to fully develop as nature would have it. In short, it is as if we were in the "Hall of Pallacorda" while times have changed, and what is needed is an assembly with the typical form of liberal Parliaments.

This situation is even worse when one considers the second aspect to the approaches mentioned earlier, namely, the programming of structural measures.

In this field, which is absolutely vital, and which affects the regions and the local government authorities very directly, the need to be the main interpreters of European development policies makes the role of the CoR even vaguer and more fuzzy.

The systems used to support structural activities in Europe, starting with the first planning period (1989-1993) have led to far-reaching changes, most of which were subsequently applied under the Union's social and economic policy. The dynamics of the structural funds were subsequently extended to other policy areas that have an impact on the socioeconomic cohesion of the individual local systems of the EU.

One may thus conclude that the systems and methodologies for supporting the European Union's structural activities have increased the economic planning responsibilities of the regional and local Governments. Local Governments have been asked to cooperate very closely not only vertically (municipal, provincial, regional, central Government, Commission) but also horizontally, characterised by relations between different Regions or localities which share the same guidelines, features and problems.

The central issue is therefore no longer how to involve the local Governments in framing programmes (a function which the CoR has performed so far, albeit with the limitations mentioned earlier) but rather the way in which this real – and not purely formal – participation in the decision-making process should take place.

The question is complex and deserves further thought, and obviously cannot be dealt with rapidly in this paper. Nevertheless, there are a few things that can be said.

First of all, one can assume that local government authorities have often been organisms responsible solely for administration, and not for taking decisions regarding planning. But today they are being asked to implement a new policy which exploits and enhances self-government and coordination, and which inter-

faces with the players responsible for development (the functional local authorities, the citizens, business, associations, not-for-profit entities). They are therefore considered to be the most credible linkage for taking up the demands for programming, and gathering together the locomotive forces in relations with business and banks (I am thinking for example of the Italian experience with programme agreements, territorial pacts and area contracts).

This new function (which gives them a number of new responsibilities in many respects, including the need to cooperate loyally with the institutions) must necessarily lead to an outlet in the construction of a CoR that is really able to embody the principles of the process which begins from the bottom and which makes the most of the policy-making capacities of local authorities, thereby underpinning a process of physical development planning consistently with the fundamentals indicated in the new institutional architecture of the EU.

Throughout Europe, the local authorities are becoming players which can, better than any other, create better relations between the citizens and the institutions, the only ones that are able not only to identify the demands of the Community, but also to debate them, discuss them, and pursue them in close contact with the citizen.

How to transfer all of this to the Brussels tier, and ensure that the future Committee of the Regions is less an opinion-generating body and more like a policy-making body in which the new functions of local Government are emphasised, appraised and made the most of, is the task facing politics today.

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The Role of Regional and Local Government in European Governance

Stelio Mangiameli

I. The White Paper on European Governance

The process of European integration has had a far greater significance than many of its critics would care to admit. It would be understating the truth and superficial, not to say unjust, to say that all its only real achievement has been to unite the economies of the member countries, with often questionable results. Economic unification has achieved far more than this, making it possible – beyond the most optimistic expectations – to enable Europe to establish a new political[1] equilibrium[2] characterised by stability, peace and prosperity[3] enabling each Member

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1 With regard to economic integration and the political purpose of integration see *U. Everling*, Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes, in: DVBl., 1993, 936-937: "the political aim was within the Community since the beginning and is expressed after much time in the practice"; see also the earlier work of the same *author*: Von Zweckverband zur Europäischen Union – Überlegungen zur Struktur der Europäischen Gemeinschaft, in: *R. Stödter, W. Thieme* (eds.), Hamburg-Deutschland-Europa. Beiträge zum deutschen und europäischen Verfassungs-, Verwaltungs- und Wirtschaftsrecht. Festschrift für *Hans Peter Ipsen*, Tübingen, 1977; see also the earlier opinions of *K. Carstens*, Das politische Element in der Europäischen Gemeinschaft, in: Festschrift für *Walter Hallstein*, Frankfurt a. M., 1966, 96 et seqq., and references by *R. Monaco*, Preambolo, in: *R. Quadri, R. Monaco, A. Trabucchi* (eds.), Trattato istitutivo della Comunità europea del carbone e dell'acciaio. Commentario, vol. I, Milan, 1970, 30-32.

2 In the history of Europe the principle of equilibrium dates back into the distant past, to as easily as the 16th century, when the treaties-writers and its consecration by different governments made it a fully-fledged "European political ideology" (see for example, *F. Chabod*, Il principio dell'equilibrio nella storia d'Europa, in: *Id.*, Idea di Europa e politica dell'equilibrio, Bologna, 1995, 3-6). Even though, prior to this, balance and equilibrium could only be discussed (and then only in theoretical terms) by reference to relations between the Empire and the Church (and certainly not between the different parts of the Empire) it was not until the break-up of the Empire that this principle became a "rule" of international law by virtue of its close linkage with the creation of the nation-States. Seen from this perspective, the post-war establishment of the European Communities acquired a significance that was far more than merely economic in character, because in the attempt to redraw the new European order it ultimately established a new political equilibrium in Europe (see note 1), thereby putting paid once and for all

State to benefit from working together with all the others for the prosperity of their own citizens.[4]

This is often hard to grasp, especially for European citizens, who are led to conclude that the Union is an artificial, and even artfully contrived, construction, because they fail to comprehend the real legal nature of the Union[5], and what it hopes to evolve into,[6] what are its geographic borders,[7] or its political objectives and the way its powers are shared with the Member States.[8]

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to the doctrine of national interest. This is also the underlying significance of today's provisions of Art. I-5 of the *Treaty Establishing a Constitution for Europe* (TEC) which, in contrast to protecting the national identity, establishes perfect equality between all the Member States forming part of the Union. On the offsetting of the principle of equilibrium and the doctrine of interests (which is also related to the idea of *raison d'État*) see also *F. Chabod*, I principi dello Staatensystem europeo fra medioevo e modernità. A proposito di un libro di *Walter Kienast*, in: Riv. stor. it., 1936, 86 et seqq., now in: *Id.* (ed.), Idea di Europa, cit., 93-98 et seqq.; more generally, for some of the earliest writing on this subject see at least *E. Nys*, La théorie de l'équlibre européen, in: Revue de droit intern. et de législ. comp., 1893, 34 et seqq.; *E. Kaeber*, Die Idee des europäischen Gleichgewichts in der publizistischen Literatur vom 16. bis zur Mitte des 18. Jahrunderts, Berlin, 1907.

3 See also the references to "world peace", "peaceful relations", "real solidarity", "progress with works for peace", "the creation...of the basis for a broader and deeper community among peoples long divided by bloody conflicts ", and "the creation of the foundations for institutions which will give direction to a destiny henceforward shared" in the Preamble to the ECSC Treaty of 1951, and "an ever closer union", "economic and social progress", "constant improvement of the living conditions", "the solidarity which binds Europe and the overseas countries" and "to preserve peace and liberty" in the Preamble to the EEC-Treaty of 1957.

4 As *H.P. Ipsen*, Zur Gestalt der Europäischen Gemeinschaft, in Rechtsvergleichung, Europarecht und Staatenintegration, München, 1983, 283 et seqq., has emphasised, the purpose of the work of the Community was only to address specific and limited sectors the of *Wohlfahrstaat*, and therefore had no effects on the basis of *Staatlichkeit*. The Communities were the holders of particular and different interests from those of the individual Member States, even though ultimately they acted for the social good of those States. In this regard see also *Id.*, Über Supranationalität, in: Festschrift für *Ulrich Scheuner* zum 70. Geburtstag, Berlin, 1973, 211 et seqq.

5 On this point, various different positions can be found in *D. Curtin*, The constitutional structure of the Union: a Europe of bits and pieces, in: CMLR, 1993, 30, 17 et seqq.; *A. D. Pliakos*, La nature juridique de l'Union européenne, in: RTDE, 1993, 185 et seqq.; *O. Dörr*, Zur Rechtsnatur der Europäischen Union, in: EuR, 1995, 334 *ff*; *D. Buchwald*, Zur Rechtsstaatlichkeit der Europäischen Union, in: Der Staat, 1998, 189 et seqq.; see also BVerfGE 89, 155, 181, who, taking up the definition of *P. Kirchhof*, called the Union a *Staatenverbund*; more recently an interesting attempt to see the European Union as a *Bund* can be found in *C. Schönberger*, Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas, in: AöR, 2004, 81 et seqq.

