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Nordic and Other European Constitutional Traditions

Edited by Joakim Nergelius

MARTINUS NIJHOFF PUBLISHERS

NORDIC AND OTHER EUROPEAN CONSTITUTIONAL TRADITIONS

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Preface

For a long period of time the Nordic countries saw themselves or were viewed upon as something different from Europe. The Nordic institutions and the long tradition of Nordic co-operation in different forms could also be seen as a hallmark of the joint actions of "non-European Nordic countries". In a historic perspective, the states have experienced war between and domination of each other. However, since almost 200 years the Nordic countries have been a peaceful area in that respect, in spite of great political-institutional changes. There is a shared cultural heritage and also some political-institutional similarities.

Today the Nordic heritage is rather a regional aspect of European integration in a broader sense. It is not possible to accuse the Nordic states of representing insularity. But the political memories are still lingering in the constitutional traditions and give an important contribution to the institutional complexity of the EU.

A European conference about Nordic and other European Constitutional traditions was organized by professor Joakim Nergelius at the Department of law at Örebro university in March 2004. This young Swedish university has the vision of establishing a truly European research university. The theme of the conference was therefore of great interest and significance for the university. But during the lively discussions it became obvious that the different contributions by the participants also could be of a more general interest. I am very pleased that it proved possible to produce this anthology, which is also an encouraging expression of the professional involvement of different scholars across Europe in this important issue.

Vice-chancellor Janerik Gidlund
University of Örebro

Section 1

Chapter I

The Nordic States and Continental Europe: A Two-fold Story

Joakim Nergelius*

The topic discussed in and giving its name to this collection of articles seems to be very timely, for many reasons. The Nordic countries do in many ways today find themselves at a constitutional crossroads, no longer able to live on memories of a glorious past when they were perhaps the leading welfare states in the world. Not least the three Nordic EU Member States Denmark, Finland and Sweden have in the last decades been profoundly affected by the encounter with other, continental constitutional cultures prevailing within the European Union and thus with legal orders less based on popular sovereignty and parliamentary supremacy and more relying on courts to fill the role as constitutional watchdogs. Also Norway and Iceland, though remaining outside the EU for the time being, are affected by this development, though yet to a lesser degree. The Nordic constitutional tradition, if we may talk of such a thing, is undoubtedly based on local and national democracy, national and popular sovereignty, parliamentary supremacy and majority rule. The huge

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Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 3–7.

impact that this encounter or clash between very different constitutional traditions has had on the constitutional understanding, and in the long run on the legal and political thinking in the Nordic countries, has so far not been fully analysed in the constitutional doctrine.

The Nordic countries were once seen as forerunners on the way to a progessive, fair and civilised society, but when they lost that status as "welfare icons", they seem – albeit to various degrees – to be hit by a severe identity crisis. At the same time, also the political and constitutional systems of many older EU Member States are undergoing important changes or facing severe challenges at the moment. This is of course true of France and Netherlands, where recent referendas on the Draft EU constitution led to negative results, which have in fact also led to questions about the legitimacy of the EU constitutional system as such. But also countries like Italy, plagued by domestic turmoil, or Germany, shaken by pessimism and lack of clear political guidance for the future, have faced severe difficulties in their constitutional relationships with an EU legal order claiming supremacy over the national laws of the Member States. Among the new Member States, some of the enthusiasm that the prospect of EU membership brought about in the 1990's seems to have withered away.

It is exactly in this climate of tension, legal and political, bothering Europe that the Draft EU Constitution has been proposed. Having this in mind, the problems of making it enter into force are perhaps not entirely surprising.

Against this background of problems in many parts of Europe, this volume seems apt to address some of the reasons for the current *malaise*, as well as hopefully finding some way out of it. Hopefully, it may also give some new perspectives on issues that are as such quite often discussed in the European constitutional doctrine. The contributions here do in fact cover quite a huge area of the current crisis situation, ranging from analyses of individual countries inside and outside EU (Italy and Iceland), to theoretical and philosophical aspects of the Draft Constitution and purely historical perspectives on the European legal development. This range of topics could be seen as extremely far-reaching, but is hopefully thought-provoking enough concerning those very important issues.

If we may analyse the different contributions somewhat closer, Ola Zetterquist analyses the Draft Constitutional Treaty from a philosophical point of view, discussing whether it corresponds to the very classical, traditional concepts of either popular sovereignty or constitutionalism, as those models were once elaborated by Thomas Hobbes and John Locke. If any perspective has been truly missing in the hitherto after all rather vivid international debate on the EU constitution, this must be the one!

Still in the first section, Agust Thor Arnàson provides a full historical perspective of the traditionally rather cautious attitude towards closer relationship

with EU and possible EU membership shown by Iceland, a country on the fringe of Europe (which strictly geographically is in fact partly American). The history of this country and the reasons for its so far somewhat restrictive attitude towards the rest of Europe (which are not only due to geographical distance) are probably not very well-known to the European legal and political environment, but do undoubtedly merit increased attention.

Moving then to a section of the book with articles that are firmly rooted in continental Europe and its constitutional traditions, Rainer Arnold analyses the idea of closer cooperation in some depth. This idea used to attract a lot of interest from EU scholars and also politicians until very recently, but its future fate may have something to do with what will happen with the EU constitution; should it fail, the possibility for certain states to move ahead on their own with further integration may seem very attractive, but at the same time it is at the moment hard to imagine ancient core states like France, Germany and Netherlands as forerunners in any future integration process. Joachim Heilmann adds a few remarks on the current use and need of legal history, before Carlo Rossetti analyses some of the hotly contested issues of law and legitimacy in Italy from a perspective that has so far unfortunately been rare in the constitutional doctrine, focusing on the myriad of corruption allegations and the constitutional impact they may have both in Italy and at the EU level. Those issues are controversial and might for a foreign observer even seem to reflect a disturbingly deep distrust of political authorities, but it is a regrettable fact that they are very seldomly discussed seriously outside Italy (and very rarely in general EU discussions).

After that, Pasquale Policastro analyses some of the contents of the Constitution, as well as the effects of EU enlargement, in a historical perspective that is stretched back to the early 20th century. Support for some of the interpretations of the proposed new rules made by him may be found not least in the jurisprudence of the European Court of Justice and the European Court of Human Rights in the last thirty years and the increasingly individual-based view on basic human rights that they reflect.

In the last section, the ever-important issue of subsidiarity is discussed by Takis Tridimas, who also focuses on general tendencies in the recent case-law of the European Court of Justice and which kind of changes for the integration process that the Constitution, with its emphasis on certain values may bring about, should it finally enter into force. Finally, the problem of the difference between the EU constitutional debate, when held at the European level, and the same debate being conducted at the national level is analysed and highlighted, in the light of general developments in the European political debate, constitutional doctrine and jurisprudential tendencies. This is definitely one of the main hidden problems of those recent developments and one of the lessons to be learned from what happened in core Member States

like France and Netherlands in the spring of 2005, but the question is of course what may really be done about it.

Reflecting once again on the content of these articles, it may be asked if the Nordic states and the rest of Europe may after all still have a lot to learn from each other. The distrust of political and public authorities that are discussed or reflected in some of the above-mentioned contributions is traditionally not a feature of the normally quite transparent Nordic countries (though it may be growing there as well, as shown for instance by the ill-fated Swedish EMU referendum in 2003). At the same time, the undisputable results of the integration process have been reached by states who have co-operated in a joint project and who have been willing to take some risks in order to achieve those results. Also the reinforcement of human rights in Europe in the last fifty years must be viewed in this light. The Nordic countries in general are hesitant towards further European integration and do sometimes seem to be characterised by political "risk-aversion" more than anything else. This is true not least for Sweden. But is that a viable option in a globalised world, characterised not only by progress but also by dangers and many catastrophies, where states and regions tend to need and depend upon each other more than ever?

This is in fact one of the general questions that future studies in this area should need to dwell upon. If the Nordic countries have anything to offer in this process – and I definitely believe that they do – what they bring with them must be based on their own experiences, while they must at the same time be open for impressions from other European traditions. In the words of one young Finnish scholar:

> "The Nordic way of thinking may be of help but it does not provide concrete ideas suitable for transplantation for use in building the United States of Europe. Further, perhaps all it can do is to show that ideas originating from popular sovereignty and cautious form of constitutionalism do not form an impossible equation."[1]

And, having asked that question, we should also ask what the contribution of the legal and constitutional doctrine to this big future debate could be. Is it perhaps time for this doctrine to look at big, specific institutional issues, crucial for European and global governance, instead of more theoretical or obscure issues in specific countries? To be forward-oriented rather than backwards-looking in the intellectual and scientific approach? Multi-level oriented rather than "homeward bound"? And maybe even time to come up with new, specific and constructive proposals for solving the institutional crisis at

[1] Jaakko Husa, Nordic Reflections on Constitutional Law – A Comparative Nordic Perspective, Frankfurt a.M. 2002 p. 187.

EU – and why not global – level, instead of merely analysing by now rather well-known historical events in a manner more or less characterised by well-known attempts of "constitutional de-constructivism"? To tackle issues like this may in fact prove to be the next fruitful step in the development of the EU constitutional law doctrine, though this is of course a huge topic that merits a lot of further analysis.[2]

Though it may seem pretentious, this collection of articles is intended and may hopefully be seen as a small step towards the elaboration of some such perspectives. The conference at which the papers in this volume were originally presented was held in the city of Örebro, Sweden, 26–27 March 2004, hosted by the University of Örebro with financial support from the Nordic Council for Social Science Research (NOS-S). It is indeed a pleasure to see those papers and speeches enlarged and updated and finally brought together in a book. The work of accomplishing this has indeed been an interesting experience.