6 Although Title I of Part I of the TEC is entitled "Definition and objectives of the Union", the new constitutional document fails to provide a definition of the legal nature of

European citizens do not have a real European consciousness,[9] primarily because there is no real European *Öffentlichkeit*.[10] Furthermore, even though the results of the process have been obtained by using the democratic method, namely, a "dual mandate" (the European Parliament representing Europe's citizens and the Council which brings together the governments of the Member States) Europe's

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the Union and expressly restricts itself to saying that the Union possesses legal personality (Art. I-7). On closer examination, the provisions scattered throughout Part I imply that the concept of the European Union *established* by the Treaty (Art. I-1) is broader than had previously been presupposed, because it no longer considers the Member States alone: see for example Art. I-1(1) where the institution of the Union is linked to the "will of the *citizens* and the States of *Europe*" and Art. I-3(1) which states that "The Union's aim is to promote peace, its values and the well-being *of its peoples*", and Art. I-3(2) which states that the area of freedom, security and justice is offered by the Union *"to its citizens"* (emphasis added).

7 It is fairly clear that the TEC seems to be making an attempt to define the borders of the Union in some way, because as Art. I-1(2) and Art. I-58 say, the Union "The Union shall be open to all *European* States which respect the values referred to in Article I-2, and are committed to promoting them together" (emphasis added); far from being a pleonastic expression, this language appear to presuppose two conditions. Namely, 1) that it is a union of States which *geographically* belong to the European continent and 2) that these are States that share one and the same legal and political tradition, in other words, the same basic "values" referred to in Art. I-2 of the Treaty; see also Art. I-3(4) where the Union (or rather its values and interests) is held up in contrast to "the wider world".

8 The link between the *objectives* and the *powers* of the Union (in sharing its competences with the Member States) as well as the *political* nature of its objectives seems to be patently evident in the plan underlying the TEC: cf. Art. I-3.

9 Cf. *J. Magone*, La costruzione di una società civile europea: legami a più livelli tra comitati economici e sociali, in: *A. Varsori*, Il Comitato Economico e Sociale nella costruzione europea, Venezia, 2000, 222-226, who says that at the end of 1995, 5% of the interviewees felt that they were Europeans alone, 6% that they were more European than linked to a particular nation, 48% felt more linked to a national rather than to a European environment, and 40% only to a national environment.

10 Assuming a "functional concept of public opinion", staunchly defended by *N. Luhmann*, L'opinione pubblica, in Stato di diritto e sistema sociale, Italian translation, 2nd edn., Napoli, 1990, 81 et seqq., according to which the problem of public opinion is really a problem of political communication, where what is important – due to the complexity of social relations – is not so much what public opinion actually is, and hence whether it is right or wrong, but rather the choice of the "issues" (namely, "those complexes of sense which are undefined or more or less susceptible of development, on which we can discuss and share the same opinion but also different ones" and which "form the structure of any communication") perhaps the formation of a European *Öffentlichkeit* needs the capacity for an "issue", by virtue of its ability to "reduce insecurity" and "provide structures", to acquire "self-evidence" within Europe. For a different reconstruction of the concept of public opinion see *J. Habermas*, Storia e critica dell'opinione pubblica, Italian translation, 8th edn., Rome-Bari, 2001.

citizens continue to see all this as onlookers from outside, not being directly involved in the political work of the Union.

The reform process which the 2001 White Paper on European Governance set out to revive took all this on board, because in an attempt to overcome the public's diffidence regarding Europe it triggered a widespread debate on the future of the Union, and at the same time examined solutions to reposition civil society at the heart of reconstruction, so that with the Union on the verge of changing (by broadening its tasks and extending its borders) civil society would be able to actively participate in every phase of the Union's political work, from European policy-framing stage to their implementation.[11]

Five principles were placed at the basis of good Governance, namely: openness, participation, accountability, effectiveness and coherence. It was to try to mitigate the vertical structuring of relations within the Union that these principles were intended to run across every tier of government (global, European, national, regional and local) and to "interact" between them. In this "interaction" the principles of proportionality and subsidiarity were supposed to play a central part, because it was necessary first and foremost to see whether public action was necessary, whether it was more appropriate for this to be done at the European level, and to verify the proportionality of the action taken in terms of the objectives to be attained.

1. The changes proposed in the White Paper: Regional and local democracy

Among the changes proposed by the White Paper there was one designed to enhance the citizens' participation in the Union, to make the integration process more democratic.[12] The pursuit of this objective appears to be linked above all to starting a public debate. And this would require the public to be informed about European events and therefore being in a position to monitor the ongoing political process as it took place. To achieve this, it deemed necessary to establish regional

[11] With regard to the initiatives undertaken following the adoption of the White Paper on Governance regarding civil society's participation, see European Commission, General Report on the Activities of the European Union 2002, Brussels-Luxembourg, 2003, 19 and European Commission, General Report on the Activities of the European Union 2002, Brussels-Luxembourg, 2004, 23.

[12] This idea – as it is clear from the novelties introduced by the TEC – has to do with a *participatory concept of democracy*, according to which the citizens are actively involved in the process of governance. In this connection, and regarding the further two distinctions drawn within this concept ("republican" *versus* "communitarian"), see more recently *S.N. Eisenstadt*, Paradossi della democrazia. Verso democrazie illiberali?, Italian translation, Bologna, 2002, 15 et seqq.; for a wider discussion of this topic, *C. Pateman*, Participation and Democratic Theory, Cambridge, 1970.

and local democracy, engage civil society in a participatory role, and use two tools that typify the modern world: computers and expert opinion.

"Vertical" relations within the Union have become more complex, and more interactive. It is not only the domestic relations between central government and the lower tier government entities that have been changed, but also the relations that traditionally have characterised international law in the classical sense of the term.[13] The work of the Union ultimately superseded the intermediary role of the State and gradually reached out to the other tiers of Government of which each Member State is composed, such that the local communities themselves have become accountable for failure to implement many of the Union's policies, such as agriculture, Structural Funds and the environment.[14] But even when these responsibilities are not directly placed on them – but only when central government is held responsible for the poor exercise of its powers – there is no doubt that as vertical relations become increasing intertwined between all tiers of government, those tiers should be more directly involved. Even though national governments are presently reluctant to give local government tiers any full and direct participation in Union policies, the efforts being made by the Union must move in that direction. As the White Paper itself said, when the Commission drafts its proposals, it should take account of regional and local government authorities, organising dialogue with European and national associations of regional and local government authorities more systematically, and at the same time respecting the constitutional and administrative provisions of each Member State, until the time becomes "naturally" more mature.[15] Furthermore, in order to achieve the necessary greater

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[13] The establishment of the European Communities also fuelled a heated debate regarding the legal nature of relations between the Member States. The fact that it produced wholly new effects compared with those affecting relations under international law, threw public law writers into disarray. For those who at all events viewed these relations to be typical of international law, albeit with different nuances, see *G. Barile*, Diritto internazionale e diritto della CECA, in: Atti ufficiali del congresso internazionale di studi sulla CECA, vol. II, Milan, 1957-1959, 92; *G. Balladore Pallieri*, Le Comunità europee e gli ordinamenti interni degli Stati membri, in: Dir. intern., 1961, 3 et seqq.; *A. Migliazza*, Le Comunità europee in rapporto al diritto internazionale e al diritto degli Stati membri, Milan, 1964, 55 et seqq., and the literature cited there; see also *H.P. Ipsen*, Europäisches Gemeinschaftsrecht, Tübingen, 1972, 185, 193 et seqq. who rejected this approach and spoke instead of "international law bias"; see also the earlier criticisms raised by di *G. Morelli*, Appunti sulla Comunità europea del carbone e dell'acciaio, in: Riv. dir. intern., 1954, 3 et seqq.

[14] On this issue see section 3 below.

[15] See the Resolution of the European Parliament of 14 January 2003 welcoming in particular the way the European Constitution had adopted new methods of participation by regional and local bodies, particularly in the process for drawing up Community decisions and implementing Community policies (OJ 1/-2003, point 1.1.13); see also the Communication from the Commission of 19 December 1003, Dialogue *with associations of regional and local authorities on the formulation of European Union policy*, COM (2003) 811 and OJ 12-2003, point 1.3.111; see also section 2.3 below.

flexibility in legal acts because of the widely differing conditions under which the local communities have to operate, the Community will ascertain whether it is possible to improve the implementation of Community policies under tripartite contracts, to be concluded between the Member States, the territorial authorities designated by them, and the Commission.[16] Lastly, the Commission will endeavour to encourage a more consistent global policy, considering which policies of the Union affect the domestic local and regional levels of the Member States, and taking action to free these policies from sectorial rationale and enable them to develop in a more unitary and coherent political framework.

2. The participation of civil society

As the White Paper puts it, "Civil society includes trade unions and employers-organisations («social partners»); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities". The importance of civil society stems entirely from the elementary consideration that the "social groupings" which comprise it represent spontaneous groups[17] in which the human personality develops.[18] As the White Paper quite rightly points out, it is in these groupings that the concerns of the citizens are pooled and responses identified to meet everyone's needs. Each one in their own manner. Each one with regard to their own part. Each one according to

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[16] Cf. in this regard the fourth Communication of 11 December 2002 by the Commission entitled "*A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities*": COM (2002), and OJ 12-2002 point 1.1.12; see also see European Commission, *General Report on the Activities of the European Union 2003,* cit. 27, referring to three environmental protection pilot projects aimed at establishing target-based tripartite contracts or agreements, launched by local authorities, with the support of regional and central authorities with backing from the Commission: one project in Birmingham (United Kingdom) to do with urban mobility, another in Pescara (Italy) relating to urban mobility and air quality, and the third one in Lille (France) focusing on the management of green urban areas.

[17] See in this regard *C. Frantz*, Der Föderalismus als das leitende Prinzip für die soziale, staatliche und internationale Organisation, unter besondere Bezugnahme auf Deutschland, kritisch nachgewiesen und konstruktiv dargestellt, Mainz, 1879, who, precisely because of the natural tendency for individuals to form groupings at every level of society, rejected the traditional (19th century) idea of society as being separate from the State. For this writer, there is only *Staatsgesellschaft*; for a reinterpretation of the positions of *Constantin Frantz* see *E. Di Salvatore*, Constantin Frantz e la dottrina del "Federalismo organico", in: TDS, 2004, 134 et seqq.

[18] See for example Art. 2 of the Italian Constitution, which specifically links the development of the human personality to the people's participation in social groupings. On the significance of this linkage, see *C. Mortati*, Istituzioni di diritto pubblico, I, 8th edn., Padova, 1969, 146 et seqq.

their partial and opposing visions of the world, according to their abilities, contributes towards building up civil society by performing widely differing tasks. Some of them, like the trade union organisations and employers' associations, can even play a special role, and have a very special influence compared with the other social groupings and organisations, because they are already taken into account by Treaty law which provides that when framing proposals, the Commission must consult employers and workers who can, under certain conditions, conclude binding agreements that will subsequently form part of Community law (with all the guarantees with which that law is surrounded).[19]

The participation of civil society, in other words, enables the citizens to play a greater part, while guaranteeing a change of ideas, political thinking, and the renewal of society itself.[20] This being so, the increasing involvement of the social

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[19] The privileged role that many associations and organisations have in civil society is also due to the fact that some of them are fully-fledged lobbies, and, as we know, manage to penetrate and informally influence the decision-making process. On this subject see: *S.S. Andersen, K.A. Eliassen*, Informal processes: lobbying, actor strategies, coalitions and dependencies, in: *Id.* (eds.), Making Policy in Europe, London-Thousand Oaks-New Dehli, 2001, 44 et seqq.; see also *E.-W. Böckenförde*, Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozialstaatlichen Demokratie. Ein Beitrag zur Problem der 'Regierbarkeit', in: *Id.* (ed.), Staat, Verfassung, Demokratie. Studien zur verfassungstheorie und zum Verfassungsrecht, 2. edn., Frankfurt a. M., 1992, 406-410 et seqq., who, *inter alia*, emphasise that these associations and organisations can be considered to perform three different functions: "*die Beeinflussungs- oder Pressionsfunktion, die Vereinheitlichungs- und Informationsfunktion sowie die Integrations- bzw. Entlastungsfunktion*"; for this writer, the first type of function is directed both "at public opinion" and "at the political parties and governmental and parliamentary authorities" (p. 412); on this point a number of interesting observations are made by *C. Mortati*, Istituzioni di diritto pubblico, cit., 144 et seqq.

[20] In institutional terms, the participation of civil society is guaranteed by the institution of the Economic and Social Committee for which Art. 257 TEC provides as follows: "The Committee shall consist of representatives of the various economic and social components of organised civil society, and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest". This Committee which, following the adoption of the rules of procedure in 2002 was named the *European Economic and Social Committee*, as a consultative body set up since the foundation of the European Communities with the responsibility of drafting mandatory and optional opinions, or opinions at its own initiative regarding the work of the Council, the Commission and the European Parliament. Despite the fact that it achieved greater autonomy across the years (financial autonomy, the power of self-regulation and of appointment of its own officials), the political weight of the Committee within the Union has gradually weakened. This has certainly been due, among other things, to the fact that groups of experts and lobbies have acquired greater importance in providing technical and scientific consultancy services for decision-making by the part of the Commission. On this point see *R. Cadin*, Art. 257, in: *A. Tizzano* (ed.), Trattati dell'Unione europea e della Comunità europea, Milan, 2004, 1206 et seqq., and the references there to Community law and case law regarding the financial,

partners in the integration process also implies that they must become increasingly more accountable for what they do.[21]

3. Computers and expert opinion

The safeguarding of citizen participation in the Union is also linked to the role of the two typical features of the modern world: computers and expert opinion.

In the first case, the existence of a variety of different networks, mainly due to increasing global interdependence, would not only develop the sense of belonging on the part of Union citizens but would also link companies, communities, research establishments and the regional and local government authorities, making it possible to create a pluralism of ideas and even –quoting the White Paper once again – "build bridges to the applicant countries and to the world". For this reason, and also because of the objectives being pursued, some of these are already in receipt of Community financial support.

As far as the decisive role of expert opinion is concerned, the first point to be considered is that like many other issues relating to bioethics or food, it appears that many of the political decisions cannot be taken without acquiring prior technical or scientific advice. It is precisely because of the frequent crises that have occurred in some sectors, however, that some suspicion has been raised regarding the real role of experts, since it is not entirely clear whether decisions are in fact due to expert advice or come from the political authorities. Closer participation by citizens and an improved drafting of Community policies will therefore depend on their being provided with more information about the working procedures used by the experts. And in addition to this, there must be the possibility of gathering and

organisational, structural and functional autonomy of the Committee (1208 et seqq.); on the origins of the Committee and its development see *S. Siebeke*, Institutionalisierte Interessenvertretungen in der Europäische Union, Baden-Baden, 1996, 23 et seqq.; among the older references in the literature see *G. Zellentin*, Der Wirtschafts- und Sozialausschuß der EWG und Euratom. Interessenrepräsentation auf übernationaler Ebene, Leiden, 1962, and *F. Fischer*, Die institutionalisierte Vertretung der Verbände in der Europäischen Wirtschaftsgemeinschaft, Hamburg, 1965; for the more recent literature see *R. Serra Cristobal*, El Comité Económico y Social de la Comunidades Europeas: su papel en la promoción de los derechos sociales, Madrid, 1996; *K.V. Jürcke*, Der Wirtschafts- und Sozialausschuß der Europäischen Gemeinschaften, Baden-Baden, 1998; *A. Varsori*, Il Comitato Economico e Sociale, loc. cit.; and most recently, *P. Brombo*, Le formazioni economico-sociali e l'Unione europa, in: TDS, 2003, 291 et seqq., 303 et seqq.

[21] On the relationship between participatory democracy and accountability see *S.N. Eisenstadt,* Paradossi della democrazia, cit., 17 et seqq.; with regard to the reform of European governance, see also *F. Morata*, Come migliorare la governance democratica europea con le Regioni, in: Ist. Fed., 2004, 23 et seqq.

disseminating different scientific opinions to create a reliable, pluralist and comprehensive scientific benchmark system to underpin the Union's policies.[22]

4. The consultation and dialogue method and culture, and improving Community legislation

The reform of European Governance also entails revising the way the powers of the Union are exercised. The Community method, rather than the governmental method, should play a central role in this regard. Extending it cover a larger number of sectors would guarantee a more equitable treatment of all the Member States, making it possible to reconcile the interests of the Union (through the Commission) with the national interests (by representation on the Council and in the Parliament).