[2] The increased general importance of constitutional traditions is shown by the case Omega Spielhallen GmbH, C-36/02, ECR 2004 I p. 9609.

Chapter II

The EU Constitution Viewed in the Light of Fundamental Constitutional Theories

Ola Zetterquist*

Introduction

This paper is concerned with some fundamental constitutional theories applied to the constitutional law of the European Union. The theories will be viewed from the perspective of political philosophy and it will be a citizen's perspective of these issues, rather than a public international law or an internal community law perspective that will be taken. In particular the paper will look closer at two important theories that, so I will claim, can be identified in the constitution of the European Union. They are the theories of *popular sovereignty* and *constitutionalism* respectively. These theories have been chosen for two reasons: Firstly they make up the core elements of what we might call the *Western theory* of political society in general. Secondly they reveal rather interesting differences when we apply them to the European Union. The paper

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Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 9–26.

will set out with a brief introduction of the problem. After that, the two theories will be looked at more in detail and I will finish by trying to apply them or make sense of them in the context of the European Union.

1. The Debate on the Constitutional Treaty and the Relation with Fundamental Constitutional Theories

Currently the issue of the European Constitution is both widely, and wildly, debated as a result of the European Convention presenting its Draft Treaty establishing the constitution for Europe (the Constitutional Treaty) which was in turn agreed upon at the meeting of the European Council on 17–18 June 2004 and finally adopted at the meeting of the European Council on 29 October 2004. The Constitutional Treaty has begun its process of ratification in the 25 Member States in accordance with article 48 of the TEU in 2005, but as we know this process is now at a halt.

At this moment the future of the Constitutional Treaty is quite uncertain. The Constitutional Treaty was rejected in referendums in both France and the Netherlands (on 29 May and 1 June 2005 respectively) and several Member States are, in the light of these results, pondering whether to proceed with the ratification or not (some 13 Member States have already ratified the Constitutional Treaty). Nevertheless, the Constitutional Treaty is the final product of an extraordinary process of negotiations and deliberation on constitutional issues of the European Union, first in the context of the European Convention (established after the meeting of the European Council at Laeken in December 2001) and subsequently between the Member States within the European Council. It is the most comprehensive attempt yet at simplifying the present Treaty structure and addressing the constitutional features of the European Union. Consequently, there are still good reasons for taking a closer look at the content and implications of the Constitutional Treaty even if it is not, in the end, adopted in its present form.

In spite of the sometimes heated debate over the Constitutional Treaty it remains a curious fact, that it has been seen as anything from the emerging European super-state, the Leviathan reborn at the European level, to something of a weakening blow to the European Union project of today, something that will actually limit its powers. The debate has most likely been stirred by the use, for the first time, in an official context of the "C-word" – the *Constitution*. The European Union will now have a constitution just like a state has a constitution, and so, the argument goes, that would be something competing with the traditional constitutions of the Member States. Should the European Union be furnished with a Constitution in the same manner as a State that will lead us straight to the core question that haunts practically every discussion of the constitutional law of the European Union: that of the so-called

competence-competence ("Kompetenz-Kompetenz"), i.e. who has the final say on the competencies of the European Union.[1]

We should, on the other hand, not forget that it has been consistently claimed by the European Court of Justice (ECJ) that the European Community is a Community based on the rule of law, that already has a constitution ever since the coming into force of the Treaty establishing the European Economic Community (ECT).[2] This view holds that there are legal norms that constitute and empower the Community's organs and a number of basic constitutional doctrines and principles that bear on the spheres of activity of the Community.[3] The European Union thus, the argument goes, is already a constitutional and independent legal order beside the Member States.

If this view of the ECJ is taken as a point of departure, it is obvious that the present Constitutional Treaty (CT) does not in any way change that situation. However, it is also rather obvious from my initial remarks that there is today serious disagreement over what sort of constitution we are really talking about in Europe. That question in turn has bearing on our notions of fundamental constitutional theories as to what a constitution actually is and which values it is designed to preserve.

The question then is whether there are any fundamental constitutional theories in the European constitution (existing or proposed)? One might be tempted to answer the question in the negative, given the widespread disagreement on what the CT actually entails in this regard. However, looking at the official texts, treaties and case law, it is clear that there are numerous expressions of what we might call a fundamental constitutional theory. Indeed, we find more than one, and that is part of the problem.

Historically speaking, many would hold that the given candidate for a fundamental constitutional value of the EU is to be found in the famous preamble of the European Community treaty about the establishment of an "ever closer union among the peoples of Europe". This statement indeed played an important part in one of the first and most important constitutionalising cases

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[1] Cf. T. C. Hartley, Constitutional Problems of the European Union, p. 156. Cfr also the use of this phrase by the German Constitutional Court in the Maastricht decision, Entscheidungen des Bundesverfassungsgerichts (BVerfGE), vol. 89, p. 155.

[2] "It must first be emphasized . . . that the European Economic Community is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." Les Verts v Parliament, ECR [1986] 1339 at 1365, § 23. This view was restated by the Court in Opinion 1/91, ECR [1991] I-6079 at I-6102, § 21.

[3] N. MacCormick, "Democracy, Subsidiarity, and Citizenship in the European Commonwealth," from Constructing Legal Systems – "European Union" in Legal Theory, ed. Neil MacCormick, Kluwer, 1997, p. 7.

of the EEC-treaty when the direct effect of Treaty provisions was established and the Community held to be a "new legal order".[4] By some, that famous statement, particularly when used by the ECJ, has been seen as a sign of an inexorable march towards ever more integration which would presumably, in the end, mean European statehood.[5] The problem, however, is that further European integration cannot in itself be a fundamental constitutional theory, since it does not provide us with an answer to the question *why* such integration should be seen as desirable or (alternatively) as a bad thing, i.e. it tells us nothing of which value (goal) the integration (which is but a means to this end) is in fact supposed to achieve or serve.

The initial version of the Constitutional Treaty contained a new candidate for a fundamental constitutional theory in the preamble. The draft presented by the European Convention started out by stating that "Our Constitution . . . is called a democracy because power is in the hands not of a minority but of the greatest number", which was a quote of the ancient historian Thucydides' quote of Pericles' definition of the Athenian democracy back in the 5th century B.C.[6] It is reasonable to assume that the fact that the first draft of the Constitutional Treaty started with such a remark tells us something about the constitutional values that the Convention thought should guide it. The reasonable interpretation of this remark would be that the EU strives to promote and achieve democracy as a form of government. It is therefore interesting to note that the quote of Thucydides was struck down by the European Council and did thus not make it into the final version. It would be exaggerated to imply that the European Council thereby meant that democracy is unimportant. The omission rather points to the complicated question of where (i.e. at what level) democracy is practicable in the EU.

Other constitutional values of the Union are expressed in the new article 2 of the CT. Article 2 tells us that the Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values, the article states, are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination. It is reasonable to hold that these values, in a very wide sense, can be said to form the core set of values of a liberal constitutional theory,[7] which is thus the normative foundation of the EU.

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[4] 26/62, van Gend en Loos, ECR [1963] 1 at 12.

[5] Cf. G. F. Mancini, "Europe: The Case for Statehood", European Law Journal [1998], pp. 29–42 at p. 39. For a critical view see T. C. Hartley, Constitutional Problems of the European Union, Hart Publishing, 1999, p. 49 s.

[6] Thucydides, History of the Peloponnesian War, Penguin Books, 1972, Book II, § 37 (Pericles' Funeral Oration), p. 145.

[7] Cf. S. Holmes, Passions & Constraint – On the Theory of Liberal Democracy, Chicago University Press, 1995, p. 16.

However, as any constitutional theorist well knows, the devil is in the details and it might be quite hard to get all of these concepts to stick together, since they might easily come in conflict with each other. Conceptually and historically, the concepts of liberty, equality and democracy have at times had a troublesome relationship and their reconciliation may be said to be a fairly recent event.[8] Everyone may agree then that a democracy is what we need (indeed, democracy is now universally agreed upon – no one would dare to propose a constitution without it).[9] The question is not whether we want democracy but rather what sort of democracy do we mean?

The problem of identifying the proper definition of "democracy" is well known in traditional constitutional theory and it seems that this classical debate has now struck the EU with full strength. These debates, both old and new, are at heart the debates of which fundamental constitutional theories that should guide the future development of the European Union, her Member States and her citizens. What has often been described as a conflict between the different perceptions of the ends of the European integration – what is the EU there for, really – can actually be rephrased as a conflict between the different theories that we find in the deep structure of constitutional law. These theories in turn give us, at least, some answers to the question of the nature and the character of the EU.

The answers to these questions (what is the purpose of the EU, which are the foundations of EU-law?) cannot be sought solely in the legislative text itself since few legislative texts take the shape of in-depth treatises on moral and political philosophy. The issue can be illustrated by the Scottish legal scholar (and former MEP) Neil McCormick;

> "Where there is constitutional law, there must also be constitutional theory; and constitutional theory is necessarily rooted in the vision of the constitutional state as being or aspiring to be a moral order."[10]

The so-called "theories of European integration",[11] like neo-functionalism, intergovernmentalism, functionalism and so forth, cannot provide us with an answer to these questions. They may tell us how European integration happens in practise and they might tell us something about what is likely to happen in

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[8] Cf., *inter alia*, G. Sartori, The Theory of Democracy Revisited – Part Two: The Classical Issues, Chatham House, 1987, pp. 383–392.

[9] As a constitutional fact, this is interesting since, for about 2000 years, democracy was more or less a banished notion akin to the sort of mob-rule that killed Socrates in 399 BC. Cf. G. Sartori, The Theory of Democracy Revisited – Part Two: The Classical Issues, pp. 278–292.