Secondly, the European institutions, particularly the Parliament through public hearings, must improve the culture of consultation and dialogue. Doing so through normative acts would not appear to be the most viable means of achieving this, for this would make the system too rigid. It would be better to adopt a code of conduct setting down minimum quality standards focusing around topics, timing, people and forms of consultation. Laying down a number of standards in the code of conduct should reduce the risk of political action ignoring public opinion or only catering for the interests of a few groups or minor organisations. However, this will not prevent the Commission from developing partnership agreements in addition to those provided by the code of conduct which will enable civil society organisations to change their structures, to become more open and representative.

Thirdly, as part of the reform process, the role of Community legislation needs rethinking. Consistently with what has already been said, the Union must improve the quality, the effectiveness and the simplicity of its normative acts, thinking first and foremost of making the different types of acts more flexible by combining the various instruments for public intervention and linking each type to the objectives of the Treaty. A number of factors will condition these improvements: 1) firstly, the fact that it is necessary to act at the European level, and that this action must necessarily take the form of a normative act, which could also exclude recourse to other forms of intervention or the combination with instruments alternative to legislation as such (for example guidelines, self-regulation, etc.); 2) if it is decided that a normative act is to be adopted in relation to the objectives of the Union, thought must be given to which instrument would be the most appropriate. A Regulation would therefore be more appropriate whenever it is necessary to en-

[22] Cf. The *2nd Communication* from the *Commission* on the collection and use of expertise by the Commission: Principles And Guidelines, 11 December 2002 (2002) 713, and OJ 12-2002, point 1.1.11: the Communication also makes it clear that these guidelines, to be implemented as from 2003, would also apply to consultancy and expertise in the broad sense of the term, and not be restricted merely to scientific expertise.

sure uniformity and legal certainty in applying the rules within the territory of the Union, while the Directive would be more appropriate whenever less imperative and more flexible rules are sufficient, even though the advantage that they can be adopted rapidly is offset by being structurally exposed to considerable delays when being transposed into national legislation; 3) the White Paper requests that under specific circumstances, use should be made of *co-regulation* (involving the parties directly involved in a particular area of governance in the drafting and implementation phases) and of the *"open method of coordination"* which, unlike the Community method, would take on the features of cooperation and the exchange of best practices between the Member States;[23] 4) with regard to improving, by simplifying, law-making – which must necessarily improve the quality and the effectiveness of the law – the Commission has expressed the hope that a comprehensive programme for simplifying current legislation will begin, above all by repealing "redundant or obsolete provisions"; 5) solutions regarding improving law-making refer above all to the European level and the tasks that fall to the Union. But a similar commitment is also demanded on the part of the Member States. They must not only repeal provisions that are not (or might no longer be) consistent with Community law, but they must also play a more active part by improving the enforcement of legislation at the national level. It is quite obvious that the future of European law – or better still, the future of the European Union itself – will depend solely on the will and the ability shown by the national authorities to make sure that European law is brought fully into force, effectively and promptly.

5. The contribution of the Union to world governance and the revamping of policies and institutions

Even though the principles of good governance were laid down looking ahead to the enlargement of the Union, they could also stand as a useful benchmark for world governance. This is essential, not only because it would lead to creating a more authoritative Union on the world stage, but also because by giving an undoubted impetus to the construction of worldwide governance, the implementation of these principles would have positive fallout at European level.[24]

Opening up to the worldwide dimension would require new instruments for action and more modern and effective institutions. The Union would have to be represented as such in international and regional forms and organisations, and by

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[23] See for example the *Communication of 11 July 2001 on the open method of coordination for Community immigration policy* (COM (2001) 387).

[24] On world governance, and in particular the role that the local and regional authorities should be playing in it, see the Draft Opinion of the Committee of the Regions of 11 November 2004, Draft Opinion of the Committee of the Regions of 11 November 2004, "The Social Dimension of Globalisation - the EU's policy contribution on extending the benefits to all", COM(2004) 383 final, point 2.

improving the existing treaties, it would have to become increasingly more visible in the eyes of the world.

In order to re-establish relations with its citizens, it would also have to comprehensively rethink all its policies and institutions.

Regarding its policies, the Union should first understand what objectives have to be pursued in the long term. Once these have been set out in the treaties, they should be pursued with greater coherence because a clearer refocusing of the objectives would make it possible for the Union to best steer the reform of its policies while ensuring that enlargement will to weaken the European level (either internally or externally). More specifically, this could mean, for example, that every year the Commission could be given the responsibility for strategic planning and for drafting policies covering two- or three-year periods.

The question of redrawing the institutions is also part and parcel of policy reform. As the White Paper states, the Union should revitalise the Community method and give the institutions their "natural" place, ensuring that all the institutions perform the tasks originally assigned to them. This means that the Commission would once again propose and implement the Union's policies, the Council would lay down the policies and jointly with the Parliament adopt the legislative acts, and so on.

II. The role of the regional and local communities in European governance: from "*Landesblindheit*" to the innovations enshrined in the Maastricht Treaty

International, European, national and local policies have developed by adopting pragmatic solutions and applying technocratic rules, without allowing the citizens to play any part whatsoever in taking decision that concern their own existence. Paradoxically, this exclusion of citizen participation has actually bridged the democratic deficit by legitimising the "results" instead of the "process".[25]

The proposals set out in the White Paper are evidently based on this understanding in an attempt to renew the European political process, but also on the realisation – which is also paradoxical – that people are already disenchanted with the *a posteriori* legitimation of the construction of Europe.

This lack of enthusiasm on the part of Europe's citizens requires the Union to return to the grass roots, to its citizens, primarily by opening up the channels of regional and local democracy.

As already mentioned, the work of the Union has been gradually extended to take in the regional and local dimensions, with the result that the *distortions* caused by legitimising the results affect them as well. That is hardly surprising. Signing the treaties establishing the European Communities opened up the state

[25] *J.H.H. Weiler*, Un'Europa cristiana. Un saggio esplorativo, Milan, 2003, 176 et seqq.

system to the process of European integration, while not only ignoring the substate levels – which are only considered in economic and geographic terms[26] – but, above all, systematically violating their prerogatives under their Constitutions.[27] For as the Union has progressed along the path of integration, the transfer of sovereign powers to the European level has eroded powers vested at the domestic level, without providing any means of seeking redress from the European institutions in the event of unlawful conduct by Central Government, on the one hand, and any (subsequent) illegal conduct on the part of the Community institutions, [28] on the other.[29]

Since the Maastricht Treaty, and also thanks to an increased awareness that has developed in other areas[30] or has become established in practice[31] an attempt has

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[26] Cf. *T.M. Margellos*, L'émergence de la «région» dans l'ordre juridique communautaire, in: *G. Vandersen* (ed.), L'Europe et les régions, Bruxelles, 1997, 19 et seqq.

[27] On the "*Landesblindheit*" of Community law, see *H.P. Ipsen*, Als Bundesstaat in der Gemeinschaft, in: *E. v. Caemmerer, H.J. Schlochauer, E. Steindorff* (eds.), Probleme des europäischen Rechts. *FS Hallstein*, Frankfurt a. M., 1966, 248 et seqq.

[28] It is well-known that, except for a few sporadic judgements of the ECJ (judgment of 8 March 1988, joined cases 62/87 and 72/87, *Exécutif régional wallon et S. A. Gaverbel v. Commission* [1988] ECR I-1573 et seqq.; Court of 1st instance, judgment of 30 April 1998, case T-214/95, *Flemish Region v. Commission* [1998] ECR II-717 et seqq.; Court of 1st instance, judgment of 15 June 1999, case T-288/97, *Regione Autonoma Friuli-Venezia Giulia v. Commission* [1999] ECR II-1871) and despite the fact that the most serious legal writers have suggested that they should also be subject to the provisions of Art. 230(4) TEC on recourse by legal persons (*A. D'Atena*, Gli assetti territoriali, le regioni e i processi decisionali. Il ruolo del Comitato delle regioni, (summary of the report), in: *S. Panunzio* (ed.), I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo di integrazione europea, Milan, 2002, 578) – the local and regional authorities have no autonomous legitimation to take legal action before the Community Court; see, in this connection *L. Chieffi*, La nuova dimensione costituzionale del rapporto tra Regioni e Unione europea, in: Dem. dir., 2004, 87 et seqq., 91 et seqq.; more broadly, *R. Fattibene*, La tutela giurisdizionale degli interessi regionali in sede comunitaria. L'ipotesi problematica della legittimazione attiva delle regioni ai sensi dell'art. 230 del Trattato CE, in: *L. Chieffi* (ed.), Regioni e dinamiche di integrazione europea, Torino, 2003, 211 et seqq.

[29] It is hardly necessary to point out here that even though the European Union does not consider regional and local government tiers from the point of view of their institutional dimensions, since the mid-80s a form direct partnership arrangements have been introduced between the Commission and the Regions under the *Integrated Mediterranean Programme* (IMP) which, unlike the *Structural Funds*, avoided the intermediation of the national government tier. On this point see most recently: *L. Chieffi*, La nuova dimensione, cit., 88 et seqq.

[30] One example has been the establishment at the Council of Europe of the *Standing Conference of Local and Regional Authorities of Europe* (1977), which adopted the *European Charter for Local Government* in 1985; in the literature see: *I. Grassi*, Il ruolo europeo delle autonomie locali, in: Le nuove leggi civili commentate, 1992, 6 et seqq.; *F.-L. Knemeyer*, Die Europäische Charta der kommunalen Selbstverwaltung, in: DÖV,

been made to – at least partly – remedy this situation by incorporating into the text of the Treaty a number of innovations in favour of the regional and local levels, and in particular: the introduction of the principle of proximity[32] and the principle of subsidiarity,[33] opening up the sessions of the Council of Ministers of the

1988, 997 et seqq.; *G.C. De Martin*, Carta europea dell'autonomia locale e limiti dell'ordinamento italiano, in: Riv. trim. dir. pubbl., 1988, 386 et seqq.; recently, *E. Di Salvatore*, Autonomie locali e Unione europea, in: TDS, 2003, 267 et seqq., 279 et seqq.; *E. Gianfrancesco*, Le province e le istituzioni europee (in the press).

31 Since 1984, some 200 *Regional Liaison Offices* have been opened in Brussels, as fully-fledged channels providing access to the framing of European policies, and in way as "mere appendices carrying out the orders of regional and local government authorities": *L. Domenichelli*, Le Regioni nel dibattito sull'avvenire dell'Unione: dalla Dichiarazione di Nizza alla Convenzione europea, in: Le Regioni, 2002, 1239 et seqq., 1264; see also *L. Badiello*, Ruolo e funzionamento degli Uffici regionali europei a Bruxelles, in: Ist. fed., 2000, and more recently *G. Luchena*, Gli uffici regionali di collegamento con l'Unione europea nella tutela degli "interessi territoriali", in: *M. Buquicchio* (ed.), Studi sui rapporti internazionali e comunitari delle Regioni, Bari, 2004, 215 et seqq., and *ivi* details regarding Italy's experience: D.P.R. 31 marzo 1994 (*Atto di indirizzo in materia di attività all'estero delle Regioni e delle Province autonome*); l. 6 febbraio 1996, n. 52 (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – legge comunitaria per il 1994*); l. 24 aprile 1998, n. 128 (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – legge comunitaria 1995-1997*); on this see also *A. Anzon*, Federalismo interno e processo di regionalizzazione, in *A. Pace*, Quale, dei tanti federalismi?, Padova, 1997, 265 et seqq., 278 et seqq.; and Corte cost. 23 dicembre 1997, n. 428; among Community level initiatives are the adoption of *The European Charter of Local Self-Government* (1985) by the European Parliament, and the setting up of the Consultative Council of Regional and Local Authorities (1988; in this connection, see *A. D'Atena*, Il doppio intreccio federale: le Regioni nell'Unione europea, in: Reg., 1998, 1401 et seqq.; on the European Parliament resolution, see *P. Häberle*, Der Regionalismus als werdendes Struktur Prinzip des Verfassungsstaates und als europarechtspolitische Maxime, in: AöR, 118, 1993, 16 et seqq.; *F.L. Knemeyer*, Die europäische Regionalcharta – ein Mailstein auf dem Weg zu einem Europa der Regionen, in: Europa der Regionen – Europa der Kommunen. Wissenschaftliche und politische Bestandsaufnahme und Perspektive, Baden-Baden, 1994, 22 et seqq.

32 Art. 1 TEU: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."

33 Art. 5(C)(2), EC-Treaty: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

European Union to representatives of the Member States at ministerial level,[34] and establishing a Committee of the Regions.[35]

1. The Committee of the Regions

Ten years of experience with the role of the Committee of the Regions (CoR) at the European institutional level[36] has shown that its particular importance is not so much linked to its official functions given under the Treaty, but rather its ability to play the part of a key interlocutor in the European integration process, speaking for the Community institutions on emerging regional problems.

As originally planned – and from a formal and official point of view – the Committee was merely an advisory organ of the Community.[37] For that reason alone, it could not be considered to be the *institutional representative body* of all of the regional interests of the Member States. This conclusion would also seem to be backed by the provision in the Treaty which, in a wholly unsatisfactory manner, states that it represents the "regional and local bodies"[38] of all the Member States, that the members are appointed by the Council,[39] that they are bound by any imperative mandate (because the functions they exercise must be linked to the

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[34] Art. 203(C)(1), EC-Treaty: "The Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State."

[35] Art. 263(C)(1), EC-Treaty: "A committee, hereinafter referred to as 'the Committee of the Regions', consisting of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly, is hereby established; The institution of this Committee was in response to a number of proposals submitted to the IGC that opened in Rome in 1990. Even though it is the outcome of a compromise achieved at the 1991 IGC that followed it, it was actually based on a proposal by the German delegation. On this point see *A.W. Pankiewicz*, Realtà regionali ed Unione europea, Milan, 2001, 75 et seqq.; recently, see *A.M. Cecere*, La "dimensione" regionale della comunità europea. Il Comitato delle Regioni, in: *L. Chieffi* (ed.), Regioni e dinamiche, cit., 175 et seqq., 180 et seqq.; regarding the background to the German proposal see *R. Theissen*, Der Ausschuss der Regionen (Art. 198a-c EG- Vertrag). Einstieg der Europäischen Union in einen kooperativen Regionalismus?, Berlin, 1996, 74 et seqq., 80 et seqq., and in the Italian literature, see *E. Di Salvatore*, Integrazione europea e regionalismo: l'esempio tedesco, in: DPCE, 2001, 513 et seqq., 518 et seqq.

[36] The Committee of the Regions began working on 9 March 1994.

[37] In the literature, but purely by way of example, see *M. Mascia*, Il Comitato delle Regioni nel sistema dell'Unione europea, Padova, 1996; *G. Sirianni*, La partecipazione delle Regioni alle scelte comunitarie. Il Comitato delle regioni: organizzazione, funzioni e attività, Milan, 1997; *P.A. Féral*, Le Comité de régions de l'Union européenne, Paris, 1998.

[38] Art. 263(c)(1) EC-Treaty.

[39] Art. 263(c)(3) EC-Treaty.

general interest of the Community),[40] that the Committee is not a full Community institution[41], and therefore it is not even a privileged party to seek redress before the Court of Justice on the grounds of violated prerogatives.[42]

While, however, in the transition from the phase of total Community blindness to phase of outreach to the regional dimension, the impetus to accept it institutionally has essentially been thanks to the work of the Member States (albeit supported by regional and local level initiatives), it has been shown in practice over the past ten years that the Committee of the Regions has on various occasions been able to influence the subsequent phases in the European integration process, by acting patiently often outside the scope of the Treaty's[43] provisions, drawing the attention of its interlocutors to the reasons advising them to proceed in one direction rather than in another.[44]

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40 Art. 263(c)(4) EC-Treaty.

41 Several writers define the Committee as a Community *Hilfsorgan* or *Nebenorgan*: cf. for example, *T. Opperman*, Europarecht, 2. edn., München, 1999, 91; *K. Hasselbach*, Auf dem Weg zu einer Föderalisierung Europas, in: ZG, 1996, 201; on the other hand, see *M. Mascia*, Il Comitato delle Regioni, cit., 34, who defines the Committee as a "struttura d'autorità".