[10] N. MacCormick, "Institutional Morality and the Constitution" from N. MacCormick & O. Weinberger, An Institutional Theory of Law – New Approaches to Legal Positivism, D. Reidel Publishing Company, 1986, p. 178.

[11] For a full account of these see B. Rosamond, Theories of European Integration, St. Martin's Press, 2000.

the future, but they cannot by themselves tell us whether European integration as such is a good thing or not. And if it is a good or bad thing we certainly need to know something more about *why* it is a good or a bad thing. The question of the foundations of the EU political and legal order therefore needs to start with an enquiry into the roots of constitutional theory in general. This means that the attention must now turn to the field of political philosophy.

2. The Question of Political Obligation

2.1. Political Obligation in Liberal Theory of Society

The central question in political philosophy is that of *political obligation,* which can be phrased as the three (normative) questions of *who* should I obey, to what *extent* should I obey him or her (or it), and *why*.[12] In liberal political philosophy, there are two main theories that answer that question, and those are the theories, respectively, of *popular sovereignty* and *constitutionalism*. These two theories seek their roots in the philosophies of two 17th century English philosophers, namely Thomas Hobbes (1588–1679) and John Locke (1632–1704). Thomas Hobbes is the father of the theory of sovereignty and arguably of the modern state as such.[13] His is a theory that establishes an iron link between the (sovereign) state and the legal order holding that no law can exist without the backing of the means of enforcement of the sovereign. John Locke, on the other hand, can be regarded as one of the first modern philosopher of individual rights. His theory of rights independent of the state has made a major and lasting impact on political philosophy and is today chiefly found within the theory of constitutionalism. It has constituted the foundation for *inter alia* the modern doctrine of the separation of powers and the concept of the rule of law, which includes a strong guarantee of the rights of the individual. The existence of these rights, according to Locke, ultimately is not dependent on the State or positive law. More or less all subsequent constitutional liberal theories fall back on the fundamental theories of either Hobbes or Locke.

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[12] A fuller account of the question of political obligation can be found in A. J. Simmons, Moral Principles and Political Obligations, Princeton University Press, 1979.

[13] N. Bobbio, Thomas Hobbes and the Natural Law Tradition, The University of Chicago Press, 1993. p. 75. The doctrine of popular sovereignty is normally associated with Rousseau rather than with Hobbes. The philosophical roots of Rousseau's doctrine of popular sovereignty, however, are to be found in the Hobbesian theory of sovereignty.

It should, however, be clear that I am not necessarily using these two philosophers or their theories in the *exact* sense that they themselves did. We know for sure that Hobbes certainly was no enthusiastic supporter of democracy in the sense that we tend to think of it today. He thought a parliamentary democracy perfectly possible and coherent, but he was not a democrat himself by personal choice since he clearly stated that he supported absolute monarchy.[14] By the same token, whether Locke was truly a democrat, as we today understand that notion, is a question that has been hotly disputed.[15]

However, the point is that one can fruitfully and coherently make use of the theories to support a theory of, on the one hand, popular sovereignty in the modern sense and, on the other hand, a theory of constitutional democracy. The opposing models can be illustrated by the following picture.[16]

Summum bonum		*Summum malum*	
Unity	—	Anarchy	(Popular sovereignty, Hobbes)
Freedom	—	Oppression	(Constitutionalism, Locke)

On the first scale, we find those who, like Hobbes, believe that the supreme value (*summum bonum*) of a given society is that it is characterized by the principle of *unity*. The ultimate evil (*summum malum*) is the absence of unity, i.e. a plurality of wills without any common direction (power), which is anarchy. On the other side, we have those who hold that the ultimate good of a society is that it protects the *freedom* of its individuals, which means that it protects the rights of the single individual. The objective here is the autonomy of the individual. The worst thing that can happen is not the absence of power (anarchy), but rather power being used for the end of oppressing individuals.

The different values in the picture are not totally detached from one another. Perfect freedom gravitates towards anarchy, whereas an overdose of unity, at least by those who would like to disagree, could be taken to be a sort of oppression.

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[14] T. Hobbes, Leviathan, Cambridge University Press, 1996 [1651], chap XIX, pp. 131–133.

[15] Cf, *inter alia*, B. Russell, History of Western Philosophy, Routledge, 1961, p. 608 and A. J. Simmons, On the Edge of Anarchy – Locke, Consent and the Limits of Society, Princeton University Press, 1993, pp. 94–96.

[16] N. Bobbio, Thomas Hobbes and the Natural Law Tradition, p. 29.

2.2. The Theory of Popular Sovereignty

If we start with Hobbes' principle of unity, which has later been very influential with philosophers such as Rousseau,[17] Bentham[18] and Austin,[19] we find that what characterises a good political system is unity in political and legal sense, that is, in sum, single judgement. Unity in the days of Hobbes and Bodin had a quite clear and obvious meaning. To them, unity was primarily represented by the monarch who would provide political, legal and, indeed, personal unity for the constitutional order. Today however, absolute monarchs are slightly out of fashion. If we look for the contemporary principle of unity as a fundamental constitutional theory, we have to turn to the democratic principle. In this more updated version, it is the will of the people, as formulated by its representatives in Parliament, which is to provide unity to the legal and political system.

We can find an expression of that theory in modern democratic thought in the principle of *Vox Populi, Vox Dei*, (the voice of the people is the voice of God). An interesting formulation of this idea is also to be found in a famous judgment of the High Court of London from 1700: "[A]n act of parliament can do no wrong although it may do several things that look rather odd."[20] There is thus in this theory no (external) power that can assign any binding constraints on what the sovereign people may decide. Any such (apparent) constraints must stem from the people itself that may, ultimately, decide to discard them if it sees so fit.[21]

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[17] "Of all Christian Authors the philosopher Hobbes is the only one who clearly saw the evil and the remedy, who dared to propose reuniting the two heads of the eagle, and to return everything to political unity, without which no State or Government will ever be well constituted.", J. R. Rousseau, Of the Social Contract, Cambridge University Press, 1997 [1762], Book IV, chap. 8, § 13, p. 146.

[18] Cf. J. R. Stoner, Common Law & Liberal Theory – Coke, Hobbes & the Origins of American Constitutionalism, University Press of Kansas, 1992, p. 69 and N. Mac Cormick, Questioning Sovereignty – Law, State and Practical Reason, Oxford University Press, 1999, p. 124.

[19] "I know of no other writer [than Hobbes] (excepting our great contemporary Jeremy Bentham) who has uttered so many truths, at once new and important, concerning the necessary structure of supreme political government, and the larger of the necessary distinctions implied by positive law", J. Austin, The Province of Jurisprudence Determined, Cambridge University Press, 1995 [1832], Lecture VI, p. 231n.

[20] City of London v. Wood, 88 Eng. Rep. 1592, 1602, (1700), quoted in Laurence Tribe and Michael Dorf, On Reading the Constitution, Harvard University Press, 1991, p. 32.

[21] Hobbes illustrated this point with a reference to the Roman republican constitution: " . . . for no man is so dull as to say, for example, the people of *Rome* made a covenant with the Romans to hold the sovereignty on such or such conditions; which not performed, the Romans might lawfully depose the Roman people." Thomas Hobbes, Leviathan, chap. XVIII, p. 123.

The value, or the purpose, of having unity, and single judgement in this system is, as has been said, the realisation of the popular will. This is therefore a theory that sees the legal process basically as a process of *command*. Law is ultimately a command from the sovereign people in its totality, i.e. also including the possible dissenters of the minority.[22] Given that the law is a command from the sovereign, it is important in such a system that there will be a clear chain of command, to make sure that legal norms may ultimately be derived from the sovereign people – it is important, as Harry Truman had it, to know where the buck stops. The ultimate power, and the ultimate responsibility, lies with the sovereign people of the state. This is true both as regards political unity, meaning that all legal orders are subordinated to the legal order of the state (that the sovereign people controls) as well as regards legal unity, meaning that all the sources of norms are subordinated to the law of the state (what may be called the "principle of closure").[23] It is therefore equally important that there are no competing claims as to where the buck should stop.

It is equally important in such a system that there is capacity for action, since the state has as its purpose the realisation of popular will. Such realisation requires that there shall exist means (i.e. power) for realising the popular will, means that are in turn provided by the institutional framework of the state.[24] If there are no means to enforce and to realise that will, we will instead find ourselves in the anarchical position so detested by Hobbes. Consequently, this is a theory that places considerable importance on the means of enforcement since only these may ultimately ensure that the sovereign's commands are obeyed.[25] Hobbes put the point quite brutally: " . . . it is men and arms, not words and promises that make the force and the power of the laws".[26] In other words, this theory highlights the importance of the state as the institutional mechanism within which this process of political will-formation (and execution) takes place. The state is therefore at the very heart of this theory.

If unity (politically and legally) is the ultimate good, the ultimate evil, on the other hand, is the absence of such power. Single will is indeed of such

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[22] As argued both by Hobbes (*De Cive*, chap. XII, p. 250, § 8 and chap. XIV p. 272, § 1) and Rousseau (Of the Social Contract, Book II, chap. 6, pp. 66–68).

[23] N. Bobbio, Thomas Hobbes and the Natural Law Tradition, p. 85.

[24] What Hobbes identified as the creation of the Sovereign (as an artificial person) which entailed the right for the sovereign to decide and act in the name of all the members of the society in question, Leviathan, chap. XVII, p. 120f.

[25] "And Covenants without the Sword, are but Words, and of no strength to secure a man at all", T. Hobbes, Leviathan, chap XVII, p. 117.

[26] T. Hobbes, Leviathan, chap XLVI, p. 471.

importance that it is the core characteristic of the State.[27] Plurality of wills (or judgements), at least in affairs of state, is an evil that may lead to the ultimate evil, i.e. anarchy.[28] Consequently, this is a theory that is deeply sceptical or even hostile to notions such as judicial review of the legislative,[29] institutional checks and balances or separation of powers at the highest level and federalism. All of these sit very ill with the Hobbesian theory of sovereignty since all of those notions, which all act as constraints on the power of the State, will lead us, to a higher or lesser degree, towards anarchy.[30]

2.3. The Theory of Constitutionalism

The turn has now come to look at the issue of political obligation in the other main theory, that of constitutionalism. In this theory, as we saw before, the supreme value is the empowerment of the individual, i.e the protection of the rights of the individual. The ultimate objective can be said to be one of *self-government* or *autonomy* for the individual meaning that no individual should be dependent on others (private individuals or the government) for preservation, unless the person in question is incapable of self-support.[31] Conversely, the ultimate evil is oppression, which would leave individuals in a state of extreme dependency on the rulers. The objective of securing autonomy for the individual (while avoiding oppression) requires that public power should be carved up, reined in, and fenced, wherever possible. The exercise of public power can never be a matter of a sovereign's (arbitrary) will but must always be supported by the laws satisfying the classical requirements of the inner

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[27] With Hobbes' own words: "The only way [for men] to erect such a Common Power . . . is to conferre all their Power and Strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will . . . This is more than Consent or, Concord; it is a reall Unitie of them all, in one and the same Person. . . .", Leviathan, chap. XVII, p. 120.

[28] Cf. T. Hobbes, Leviathan, chap. XXIX, p. 223, and The Elements of Law, James Thornton, 1888 [1640], part 2, chap. 10, p. 188f, § 8.

[29] Hobbes was deeply suspicious of judges who, under the cloak of their legal expertise, placed themselves above the sovereign and thereby laid the foundation for anarchy, and that they were therefore in principle no more than "*a most inexpert mob*" T. Hobbes, *De Homine*, from Man and Citizen (*De Homine* and *De Cive*), ed. Bernard Gert, Hackett Publishing, 1991, ch. XIII, p. 67, § 6.

[30] As Hobbes frequently argued: "For what is it to divide the Power of the Common-wealth, but to Dissolve it? for Powers divided mutually destroy each other.", Leviathan, chap. XXIX, p. 225.

[31] Cf. A. J. Simmons, On the Edge of Anarchy, p. 74f and The Lockean Theory of Rights, Princeton University Press, 1992, p. 284.

morality of law[32] since otherwise the rulers will lose their moral authority to claim obedience for their norms.[33]

A system based on the idea of constitutionalism will insist on an elaborate system of checks and balances and strong constitutional provisions that clearly mark out the limits of political power.[34] Political authority can never be absolute, i.e. unlimited, in nature since this would be tantamount to political slavery.[35]

As the name of the theory implies, the objective of limiting power is achieved mainly through the constitution. In this sense, the constitution can be said to form an interesting transformation from philosophy to law of the idea that there is a hierarchically higher law, based on moral rights, against which one can assess the validity of normal legislation.[36] The law thus does not have the same character as it does in the unitary theory. In that theory, law was an expression of the sovereign's command (an expression of will), whereas in the constitutional theory law is rather taken as something that gives detail to the constitution, the objective of which is to secure the moral rights of the individual.

As can be seen, there is a tension between the constitutionalist principle separation of powers and the (pure) principle of popular sovereignty. This is not the same as saying that the constitutionalist theory is hostile to democracy. Democracy, if not for any other reason, is by far the cheapest and most efficient way of making sure that public power does not go on the rampage. Democracy means that those who hold power have to answer to those they govern and brutal oppression is not, generally speaking, a vote-winner. The constitutionalist theory is positive to the democratic principle, both for protecting rights and for giving room for collective decision-making in important areas of society. According to constitutionalism, however, collective decision-making is not, as in the Hobbesian

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[32] Cf. L. Fuller, The Morality of Law, Yale University Press, 1969.

[33] With Locke's own words: "*Where-ever Law ends, Tyranny begins*, if the Law be transgressed to another's harm. And whosoever in Authority exceeds the Power given him by the Law, and makes use of the Force he has under his Command, to compass upon the Subject, which the Law allows not, ceases in that to be a Magistrate, and acting without Authority, may be opposed, as any other Man, who by Force invades thee Right of another." Two Treatises of Government, Cambridge University Press, 1988 [1689], II, p. 400f, § 202. Cf. also the Introduction by P. Laslett, p. 112f.

[34] Cf. G. Sartori, The Theory of Democracy Revisited – Part Two: The Classical Issues, pp. 307–309. In this sense the notion of constitutionalism has often been said to be synonymous with the notion of the *rule of law*, cf. The Blackwell Encyclopaedia of Political Thought, ed. D. Miller, Blackwell Publishers, 1991, p. 103.

[35] Cf. A. J. Simmons, On the Edge of Anarchy, pp. 48–55.

[36] Cf. E. García de Enterría, La Constitutción como Norma y el Tribunal Constitucional, Editorial Civiitas, 1985, pp. 50–55.

theory, an instrument for achieving the over-arching value of unity. The ultimate value is rather found in protection of the rights of the individual.

The conflict is thus not, as it mainly was in the 17th century, one between absolute monarchy or autocracy in general and Parliamentary government, but rather one of popular sovereignty versus a rights-based perspective where there must be limits placed on the scope of action of the majority. The diverging views of these theories are of importance when we approach a new problematic question like the one concerning the constitution of the EU.

3. The Fundamental Theories Applied to the European Union

3.1. The Theory of Popular Sovereignty Applied to the European Union

The next step in the inquiry then would be to try to make some use of those theories within the context of the European Union. It is logical to start, as in the general section, with the European Union and the principle of unity (popular sovereignty). As a starting point, it appears to be safe to say that it is quite obvious to any lawyer who studies European Union and European Community law that the Union is not characterised by the principle of unity in the sense of popular sovereignty. Rather to the contrary, there is an elaborate and complex system of checks and balances, both horizontally and vertically, in the European political system. Given this fact, it is indeed quite odd that the Draft presented by the European Convention started with a bold quotation from Thucydides, something which clearly implied that unity, democracy, should be the supreme value of the Constitutional Treaty.[37]

The principle of popular sovereignty, as previously mentioned, strongly militates in favour of a system where pre-eminence is given to a political assembly accountable to the (sovereign) citizens of that political system. This is particularly so if democracy is to be understood in the sense that it was understood in the ancient Greece of Thucydides.[38] Any system that severely obstructs the will of the sovereign people will therefore be at odds with this fundamental value.

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[37] This fact is especially odd, given that Thucydides was indeed critical of the Athenian democracy and was even expelled from his native city of Athens It should be mentioned in this regard that Hobbes was a devote scholar of Thucydides and it is no coincidence that his first publication (1628) was a translation of Thucydides' History of the Peloponnesian War. As to the political implications of Thucydides work Hobbes stated that "it is manifest that he least of all liked the democracy" quoted from The Cambridge Companion to Hobbes, ed. Tom Sorell, Cambridge University Press, 1996, p. 209.

[38] For an account of this issue see G. Sartori, The Theory of Democracy Revisited, Part II, pp. 278–297.

It can be seen that the present structure of the European Community is not in accordance with the principle of popular sovereignty. The Commission, that proposes Community legislation, is appointed in an indirect manner by the Member States and the European Parliament in conjunction. The Council, which is often held to be the most important political body, is clearly characterised by the indirect representation and is in fact more akin to the diplomatic model of public international law than the constitutional concept of a legislative power.[39] The European Parliament certainly enjoys more direct legitimacy, but then the Parliament is elected on a national basis (and most often on national issues as well) rather than on a European one which would have been the more reasonable solution for a genuine Parliament. All these factors, together with the fact that small Member States have slightly more representation in the Parliament than larger Member States, also reflect an indirect legitimacy, which is based more on the Member States than the traditional concept of proportional representation. The fundamental democratic mechanism, i.e. the power to hire and fire, is thus not present at the European level.[40] Nobody can take credit for the policies of the European Union as a whole, and there is no one to fire if the citizens (voters) are unhappy about it. A description of the institutional structure of the European Union as based on the principle of popular sovereignty therefore hardly seems appropriate.

From the point of view of popular sovereignty, it is quite problematic that the European Court of Justice holds such a strong position as it does on the horizontal level of the European Union, since this places constraints on the political institutions (i.e. the European Parliament, the Commission and the Council) of the Community. It might be argued that these political institutions have a closer, albeit indirect, relation to the voters, i.e. to the majorities, in the Member States, than does the European Court of Justice.[41]

It could be argued, on the other hand, that the political institutions of the EU are hardly adequate as representatives of the European citizens. If we are to be true to the principle of popular sovereignty, this theory would point us towards an (ultimately) sovereign European Parliament. But as things stand today, it would be more likely to hear the argument, from the point of view of

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[39] Cf. D. Spence, Negotiations, coalitions and the resolution of inter-state conflicts, in M. Westlake, The Council of the European Union, Cartermill Publishing, 1995, pp. 373–377.

[40] Cf. T. C. Hartley, Constitutional Problems of the European Union, p. 19.