42 Art. 230 EC-Treaty.

43 Cf. the "*Protocol governing arrangements for cooperation between the European Commission and the Committee of the Regions*" (DI CoR 81/2001); in the literature, see most recently, *M. Esposito*, Dal libro bianco sulla governance europea alla Convenzione sul futuro dell'Europa: il Comitato delle Regioni e le sue componenti, in: Ist. fed., 2004, 123 et seqq., 128 et seqq.

44 It is obvious that this has also been affected by the fact that, as far as the amendments to European law are concerned, the Member States are always the "Masters of the Treaties", and therefore any amendments that are made in later phases in the integration process – which have clearly improved the position of the CoR at the institutional level – are always subjectively linked to their will and to their actions. But it should not be forgotten that the amendments are often the output of a procedure for formalising practices which have become established across the years within the Community, obviously ignoring the need for the assent of all the Member States. This being so, it might be said that the Committee has made wide use of the prerogatives given to it by the Treaty, and has even acted at the *institutional level*, as it did in its Opinion of 11 March 1999 on the principle of subsidiarity, entitled, *"Developing a genuine culture of subsidiarity; An appeal by the Committee of the Regions"* (CoR 302/98 fin); or its Opinion of 15 September 1999 and its Opinion of 13 April 2000 on relations between the European Commission and the Council *"Better lawmaking 1998"* and *"Better lawmaking 1999"* (CoR 50/99 fin and CoR 18/2000 fin); the *"Proximity report"* of 20 September 2001 (CoR 436/2000 fin); the Opinion of 13 March 2001 on the "*Draft Report of the European Parliament on the division of powers between the European Union and the Member States" (CoR 466/2001 fin);* on the so-called "structural limitations" of the Committee and the amendments made by the Treaties of Amsterdam and Nice see *H.-J Blanke*, Der Ausschuss der Regionen. Normative Ausgestaltung, politische Rolle und verwaltungsorganisatorische Infrastruktur, published by the Europäisches Zentrum für Föderalismus-Forschung Tübingen, Stuttgart, 2002; more recently, *L. Domenichelli*, Il

2. The development of practice. The local and regional Associations

Despite the improvements introduced by the adoption of the Amsterdam and Nice Treaties[45] the Committee of the Regions still suffers from evident limitations that are not only functional but also structural. It is mainly unsatisfactory because of its composition which, as already indicated, it is made up of "representatives of regional and local authorities", without taking into account the differences of status in the national systems between Regions and local authorities;[46] secondly, no consideration is given to the fact that, in some countries, Regions have full legislative powers distinct from those of the States to which they belong.[47] As far as the latter point is concerned, it is not clear what type of institution should represent them, because both the elected Assemblies and the local Executives have claimed this right.[48]

The question of the simultaneous presence of regional and local tiers on the Committee has, in the past, led some writers to the conclusion that future reforms of the Union should consider the different type of representation expressed by its members. Despite the fact that the members of this Community organ were required to perform their mandate solely in the interest of the Community, there is no denying that, in an ultimate analysis, membership of the Committee tended to be justified in terms of the linkage with their community of origin.[49] It would

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contributo del Comitato delle Regioni alla valorizzazione della dimensione regionale nell'Unione europea, in: TDS, 2003, 250 et seqq.

45 The Nice Treaty raised to 350 the number of representatives on the Committee, linking them to an electoral mandate as members of a regional or local authority, or at all events making them accountable to an elected Assembly; following the entry into force of the Amsterdam Treaty, on the other hand, the CoR has been asked to perform its functions covering a larger number of sectors.

46 For *M. Plutino*, La partecipazione delle regioni, cit., 60, "the mixed participation of regional and local levels (among the Committee of the Regions) does not represent a problem but, on the contrary, can result as an enrichment to the legitimation process".

47 However, this problem seems to have been taken up by the *Laeken Declaration on the Future of the European Union*, 2001, which provided that six representatives appointed by the Committee of the Regions, chosen from "the regions, cities and regions with legislative powers" could attend the Convention and take part in the proceedings as observers, representing the Committee of the Regions.

48 *M. Plutino*, La partecipazione delle regioni, cit., 69 et seqq.

49 The Committee members are grouped in two different ways: by political groups and by national delegations. As far as the political groups are concerned, the criterion is the political positioning of the component linked to the election results at the regional or the local level. In the second case, on the other hand, the criterion is the nationality of the component. However, while national membership was the original form used for the Committee groups, the "political group" form eventually became predominant at a later stage (and has now been strengthened by the fact that the modifications introduced at Nice require the members to have been elected, or to be accountable to an elected Assembly). Consequently, the national membership criterion is used today for the purpose

therefore have been appropriate, on this basis, to separate the levels of representation by splitting the structure of the Committee into different branches.[50]

The political debate on the issue of bringing together the different types of regions under a single model has run parallel to the debate on the entity which is delegated to represent them.

In 1997, a number of Regions with legislative powers that considered that they had not been adequately represented on the Community Committee established a *Conference of Presidents of the European Regional Legislative Assemblies* (Oviedo, 7 October 1997). This is an association of the "Parliaments" of 74 Regions and 8 countries of the EU, namely: the Parliaments of the Spanish Autonomous Communities, the Italian Regional Councils, the Belgian Assemblies of the Regions and Communities, the Autonomous Parliament of Åland (Finland), the Regional Assemblies of the Azores and Madeira (Portugal), the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly (United Kingdom)

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of appointing members to the Bureau and the Standing Committees whereas for the formation of opinions and other documents of the Committee it is membership of the component's political group that is decisive (for further clarification on this point see more recently, *A.M. Cecere*, La "dimensione" regionale, cit., 189 et seqq.). Quite clearly this gives a specific arrangement to the plan underlying the Treaty, by removing the contradiction that has been highlighted in this text: the groupings based on "political groups" – strengthened by the prohibition on an imperative mandate – will enable the body to gradually detach itself from the national base and play an across-the-board role on the institutional stage to address the specific regional and local domestic needs of the Member State; one need hardly note that membership by political groups is very warmly welcomed by the political groups themselves. See, for example, the *Venice Declaration* of the EPP group on the Committee of the Regions entitled *"Europe needs its citizens/Strong regions and municipalities: the pillars of Europe"* on 5 July 2002: "Organizing the COR mainly along national lines is felt to be unbalanced and often too clumsy. The political group shall contribute more to COR political opinion - forming."

50 This is the idea that emerged at the first *Conference of Presidents of the European Regional Legislative Assemblies* (Barcelona, 23-24 November 2000); on this point see *S. Mangiameli*, Il Governo tra Unione europea e autonomie territoriali, in: La riforma del regionalismo italiano, Torino, 2002, 191 et seqq., 212 et seqq. Against this position was the proposal tabled by the Assembly of European Regions in the Resolution adopted on 4 December 1996 requesting that the Committee of the Regions be transformed into a co-decision-making body representing the Regions alone; but the Committee of the Regions seems to be of the contrary view, and claims exclusive legitimacy, as a constitutional interlocutor, to represent all the local and regional administrations present in the EU (cf. also below note 54 et seqq.), and does not seem likely to support the idea of separate regional and local representation. See the Opinion of 21 November 2001, *"The role of the local and regional authorities in the construction of Europe"*(CoR 237/2000 fin) point 34, which recalled that according to the Treaty establishing the European Union, the CoR was instituted as the only organ to represent the "regional and local authorities" of all the Member States, which is therefore required to equitably balance the various forms of local and regional governance in the Member States.

and it has a Plenary Assembly and a Standing Committee of eight members. Among the documents adopted by the Conference one of the most important was certainly the *Madeira Declaration* (Funchal, 30 October 2001)[51] which proposed the inclusion into the Treaties of a "Statute of Regions With Lawmaking Powers", enhancing the position of the Committee of the Regions, advocating that "Federal States and regions with lawmaking powers must be recognised as being entitled to act before the European Court of Justice" and the Right to regional and local self-administration. Furthermore, after recalling that "Regional Legislative Assemblies, together with National Parliaments and the European Parliament, are indispensable instruments in the construction of Europe, a process that must follow the principle of parliamentary co-operation" it declared that "the role of the Regional Legislative Assemblies within the European Union Member States should be strengthened" in each of the Member States, and that the Regional Legislative Assemblies should be permitted to become members of COSAC ("Conference of Community and European Affairs Committees")[52] and that "All European Union texts and institutions should gradually give greater recognition to the Regional Legislative Assemblies" as official interlocutors of the Union.[53]

Parallel to the extra-institutional work performed by these "Parliaments", however, the Regions with legislative powers have also set up an association of their own, and in 2000[54] they adopted a number of resolutions demanding a more active role for these Regions in the European integration process, beginning with the

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51 The Conferences held so far have been: Oviedo (7 October 1997), Salzburg (6-7 October 1998), Florence (17-18 May 1999), Santiago de Compostela (28 October 2000), Funchal (Madeira, 28-30 October 2001), Brussels (28-29 October 2002) and Reggio Calabria (27-28 October 2003).