[41] As argued by Bentham: "Give to the Judges a power of annulling [the legislature's] acts; and you transfer a portion of the supreme power from an assembly which the people have had *some* share, at least, in chusing, to a set of men in the choice of whom they have not the least imaginable share.", A Fragment on Government, Cambridge University Press, 1988 [1776], chap. IV, p. 100, § 32.

popular sovereignty, that power ought to be repatriated to the parliaments of the Member States instead.[42]

Looking at the relation between the European Union and the Member States, another problem with the European Union arises from the point of view of popular sovereignty. The activities of the European Community and Union today mean a substantial change of tasks and obligations of the executive and judicial branches within the Member States. In the Community system, Community issues are (mainly) removed from the jurisdiction of the national legislator.[43] Legislation is mainly centralised to the Community institutions, whereas application and interpretation mainly fall to the authorities and courts of the Member States. Member state courts are called upon to perform quite qualified and elaborate duties under Community constitutional law that, at least as regards Member States like Sweden, puts them in an entirely new relation with the legislative and executive branch. By the same token, it is clear that the executive power, which, after all, is the power that carries out the daily business of the European Community and Union law, has been given a much more central position in the area of Community legislation than national legislative powers, since it is the national executive, and not the national legislator, that enacts European law within the Council of Ministers.

If the democratic principle is the one that should guide the European Union, the Constitutional Treaty presents several deeply problematic aspects. Why then, could one ask, did the European citizens not get a Constitutional Treaty based on the principle of popular sovereignty when, not least, the problem of the so-called democratic deficit was so well known before the European Convention started out on its task? Presumably the answer to that question is that more democracy within the European Union, by empowerment of the European Parliament, is perceived as a threat to democracy in the Member States. This is most likely the real essence of the hot debate over the issues of European Union powers and Member state sovereignty, rather than the questions of whether the actual scope of EU competencies have been properly detailed in the Constitutional Treaty.

The present structure of the European Union is, as I have argued, difficult to reconcile with the principle of popular sovereignty. Reconciliation with this principle would require resorting to the Benthamite concepts of delegation,

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[42] The proposed involvement of the National Parliaments in the supervision of the application of the principle of subsidiarity (Protocols On The Role of National Parliaments in the European Union and On the Application of the Principles of Subsidiarity and Proportionality) can be said to give expression to the view that national parliaments should have a stronger position in the EU.

[43] Cf. E. Smith, "Cross-fertilisation of Concepts in Constitutional Law," from New Directions in European Public Law, eds. J. Beatson and T. Tridimas, Hart Publishing, 1998, p. 109.

adoption and preadoption,[44] which really means that the central players are, and remain, the Member States.

With a view to possible reforms for a more democratic European Union, the problem is that the more powers that are given to the European Parliament, the greater the fear will be in the Member States of a European super-state that will dilute, or destroy, democracy in the Member States. This fear has a powerful political impact. It is therefore very hard to develop the European Union in a more democratic direction.

The theory of popular sovereignty is a very monolithic one that is centred on the state. Insisting on this theory will therefore push us either towards a European state or back, if one may say so, towards a more strong position for the sovereign Member States.

3.2. The Theory of Constitutionalism Applied to the European Union

Turning to the theory of constitutionalism and applying it to the European Union, a different picture of the European constitution will emerge. As has been said previously, the supreme value in the theory of constitutionalism is the protection of the rights of the individual. This objective requires an effective curtailing of public power in relation to the individuals. Such a point of departure means that the need for a strong court on the community level is clear from the outset. One could liken the role of that court in such a system to Ulysses' being tied to the Mast, in order to avoid the deadly call of the sirens, accepting that it is not a good thing to have immediate practical effects of political impulses even if that means that, from time to time, perceived social needs may be delayed or even frustrated.[45]

A constitutionalist point of departure would be taken in the notion that the purpose of the European Union is not primarily to introduce a new form of European democracy, but rather that its primary goal is one of empowering European individuals by protecting their rights and enhancing their autonomy. Freedom in the constitutionalist theory is understood as not being subject to the arbitrary will of other persons.[46] Looked at from this angle one could even

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[44] J. Bentham, Of Laws in General, Athlone Press, 1970, ch. II, p. 18f.

[45] This metaphor was originally used by Jon Elster, Ulysses and the Sirens, Cambridge University Press, 1979.

[46] As Locke formulated this ideal ". . . *the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom.* For *Liberty* is to be free from restraint and violence from others which cannot be where there is no Law: But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*. . . . But a *Liberty* to dispose and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not be subject to the arbitrary Will of another . . .," J. Locke, Two Treatises of Government, II; p. 306, § 57.

make sense of such exotic rules as, for example, the water content of cans of tomato, that are otherwise often given as examples of unnecessary Community intervention in the legal systems of the Member States. It certainly is true that detailed regulations of this kind raise questions over the appropriateness of Community legislation, particularly when viewed in light of the principle of subsidiarity laid down in article 5.2 of the ECT. It could be argued, however, that such norms belong in a bigger context which is the internal market, and the internal market could very well be construed as empowerment of the European individuals to seek their fortune, i.e. sell their canned tomatoes, without having to worry about (arbitrarily) imposed boundaries and diverging standards of the different Member States.

Protection of individual rights can be a central feature both of Member State and European Union constitutional law. In an individual-empowerment sense, the European Union could be seen as an additional guarantee, or, as James Madison described the American Union, a "double security," for the rights of the individuals.[47] The role of a supranational court like the ECJ is much less problematic in such a system than in the system of popular sovereignty since the court protects the rights of the individual both against the community institutions and against the Member States when acting within the scope of European Community law. What is interesting about this idea is that it is very consonant with the case-law of the ECJ itself. Most of the famous revolutionary cases (or perhaps one should say the constitutionalising cases) of the ECJ, like van Gend en Loos,[48] Costa v. ENEL,[49] Simmenthal,[50] Defrenne,[51] Marshall,[52] Francovich,[53] to mention a few, have all been about the protection of the rights of the individuals. Advocate General de Lamothe expressed the idea with particular clarity in the case "Internationale Handelsgesellschaft"

> "[The fundamental principles of national legal systems] contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual."[54]

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[47] "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.", James Madison, The Federalist, no 51, Everyman's Library, 1992, p. 267.

[48] 26/62, van Gend en Loos, ECR [1963] 1 at 12–13.

[49] 6/64, Costa v ENEL, ECR [1964] 585 at 594.

[50] 106/77, Simmenthal, ECR [1978] 629 at 644, § 21.

[51] 43/75, Defrenne II, [1976] ECR 455 at 478 s, §§ 56–60.

[52] 152/84, Marshall, ECR [1986] 723 at 748 s, § 47.

[53] C-6 and 9/90 Francovich & Bonifaci, ECR [1991] I-5357 at I-5413 ss, §§ 31–37.

[54] 11/70, Internationale Handelsgesellschaft", ECR [1970] 1125 at 1146.

The protection of the rights of individuals has thus been used both as a sword and a shield by the ECJ in its response to action by the Member States.

At the same time it should not be forgotten that the idea of double security is contested and can be understood in a reverse sense. Among others, the German constitutional Court has claimed that the ultimate right to judge over the rights of German individuals belongs to the German constitutional Court as an organ of the sovereign German state.[55] The German Constitutional Court thus argues that the German constitution ultimately is independent from the EU constitutional system.

The position of the ECJ may arguably be further strengthened given the weak, i.e. mainly indirect, democratic legitimacy of the political institutions in the European Union. Given the indirect nature of legitimacy, one might actually say that the strong position of the Court is even more important for the legitimacy of the European Union, since it provides the only channel for a European citizen to directly affect the development of the Union.

The point of the Court as the citizen's channel for civic participation, which may be seen as the relationship between the individual and the legislator, is worth elaborating further upon. We are used to having the idea of the legislator passing a law which comes to the judge, who in turn applies it to citizen X. This "top-down" perspective is a very standardised way of thinking about how law and citizens interact or how they affect each other. However, what we tend to forget is that we can also take a "bottom-up" perspective of this relationship. In this model, the point of departure is rather that citizen X takes a case to the Court, whose judgment may in turn affect the legislation and the legislator.[56] This perspective is appropriate in particular if there is a constitution above the legislator that establishes a restricted area of competence for legislative activity. We expect the legislator to respect the constitution, which, after all, constituted the legislator's moral authority to demand obedience for his laws. It might be argued that this perspective is particularly appropriate in the European Union where the Treaties, i.e. the constitution, are actually the only legal acts that have been entirely adopted by directly elected parliaments. To the extent that the ECJ thus, at the request of individuals, enforces the Treaties on Community Institutions and Member States, it might be said to actually enforce democracy.

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[55] "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 of the basic rights." BvG 2BvR 2134/92 & 2159/92. English translation in [1994] 1 C.M.L.R. p. 79, § 13.

[56] Cf. S. Holmes, Passions & Constraint, p. 166.

As most community lawyers are familiar with the "bottom-up" perspective, that kind of enforcement was precisely what happened in the second Defrenne case, referred to above. This case is a classical illustration of the fact that one individual (Mrs. Defrenne) could actually defend her Community rights in the opposition of no less than nine Member States ready to sacrifice her rights under Community constitutional law. Focus in this constitutionalist theory, then, is not primarily on the relation between the Member States and the Union (like in a public international law view), but on the protection of the individuals and on institutional balance, both between the institutions of the Union and with the Member States. The consequence of the constitutionalist theory is that we can, on such an account, hold the European Union to be a constitutional order even if it is not a state.

Conclusion

In sum, depending on which of the fundamental constitutional theories of popular sovereignty or constitutionalism we apply, there will be diverging answers to the question of whether the European Union has a constitution or not. Following the footprints of Hobbes, it is clear that the European Union does not have a constitution and will not have a constitution, whatever will be put in a document bearing that name, unless the Union is provided with its own means of enforcement and a clear chain of command. Following the Lockean path, it is easier to claim that the European Union already has a constitution and that the problems connected with that constitution (present and future) are rather the unsatisfactory direct links between the citizens and the European institutions and the possible weaknesses in the judicial structure, i.e. is the restricted access of individuals to the European courts.