52 On 6-7 October 2003, for the first time, three Presidents of Regional Legislative Assemblies were invited to Rome to attend the deliberations of COSAC; cf. point 2 of the *Reggio Calabria Declaration* of 28 October 2003.

53 The *Protocol on the role of national parliaments in the European Union*, annexed to the *Treaty Establishing a Constitution for Europe* adopted the principle of "interparliamentary cooperation" but limited its application to relations between the European Parliament and the national Parliaments which "together determine how interparliamentary cooperation may be effectively and regularly organised and promoted within the European Union." (Art. 9).

54 The *Conference of Presidents of Regions with Legislative Powers* ("Refleg") met in Barcelona (Spain) on 23-24 November 2000, at Liège on 14-15 November 2001, in Florence on 14-15 November 2002, in Salzburg on 12-13 November 2003 and in Edinburgh on 29-30 November 2004; it should be noted that, at the initiative of the Flemish Government, the Executives of seven Regions with Legislative Powers met for the first time in Brussels on 22 February 2000. Following that important meeting, on 28 May 2001 the Executives adopted the *Political Declaration of the Seven Constitutional Regions*. The Lieges Resolution of 15 November 2001 entitled "*Towards the reinforced role of the Regions with legislative power within the European Union*", which endorsed that Declaration.

right of its representatives to form part of the national delegations attending the Convention.

3. Territorial Associations and relations with the European institutions

The extra-institutional work performed by these Conferences was initially opposed by the Committee of the Regions, which argued that no association or other institution would be able to represent the whole of a territorial component of the Union.[55] In an Opinion issued on 21 November 2001, the Committee reiterated that it was "a political organ representing the general interests of the Union's decentralised territorial entities" which "places it in a different position, from both civil society, the forum for the spontaneous organisation of specific interests; and secondly, from the European associations of regional and local authorities".[56] The increasing visibility (and its credibility, perhaps due to its political character) as well as the increase in the number of local and regional authorities (due both to the domestic regionalisation processes taking place in the Member States and the entry into the Union of ten new Member States) has nevertheless reversed this situation, opening up new prospects for institutionalising the Regional Associations.[57] In this connection, there are at least three important novelties.

The first has to do with relations between the *Conference of Regional Legislative Assemblies* and the Committee of the Regions. In August 2003 the Secretary

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[55] Cf. the *"Report on Proximity"*, loc. cit.: "it is, indeed, the Committee of the Regions' job to represent the local and regional component of the European Union for which no other institution is suitable, since it is also the guarantor of the EU's territorial solidarity."

[56] "...which, although made up of political bodies, are private in nature and represent the interests of their members; and thirdly, from individual local and regional authorities which are political in nature but represent their own individual and specific interests. Furthermore, its specific status as a formal EU advisory body distinguishes it from the European associations of regional and local authorities": Draft opinion of 21 November 2001 on *"The role of the regional and local authorities in European integration."* cit. point 34.

[57] Among the "regionalisation" processes that are gradually taking place in the EU Member States, one might recall what has recently occurred in France; cf. the "*Loi constitutionnelle n° 2003-276 du 28 mars 2003 relative à l'organisation décentralisée de la République*", which is considered to mark a further stage forward in the process of regionalisation that began in 1982; in addition to this is the fact that the accession to the EU of ten new Member States has increased the number of local and regional authorities, making the overall total of authorities present throughout the EU 250 Regions and 100,000 local authorities. Cf. the CoR Opinion of 21 November 2001, *"The role of local and regional authorities"*; see also *M. Plutino*, La partecipazione delle regioni alla formazione della decisione politica comunitaria, in: *L. Chieffi* (ed.), Regioni e dinamiche, cit., 49 et seqq., 60, note 51.

General of the Committee of the Regions and the Secretary General for the time being of CALRE initialled a joint "CoR-CALRE 2003/2004 Action Plan", to improve cooperation between the CoR and the Association by identifying two distinct priorities: to frame a joint strategy to influence the work of the Intergovernmental Conference, and to perform a number of activities to improve regional democracy in Europe.

The second had to do with relations between the Conference and the European Parliament. On the basis of a number of agreements concluded between the association and the Chair of the European Parliamentary Committee on Regional Policy, Transport and Tourism, the CoR undertook to guarantee "wider institutional relations between the European Parliament and the Regional Parliaments. This happens through the presence of institutional representatives of the Regional Parliaments, who have the right to speak at the Committee's debates, and through the acknowledgement of their initiative to submit draft resolutions, approved by regional Parliaments, on issues dealt with in the European parliamentary groups."[58]

However, the third relates to the relationships between *all* the local and regional associations and the European Commission. On 19 December 2003, in a Communication entitled significantly "*Dialogue with regional associations on the formulation of EU policies*",[59] the Commission officially undertook to guarantee the involvement of the regional and local associations in the preliminary phase of formulating legislation and discussing the annual programme of work. [60]

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[58] This is the actual wording of the *Reggio Calabria Declaration*, cit., point 3; see also the European Parliament Report on the Role of Regional and Local Authorities in European Integration - Committee on Constitutional Affairs of 4 December 2002 (A5-0427/2002) point 7, which states that the European Parliament "proposes that cooperation be stepped up between regional assemblies and the European Parliament, in particular through its Committee on Regional Policy, Transport and Tourism".

[59] COM (2003) 811 (cf. also *supra* section 1.1).

[60] This document states, furthermore, that "1) This dialogue is additional and complementary to all the other methods it uses to consult regional and local authorities; 2) more clearly sets out the role the Committee of the Regions is to play in the proposed dialogue; 3) establishes a reference framework for identifying the associations that may participate in the dialogue." According to the Communication, there are essentially two purposes of dialogue; firstly, via the regional associations, in order to gather together all the parties present locally in order to give them the possibility to speak out on European policies before the final decision is taken, and secondly to provide better information and a more comprehensive understanding of the Union's policy thinking and ideas regarding European legislation. By so doing, the Community's work will become more transparent and easier for citizens to follow. In the dialogue with the regional associations, the CoR is required to mediate between the Associations and the European institutions, above all choosing the ones which are affected by the Union's policies case by case, and for each meeting drawing up a list of the European and national associations depending upon the agenda for the meetings. This does not preclude the possibility that the Commission may also invite other associations, in addition to those indicated by the Committee to attend, or even change the lists provided by the Committee. One hardly

III. Governance in the European Constitution: the sharing of competences and "systematic dialogue" with the regional and local authorities

The Treaty Establishing a Constitution for Europe (TEC) does not seem to take sufficient account of the proposals set out in the White Paper on Governance, or to have put into law the achievements that the regional and local authorities have so painstakingly in their practical experience. On the contrary, the purpose of the White Paper seems to have been completely betrayed, in both the spirit and the letter, because the legitimisation of the result – a new Union, different from the previous one by expanding it horizontally (to twenty-five States) and vertically (with new areas of competence ranging from foreign policy to organised crime) in the new structure – is not founded, as the Commission had hoped it would be, on the participation and involvement of the citizens, civil society and regional and local authorities.

For all this would have required a model with a top-down imposition of policies in place of the participatory model, that is to say, a virtuous circle based on feedback, networks and participation at every level, from policy framing to policy implementation.[61] It would therefore have required, just by way of example, a different use of normative instruments, laying down measures regarding the use of models that are alternatives to traditional ones. But this has not been done. One only needs to analyse the way in which the individual policies of the Union are governed to see how the TEC has completely ignored the idea of using acts other than the traditional instruments. For whereas compulsory or binding legal acts are required for *every* policy of the Union, the use of "alternative" acts is left to custom, in areas not otherwise governed by the Treaty.