Chapter III

The European Union Seen From the Top – the View of an Inside-Outsider

Agust Thor Arnason*

Introduction

When we look at a map of Europe, we see that Iceland is an island which lies far to the northwest of the other European countries. Although Icelandic society is rooted in Medieval European culture, it has a number of North American characteristics.[1] Following its severance from Denmark in 1940 and the presence of American armed forces in the country during the Second World War, Iceland distanced itself, at least for an indefinite period, from its European origins. Except for its participation in the Council of Europe, Iceland came late to European cooperation. Close connections with the United States during and following the war, and disagreements with a number of European states over the expansion of territorial fishing limits, influenced this distancing.[2]

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[1] See V. Stefansson: *Iceland: The First American Republic*, Doubleday, New York 1947, and R. F. Tomasson: *Iceland: The First New Society*, Iceland Review, Reykjavík 1980.

[2] E. Benediktsson: *Ísland og Evrópuþróunin 1950–2000*, Fjölsn forlag, Reykjavík 2000.

Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 27–42.

Those who have followed the discussions of the position of Iceland within Europe can testify to the hesitancy of Iceland's leaders to associate Iceland too closely with Europe. Public sentiment has been surveyed only through opinion polls but appears to be more positive about further cooperation with Europe than are Iceland's leading politicians. This situation is the opposite of the situation found within European countries generally and is for that reason remarkable. However, there has not been much public pressure on government to go further than Iceland went in 1970 when it joined the European Free Trade Association (EFTA) and became later incorporated into the European Economic Area.[3]

After having shelved all plans for joining the European Economic Community, the Icelandic government decided in 1967 to seek membership in the European Free Trade Association, to which it gained entry in 1970.[4] At the end of the 1980's, the European Union invited the EFTA countries to discuss a closer association with the EU. The result of these discussions was the formation of the European Economic Area through the signing of a treaty in Oporto in May, 1992, which took effect in January, 1994. It has been claimed, both by supporters and opponents of Iceland's membership, that by joining the European Economic Area, Iceland in effect became an adjunct member of the European Union. Whether or not one agrees with this, it is undeniable that Iceland has taken a leap forward – economically, politically, legally and even culturally – since the signing of the EEA Treaty.[5] In this paper, I will discuss the background and nature of these changes and will go on to discuss why the Icelandic authorities have not seen fit to pursue full membership in the European Union. I will also discuss the reasoning of those who say that full membership is a better alternative than merely retaining the current treaty agreements and of those who think that a closer association with the European Union would be undesirable. Finally, I will try to assess the chances of Iceland's applying for EU membership in the near future.

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[3] The European Economic Area consists of the countries of the European Union and the three EFTA countries: Norway, Iceland and Lichtenstein.

[4] In 1967 the Icelandic government decided to seek EFTA membership. The negotiations started in January, 1969, and Iceland became member of EFTA on March 1st, 1970. According to the EFTA-agreement, duties on Icelandic export goods to the EFTA countries were reduced in accordance to the internal EFTA level. Iceland was to gradually lower its protective duties on industrial goods until they were eventually eliminated, which was supposed to be accomplished by 1980.

[5] Ó. Stephensen: *Áfangi á Evrópuför*, Háskólaútgáfan, Reykjavík 1996, p. 9.

1. From Ancient Commonwealth to Modern Democracy

Iceland was originally settled in the period 874–930 AD, by emigrants from Norway and the Norse settlements in the British Isles. With the establishment of the General Assembly (Alþingi) in 930, which may be described as the first parliament in the world, Iceland became a political and legal unity, with national legislative and judicial bodies in the style of the times, but without a central executive. The period between 930 and 1262 has been called the Commonwealth Period. Between 1262 and 1944, Iceland came first under the Norwegian crown and later under Denmark with the dissolution of the Kalmar Union in 1523. Iceland's struggle for autonomy began in the 1830's and ended when Iceland became an independent democratic republic on June 17th, 1944. Iceland had earlier gained national sovereignty and had entered into a personal union with the King of Denmark.[6] One of the first acts of Alþingi[7] after sovereignty was achieved was the declaration of Iceland's permanent neutrality. The Icelanders quickly took foreign relations largely into their own hands, although formally speaking foreign relations, including foreign trade, remained under Danish authority. When Denmark was occupied by the Germans on April 9th, 1940, which "rendered the king over Iceland incapable of exercising his powers under the constitution," Alþingi declared that "the exercise of these powers fall to the Icelandic government."[8] The Icelanders at that point took control of all of their political affairs. On the 10th of May of the same year, Iceland was occupied by British forces. The occupation was formally protested by the Icelandic authorities, but they nevertheless cooperated with the British forces. Although the occupation had no formal effect upon Iceland's legal status with respect to Denmark, it may be said that the British, and later American, occupation helped to put the young republic on its feet, prior to the end of the war. On July 7th, 1941, the United States formally undertook the defence of Iceland, by mutual agreement of the Icelandic, American and British governments.

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[6] With the Union Act, Iceland became a sovereign state on December 1st, 1918. In 1920, Iceland received a constitution in accordance with its new status, and this functioned as basis for the constitution when Iceland became a republic on June 17th, 1944. According to article 18 of the Union Act, both countries had the authority to demand a review of the Act after January the 1st, 1940. If no agreement was reached within three years from the day when a review was demanded, each national parliament, *Alþingi* or *Rigsdagen (Folketinget* in Danish), could annul the agreement.

[7] Since 1845, the formal name of the Icelandic Parliament.

[8] Resolution nr. 4 of the 55th session of Parliament, 1940.

2. Iceland and the Larger World

One may say that Iceland jumped onto the Western European welfare wagon with the coming of the British and Americans during the Second World War. Although the Icelandic economy and the national living standard had improved considerably after 1890, the Icelandic nation was still among Western Europe's poorest at the outbreak of the Second World War. During the war years, the financial input to Iceland was tremendous, so that by the end of the war, the Icelanders were both newly independent and newly affluent. The Icelanders were fourth in the world in per capita GDP at war's end after having been well below the European average prior to the war.[9] But despite the new-found wealth at war's end, the Icelandic economy declined severely in the following years. The American armed forces, which had left Iceland early in 1947, returned in the spring of 1951 on the grounds of the country's alleged military vulnerability.[10] The return of the Americans was agreed to by all of the political parties except the socialists, and without the knowledge of their MP's.

The arrival of the American armed forces and Iceland's membership in NATO created great unrest in Iceland,[11] and throughout the 1950's, there was considerable tension in political and social matters. The contested presence of the Americans, economic contraction, trade restrictions and rationing took the wind out of the nation's sails at a time when most other countries in Western Europe were flourishing. The rationing of essential goods was in some cases more restrictive than it had been during the war.

The Icelanders had supported a policy of international free trade until the height of the Great Depression in the 1930's. After the war, international trade policy was characterized by restrictions on currency exchange and imports in an attempt to prevent trade deficits and the accumulation of foreign debt. The coalition government of the Independence and Progressive Parties (Sjálfstæðisflokkurinn and Framsóknarflokkurinn) attempted to change direction in 1950 but retreated from this less than two years later.

Given its neutrality policy, Iceland had not wanted to participate in the founding of the United Nations in 1945, because of the requirement that the founding nations should declare war on the Axis Powers. Despite the British occupation and the presence of American defence forces, the abandonment of

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[9] Jónsson, Guðmundur: *Hagvöxtur og iðnvæðing – þróun landsframleiðslu á Íslandi 1870–1945*, þjóðhagsstofnun, Reykjavík 1999, p. 387.

[10] The Korean War, which broke out on June 27th, 1950, was given as the reason for the return of the U.S. military (Marines) to Iceland in 1951.

[11] Iceland became a member of NATO when the Foundation Act was signed in Washington on April 4th, 1949.

the neutrality policy was little discussed. Iceland finaly abandoned neutrality by joining NATO in 1949, thus declaring itself to be in league with the Western powers. Participation in the Marshall Plan and the return of the American armed forces in 1951 brought Iceland still further from its former neutrality, and the increased cooperation which was developing in Western Europe in the 1950's failed to extend to Icelandic shores.[12] Although Iceland participated in various international institutions and agreements in the post-war period, the nation was preoccupied with internal problems, both economic and political, right up to the end of the 1950's.

3. Changing Times

With the formation of a new coalition at the end of the 1950's began the so-called "Reconstruction Period", which lasted unbroken for more than ten years. This was a cooperation between the social democrats (Alþðuflokkurinn) and the liberal conservatives (Sjálfstæðisflokkurinn).[13] Many economic and business restrictions were removed, and a committee was established to consider whether Iceland should seek entry to the European Community. This committee concluded that joining the Community would not be desirable because of the special situation of Icelandic economy, which was largely built upon the exportation of fresh fish.

The mid-1960's saw the construction of large power plants in Iceland, and contracts were made with large foreign firms for aluminium production. Fishing and the export of fish products remained the basis of the economy, however. The leftist government that came to power in 1971 extended the territorial fishing limits to 50 miles; and in 1976 a centre-right government extended the limits to 200 miles. It may thus be said that in this period the Icelanders took full control of the principal natural resource upon which they depended.[14]

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[12] Iceland became an aid recipient under the Marshall Plan in 1947.

[13] The economist þorvaldur Gylfason claims that the inspiration for the formation of the so-called Viðreisnarstjórn ("reconstruction government") came from the German Social Democrats' "Godesberger Programm" of 1959, wherein they replaced claims about nationalization and broad economic activities of the state with the concept of "soziale Marktwirtschaft". In an article on the history of trade, in Iceland, þorvaldur claims this to be the reason why the social democrats (Alþðuflokkurinn) joined forces with the liberal conservatives (Sjálfstæðisflokkurinn) in 1959 with the clear aim of changing radically the pre-modern methods of running the economy, for which all parties had had their share of responsibility since the early thirties. See þorvaldur Gylfason in *Frjáls verslun*, 1. tbl., Reykjavík 1999.