And despite the numerous references in the text to the system of autonomous territorial authorities,[62] one can hardly say that the novelties introduced for the

need recall that the need to involve those responsible for implementing Community policies in the decision-making process, from the formulation phase onwards, in order to guarantee their effectiveness, as the Parliament ruled several years ago; cf. European Parliament Resolution of 18 November 1993 on the representation and participation of the regions in the construction of Europe: CoR, (A3-0325/93), point 7.

61 Cf. the Study entitled: *"The regional and local dimensions in establishing new forms of governance in Europe"*, (CoR E-7/2002), 47.

62 There are various, fragmentary, provisions of the Treaty relating to the system of local government, such as Art. I-3(3), 3rd sentence, setting out as the objectives of the Union, the promotion of economic, social and territorial cohesion; Art. I-5(1) respect for regional and local self-government, the Preamble to the Charter of the Fundamental Rights of Union incorporated into the Treaty, requiring the preservation and development of these common values, while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; Art. I-10(2)(b) and Art. III-126, relating to the right to vote and to stand as a candidate

benefit of the regional and local authorities are particularly consistent or wholly satisfactory, as the following examples show.

1) To develop real Governance, as many are advocating, a better and much clearer delimitation of competences is required above all. But it still remains to be seen whether the TEC has done this.

According to the thinking underlying arts. I-11 et seqq. TEC, the delimitation of the competences of the Union are based once again on the principle of conferral, whereas every competence that is not conferred formally on the Union remains in the hands of the Member States. In addition to these two types of "exclusive" competence, there exists "shared" competence and "support, or complementary" competence.

In the areas for which shared competence exists between these two tiers, the actual exercise of that competence underlies compliance with the principles of subsidiarity and proportionality according to the rules laid down in the Protocol for the implementation of these principles. This means that the Union is authorised to act only if, and only to the extent that, the objectives of its action cannot be achieved adequately by the Member States themselves either at central level or – and this is the novelty – at the local level, but "by reason of the scale or effects of the proposed action, [can] be better achieved by the Community".

Everyone can see that this reference to the regional and local levels is not in itself a guarantee for these levels, but if anything an element that could strengthen shifting the decision to the Union. Because, whereas in the past the legitimation of Union intervention rested solely on an assessment that considered the governance of a particular sector in terms of the Union-State levels, today the assessment of any intervention also involves assessing the impossibility for the exercise of that competence being satisfactorily performed by the States at the domestic level. But the risk here is that, in reality, a further legitimation may be created to enable the Union to claim for itself the exercise of that competence. Even if this shift were to move in the direction of the State rather than the Union, the domestic levels would never be able to demand the right to exercise these competences because the violation of the principles of subsidiarity – according to the rules of the TEC and the Protocol – can be used by the national Parliaments or by the Committee of the

in municipal elections; Art. III-183, which provides in relation to Economic Policy, that "the Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities (...) without prejudice to mutual financial guarantees for the joint execution of a specific project"; art III-246, enabling "regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures"; art.III-284, which provides that "Union action shall aim to: support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union".

Regions, but certainly not by the internal regional or local authorities of any State.[63]

But the scope of shared competence is ambiguous for other reasons, too.

First of all, because the way in which the so-called "shared competence" model is governed seems partly to contradict the rationale of subsidiarity. By saying that "The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence" (Art. I-12(2) TEC) the Treaty seems to forget – following this line of reasoning – the intervention of the Union should be residual.

Secondly, it is ambiguous because the model of support, coordination and complementary competence for the sectors indicated in Art. I-17 is ambiguous. For these are sectors that should really fall within the exclusive competence of the State since they are not expressly placed within the sphere of the exclusive or the shared competence of the Union. This "type" of competence, which in the present system falls almost entirely within the sphere of the shared competence between the Union and the State, completely evades compliance with the principle of subsidiarity precisely because the exercise of this competence is designed to support, coordinate or complete the work of the Member State. And in reality, this opens up the possibility of giving the Union yet another opportunity to exercise the competence itself, making it one of the Union's "exclusive" competences.[64]

Thirdly, it should not be forgotten that the TEC codifies the so-called "implicit powers" clause, which is now known as the "flexibility clause" in disguise. That clause had formerly caused sharp divisions in the literature because of the unifying function of a clause of that kind. For Art. I-18 states that if action by the Union appears to be necessary to achieve one of the objectives of the Constitution, and that powers have not been provided to act to achieve that end, the Council of Ministers may, with a unanimous vote and after receiving the approval of the European Parliament, adopt appropriate measures. The risk here is that a unifying act

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[63] Cf. Art. 8 of the *Protocol on the application of the principles of subsidiarity and proportionality*, annexed to the TEC, according to which, "The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it." In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted. In this connection see also the *Reggio Calabria Declaration*, loc. cit., point 1. Consider also that Part III of the Constitution shows that for many material areas that are of typical regional competence, consultation with the CoR is excluded.

[64] For only for a few matters is express provision is made for "European laws or framework laws (to) establish incentive measures, excluding any harmonization of the laws and regulations of the Member States" (Art. III-281(2) relating to tourism; Art. III-282(3)(a) relating to education, youth and sport, and Art. III-282(3)(a) on vocational training; and Art. III-284(2) on civil protection.

mat overturns the system of competences evidently becomes a possibility, on the basis of the second paragraph of that article which says that in that case, "Using the procedure for monitoring the subsidiarity principle referred to in Art. I-11 (3), the European Commission shall draw national Parliaments' attention to proposals based on this article." But this is a pointless clarification.

Fourthly, it should also be borne in mind that the sharing of competences that is set out in general terms in the part devoted to "fundamental principles" is strongly conditioned by the way in which individual policies are actually governed. Priority is very often given to the need for the Union to act, and consequently the rules laid down are anything but flexible. One has only to think of the environment (Section 5, arts. III-233 *ff*). In this sector, after specifying the objectives of the Union's environmental policies it provides, for example, that "European laws or framework laws shall establish what action is to be taken in order to achieve the objectives" (Art. III-234 (1) TEC), and that by way of derogation from paragraph 1, the Council shall unanimously adopt European laws or framework laws establishing specific measures (Art. III-234 (2) TEC); and that except for certain measures adopted by the Union, it is the Member States who shall finance and *implement* the environment policy." (Art. III-234 (4) TEC).

2) In the White Paper on European Governance, the Commission maintained that establishing regional and local democracy could not evade the obligation of systematic dialogue with regional and local communities. This would require the TEC to establish *ad hoc* provisions setting out the timing and the procedures for dialogue, and to specify the subjects on which these communities would be asked to "dialogue" with the institutions. But even here, the proposals fall far short of the expectations raised.

Title VI TEC on the "Democratic life of the Union" governs two different aspects of democracy, namely, "representative" and "participatory" democracy. As for representative democracy (Art. I-46), the Treaty states that "every citizen" has the right to "participate in the democratic life of the Union" and establishes the principle that "decisions shall be taken as openly and as closely as possible to the citizen." (Art. I-47). The provision governing participatory democracy (Art. I-47) provides, furthermore, that, "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and "shall maintain an open, transparent and regular dialogue with representative associations and civil society." Furthermore, "the Commission shall carry out broad consultations with parties concerned[65] in order to ensure that the Union's actions are coherent and transparent."

As this shows, the attempt to rationalize systematic dialogue would appear to be quite unsatisfactory because no clarification is given as to the identity of the

[65] With regard to the various ways in which so-called "participatory democracy" can be practiced, see the European Parliament's Report on the role of regional and local authorities in European integration, loc cit., point 4.

interested parties involved, the subjects on which the Commission is required to consult, the procedures for consultation, and above all the powers that the consulted parties can exercise in the course of their hearings.[66] The consequence of this is that, once again, the coherence and the transparency of the work of the Union will be spontaneously guaranteed by the goodwill of the parties involved.[67]

[66] See also article 2 of the *Protocol on the application of the principles of subsidiarity and Proportionality* loc. cit. which provides that "Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

[67] See the reasoning accompanying amendment no. 7 to point 1.17 of the *Draft Opinion on the Treaty* of the Committee of the Regions (57th plenary session on 17-18 November 2004): "The Treaty establishing a Constitution for Europe provides for a more broad consultation of regional and local levels in the pre-lawmaking phase, but does not introduce any legal basis for a 'systematic dialogue' between the European Commission and national and European Associations of territorial entities. That dialogue exists already and was established following the proposals put forward by the Commission in the White Paper on European governance".

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