[14] The Viðreisnarstjórn had been in power for three election periods but lost its majority to a centre-left government formed by the Progressive Party (Framsóknarflokkurinn), the socialists (Alþðubandlagið), and a new social-liberal party (Samtök frjálslyndra og vinstrimanna).

With the extension of the territorial limits came a major increase in fishing effort, and the trawler fleet grew considerably during the 1970's. Around the country, there was an explosion in construction and trawler purchases, based upon the government's rural development policy. However, the economy could not absorb this expansion, and inflation was therefore very high in Iceland all through the 1970's and up to the end of the following decade.

The 1980's saw the arrival of new lending institutions, which made it easier for individuals and companies to take loans at affordable rates. Formerly, nearly all lending in Iceland had been controlled by state institutions. Interest rates were deregulated in 1986, and by the early 1990's, inflation had been brought under control. Icelandic economic life quickly began to resemble that of its neighbours.

Despite the volatility, insecurity and general weakness of the Icelandic economy during most of the 20th century, the nation managed to pull itself out of centuries-old poverty and build a society which today places Iceland among the world's most advanced welfare states.[15] In contrast with other Western European countries, Iceland experienced very little unemployment during the entire latter half of the 20th century with the exception of the years 1989–1995.[16]

4. EFTA–EU–EEA

In 1984, the EU and EFTA countries held a ministerial conference in Luxembourg and agreed to increased cooperation in the areas of trade, research and development, education and culture, and environmental matters. This cooperation was called the "Luxembourg Process". European development had been stalled for some time when Jacques Delors assumed the Presidency of the European Commission at the beginning of 1985 and introduced significant changes. In connection with a meeting of European leaders in June, 1985, the Commission submitted a White Paper calling for the organization of an effective European internal market by the end of 1992.

Prior to the submission of the Commission's White Paper and the adoption of the Single European Act in February, 1986, the EFTA States had been fairly satisfied with their relationship with the European Community, thanks to the duty-free trade in industrial goods provided for in the Free Trade

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[15] See Stefán Ólafsson: *Íslenska leiðin – almannatryggingar og velferð í alþjóðlegum samanburði*, Háskólaútgáfan, Reykjavík 1999.

[16] See Hagskinna:Icelandic historical statistics, editors Guðmundur Jónsson, Magnús S. Magnússon, Hagstofa Íslands, Reykjavík 1997.

Agreements that were negotiated during the Community's first enlargement in 1972–1973.[17]

Only a short time passed before the EU countries began to hesitate in following through on the Luxembourg Process, and for some years it appeared that cooperation between the EU and EFTA would not progress. In January, 1989, Jacques Delors gave a historic speech at a meeting of the European Parliament in Strasbourg in which he took up the matter of EU-EFTA relations. He raised the question whether cooperation between the EU and EFTA needed to be reorganized and discussed two possibilities: On the one hand, bilateral relationships of the existing kind, where the EU contracted with each of the EFTA countries separately on free trade; or, on the other hand, a broader sort of relationship than had earlier been considered, including the establishment of common institutions and decision processes. The main emphasis would be on economic, social, financial and cultural affairs.

At a meeting of EFTA leaders in March, 1989, Delors's initiative received a positive response. The meeting expressed the will to explore, with the EU, means for securing regular, productive cooperation through the establishment of common channels for decision-making and common governing institutions. It was at this moment that the idea of a European Economic Area was born.

Shortly thereafter, exploratory talks were held between high officials of the EU and EFTA countries, and in December, 1989, it was decided to hold formal talks aimed at concluding a comprehensive agreement between the parties. The aim of the EFTA states was to secure a share in the economic gains which were thought to have derived from the discussion of the inner EU market.[18] The EFTA states further specified certain basic interests which they were not prepared to sacrifice. In this connection, the Icelanders insisted upon protection of their fishing industry and other natural resources from foreign investment, and they made certain demands concerning security; these were claimed as basic interests. Formal contract negotiations began in September, 1990. As mentioned above, on May 2nd, 1992, the foreign ministers of the EU and EFTA countries assembled in Oporto, Portugal, and signed a document creating the European Economic Area. This agreement was confirmed by the Alþingi on January 12th, 1993 and took effect on the

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[17] Auðunn Arnórsson: "Ten Years with the EEA: Expectations and Experiences", in: *The EEA and EFTA in a new Europe, Conference of the EFTA Parliamentary Committee and the EFTA Consultative Committee*, *Grand Hotel Reykjavík, October 21, 2004*, EFTA, Brussels 2004, pp. 7–16.

[18] See the report of foreign minister Halldór Ásgrímsson on the situtation of Iceland in European co-operation (2000), (Skyrsla Halldors Asgrimssonar utanrikisradherra um stödu Islands I Evrupusamstarfi, Utanrikisraduneytid, Reykjavik 2000), p. 3ff.

1st of January, 1994. In December, 1992, the Swiss in a plebiscite rejected membership in the EEA.

Without going further into the story of the EEA negotiations, it should be mentioned that the original goal became a mere staging post to full accession to the EU. Iceland was the only EEA-EFTA State, apart from Liechtenstein, that decided not to apply for EC membership, largely because of reservations about the Common Fisheries Policy, but also because of reservations concerning any formal transfer of sovereignty to supranational institutions. There were also doubts among Icelandic politicians as to whether the administration of a small island state could at this stage cope with full EC/EU membership.[19]

In spite of its reasonably good cooperation within the centre-left coalition government (1988–91) in preparing the EEA agreement, the Progressive Party (Framsóknarflokkurinn), which had led the government, turned opposition to joining the EU into a major campaign issue in the spring of 1991.[20] When the election results had come in, the social democrats, led by Jón Baldvin Hannibalsson, who had been the Foreign Minister in the departing government, turned to Davíð Oddsson, the newly elected chairman of the liberal-conservative Independence Party (Sjálfstæðisflokkurinn), Iceland's largest party.[21] Jón Baldvin[22] judged that it would be easier to gain consensus about EEA membership in government with the conservatives than with his former coalition partners. On the eve of the agreement, doubts grew among Progressive Party and socialist MP's as to whether the EEA-agreement was consistent with the Icelandic constitution. In the event, Alþingi ratified the EEA Agreement, following a rather dramatic debate, on January 13th, 1993. The agreement was supported by 33 social democratic and conservative MP's out of the 63 MP's who sit in Alþingi.[23]

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[19] *Ibid*.

[20] The political parties that stood behind the government in power from 1988–91 were the Progressive Party (Framsóknarflokkurinn) the social democrats (Alþðuflokkurinn) and the socialists (Alþðubandalagið). In 1989 the Liberal Party (Borgarflokkurinn) joined the government.

[21] The liberal conservatives (Sjálfstæðisflokkurinn) won the elections in 1991 under the newly elected party leader, Davíð Oddsson, with 38% of the votes. Davíð Oddson was Prime Minister from 1991 until the autumn of 2004 when he became Minister of Foreign Affairs.

[22] As Icelanders still usea patronymic name system, it has become conventional to refer to individuals, in English texts, by their first names, as in Icelandic.

[23] In voting on the EEA-agreement all of the MP's from the social democrats (Alþðuflokkurinn) voted in favour: three MP's from the liberal conservatives (Sjálfstæðisflokkurinn) voted against, along with seven MP's from Framsóknarflokkurinn (Progressive Party), nine from Alþðubandalagið (the Socialist Union) and the four MP's from Kvennalistinn (the Women's Party). Six MP's from Framsóknarflokkurinn and one from Kvennalistinn abstained.

The debate about the EEA-agreement in Iceland turned around two questions: (1) whether Iceland would have to give in to EU demands for access to her fishing grounds in order to gain market access in the EU, and (2) whether the transfer of sovereignty would violate the constitution. The question of whether influence could be exerted on the new EEA legislation was far less an issue in the Icelandic debate than it was in the other EFTA-countries. When the negotiations were over, Jón Baldvin declared that Iceland had attained "everything for nothing".

When the facts are reviewed, it comes to light that the Icelanders retained nearly complete control over their fishing grounds and sacrificed little for the privilege of gaining market access to the EU that they had hoped for. The question as to whether the transfer of sovereignty attached to the EEA Agreement was constitutional is much less clear. In contrast to the other Nordic countries, Iceland had not amended its constitution in such a way as to allow a transfer of sovereignty to supranational polities. When it was pointed out that EEA membership almost surely involved breaches of the Icelandic constitution, the Foreign Minister appointed a committee of experts to consider the matter.[24] This committee came to the conclusion that the EEA Agreement did not violate any constitutional provisions. Most experts who have subsequently expressed opinions about the matter have disagreed.[25] Without having completely surveyed the facts, it would appear that the majority of MP's think that the transfer of sovereignty in connection with the EEA Agreement was constitutionally doubtful.

5. The EU Discussion

In recent years, the discussion in Iceland concerning Europe has focussed mostly upon the question of the future of the EEA Agreement. After only a single year in force, it had appeared doomed. The rejection of EU accession by Norwegian voters in November, 1994, probably "saved" the EEA Agreement from collapsing after Austria, Finland and Sweden all became EU member states in that same year. Luckily for the remaining EEA-EFTA States – Iceland and Liechtenstein – it proved possible to adjust the Agreement to these new realities.[26]

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[24] In a radio interview in December 1991 (RÚV:Icelandic National Broadcasting Service), Guðmundur Alfreðsson, a specialist in international law, had claimed that it was more than possible that the EEA-agreement was not consistent with the Icelandic constitution.

[25] An example is Sigurður Líndal, Emeritus Professor of Law, who has expressed this opinion in several articles and in discussions with the author of this article on September 18th. 2003.

[26] Auðunn Arnórsson: *Op. cit*., pp. 7–16.

Although it is clear that Iceland's membership in the EEA has led to many positive changes in Icelandic society, the weaknesses of the EEA Agreement have become increasingly evident with the passage of time. The prediction that Alþingi would become little more than a rubber stamp for EU legislation has been confirmed by experience. Formally, Alþingi can refuse to confirm EU legislation, but this is not a realistic possibility, given the reactions that it would almost surely entail.[27] The manner in which various controversial matters have been treated by the EFTA Court and the EFTA Surveillance Authority (ESA) has led people to ask whether the three EFTA countries in the EEA (and their joint institutions which oversee the execution of the EEA Agreement) are not more Catholic than the Pope when it comes to confirming and applying EU law.[28] There has been very little Icelandic research on this question, and the extent to which membership in the EEA has affected Icelandic judicial practice has likewise been little examined.

Recently, attention has been turned to the possible effects of EU expansion upon the authority of EU institutions and upon legal development within the EU.[29] Halldór Ásgrímsson, the present Prime Minister and former Foreign Minister (1995–2004), thinks that current developments may weaken the EEA Agreement internally. Halldór and his party have been looking seriously at the possibility of Iceland's applying for EU membership.[30] Davíð Oddsson, Foreign Minister 2004–2005 and Prime Minister 1991–2004, has been of the opinion that the EEA Agreement is sufficient and that there is little reason to aim at applying for membership in the light of changes in its status.[31] Both are in agreement, however, that there is no point in seeking membership as long as EU fisheries policy remains as it has been.

No real research has been carried out on the attitude of the public towards possible EU membership. Whether people are for or against has been surveyed

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[27] Ágúst þór Árnason: Har EØS ændret magtbalancen mellem den lovgivende og den udøvende magt i Island? in Krister Ståhlberg, ed. *Kontinuitet och förnyelse – europeisk integration och nordisk förvaltningsanpassning*, Nordic Council of Ministers, Nord 2000:3, pp. 33–46.

[28] Hans-Petter Graver and Ulf Sverdrup: "EFTA Surveillance Authority more Catholic than the Pope?" in *Nordisk Administrativt Tidsskrift*, Vol. 83 (2002) Nr. 2, pp. 154–170.

[29] When the EEA-agreement was in the making, no one could foresee the changes caused by the EU-treaties of Maastricht, Nice and Amsterdam and the EU expansion.

[30] Evrópunefnd Framsóknarmanna: Committee conclusions from 22nd of January, 2001.

[31] Davíð Oddsson left office as a Minister of Foreign Affairs on September 27th, 2005, and retired as party leader of Sjálfstæðisflokkurinn in October of the same year. Political analysts suggest that the party might change its stand on EU membership as a consequence of his disappearance from the political scene. After leaving politics Davíð became the general director of the National Bank of Iceland (Seðlabanki Íslands).

only by opinion polls.[32] Judging by what has been written in Icelandic newspapers and magazines, views within the supporting and opposing groups are fairly homogenous. Most supporters of EU membership believe that Icelanders should participate in shaping the future of Europe and that Iceland's cultural, political and economic affinities lie with the EU states. They commonly suppose that the Euro would import stability to the Icelandic economy and that membership would help to make Iceland's voice heard in the international community. They also emphasize the EU's positive effects on international relations. Last but not least, it appears to be a common view that membership would free Iceland from the twofold democratic deficit deriving from her EEA membership, wherein Iceland is forced to adopt EU laws and regulations without having had any say in their formation and passage.[33] Lately, questions of security and the world power balance have entered the discussion. Many people think that the EU is the only possible counterbalance to the power of the USA. One rarely sees an article which considers the overall picture in arguing in favour of membership. Supporters generally write about individual issues: most commonly fishing policy or the Euro. The National Council of the European Movement in Iceland (Evrópusamtökin), which was founded in 1995, has collected articles about the EU, and about Icelandic relations with the EU, on its web site.[34]

In contrast with supporters, opponents maintain that EU membership would tend to isolate Iceland from the outer world. A statement issued by the association World Vision (Heimsn) says that:

> "Icelanders have for less than half a century established themselves as an independent nation, with an energetic economy and culture, wherein the welfare of citizens is secured. Such extraordinary accomplishments of a small nation would be impossible save for the

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[32] The information about the views of the Icelanders on EU are based on public opinion polls conducted by Gallup and the Social Institute of the University of Iceland. Professor Gunnar Helgi Kristinsson carried out some research on the EU-policy of the political parties in: *Ísland og Evrópubandalagið, Öryggismálanefnd 5*, Reykjavík 1987; Ólafur þ. Stephensen studied how the parties viewed the EEA-agreement, both in its making and after it became law, in *Áfangi á Evrópuför*, Háskólaútgáfan, Reykjavík 1996. In his book Stephensen describes how the parties view the main objectives of the European Union.

[33] Ágúst þór Árnason: "Har EØS ændret magtbalancen mellem den lovgivende og den udøvende magt i Island?" in Krister Ståhlberg, ed. *Kontinuitet och förnyelse – europeisk integration och nordisk förvaltningsanpassning*, Nordic Council of Ministers, Nord, Copenhagen 2000:3, pp. 33–46.

[34] On the homepage of the Evrópusamtökin (www.evropa.is) one can read that the association is an "inter-political forum for people interested in European co-operation and those who willing to support enlightened discussion about European co-operation without any prejudice." One of the main objectives of Evrópusamtökin is to persuade the Icelandic government to apply for EU membership. The National Council of the European Movement in Iceland was founded in May, 1995, but was fairly inactive until the year 2000.

> power that derives from independence. We . . . emphasize friendly relations and extensive cooperation with other nations in Europe and around the world but believe that it is not in the interest of the Icelandic nation to join the European Union."[35]

Opponents of membership commonly think that the EU has already become a kind of state and that Iceland would quickly lose its economic and cultural independence were political decisions to come increasingly from Brussels or Strasbourg. This reasoning is undeniably nationalistic and is not unlike the reasoning that was applied when Iceland fought for its independence from Denmark.

In a period of increasing prosperity in Iceland, supporters have had difficulty in naming pressing reasons for EU membership. Spokesmen for various business sectors which are troubled by the recent strength of the Icelandic Crown have suggested taking up the Euro as the only possible solution to the exchange-rate problem; this argument has been seen in the newspapers.[36] Supporters have grasped the opportunity to point out the possibility for making favourable agreements with the EU on fishing rights and exchange rates in the light of current Icelandic economic strength. Opponents have recently contented themselves with pointing to the EU's difficulties, for instance the rejection by the French and the Dutch of the European constitution in the spring referenda of 2005 and the many difficulties surrounding the Turkish application for membership.

A political discussion of EU membership has been slow off the mark and has indeed not progressed very far. There are many reasons for this, but perhaps the most weighty of them is the magnitude of the step that was taken in signing the EEA Agreement, which took effect about ten years ago. It must also be kept in mind that the EEA Agreement has served Iceland well in most ways, and it is thus not clear why the country should go further. Politicians surely also bear in mind the loss of support borne by the social democrats in the 1995 elections, in which they had emphasized EU membership as an objective. Following those elections, the Independence Party (Sjálfstæðisflokkurinn) formed a coalition with the Progressive Party (Framsóknarflokkurinn); this coalition is still in power. It has also made a difference to the discussion that the Chairman of the Independence Party, Davíð Oddsson, maintained during his entire career in government that EU membership is not on the agenda. The

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[35] Heimsýn (World Vision), is a movement which claims to be independent in its views on European matters. The movement was founded on June 27th, 2002.

[36] See also: Áhrif Efnahags- og myntbandalags Evrópu á á íslenskt efnahagslíf, published by the Office of the Prime Minister, Reykjavík 1998 and a report from the Icelandic National Bank (Seðlabanki Íslands) on "Aðdragandi og áhrif stofnunar Efnahags- og myntbandalags Evrópu – EMU, Reykjavík 1997.

flirtation of the Chairman of the Progressive Party and present Prime Minister, Halldór Ásgrímsson, with the possibility of EU membership has so far had little effect.

Conclusions

It is clear that the Icelanders have their foot in the EU door, because the objectives of the EEA are largely the same as those of the EU itself.[37] A great deal of effort has been put into following developments within the EU and in trying to influence the EU legislation that pertains to matters of direct interest to Iceland. A great deal of EU legislation has been incorporated into Icelandic law, and considerable efforts have been put into increasing market homogeneity within the EEA. Recent research has shown that Icelandic membership in the EEA has led to numerous changes affecting competition, consumer protection, environmental policy, social policy and communications. EEA membership has also had the effect of opening up financial markets to Icelanders.[38] One may mention in addition the widespread effects of cooperation in education and cultural affairs; and the effects upon Icelandic courts should not be forgotten. There has been a tremendous increase in the contact and cooperation between Icelandic officials and politicians and their European counterparts, and the dynamic EU expansion has had considerable influence upon most areas of Icelandic life.

The many changes that have occurred in Iceland since the signing of the EEA Agreement are not attributable solely to the Agreement. They are due to other factors as well, such as the higher level of education of the general population and the greater participation of women in all phases of national life. Prior to the EEA Agreement, the Icelanders had already managed to build a society characterized by prosperity and a high level of welfare. It is likely that if the EEA agreement had never been made, other solutions would have been found to Iceland's problems.

As previously mentioned, the main reason why the Icelandic authorities have not seen fit to pursue full membership in the EU is the EU fisheries policy, which would not allow Iceland to retain full control over its fishing grounds. The prospect of a further loss of state sovereignty also creates reservations for those at the helm.

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[37] Ó. Stephensen: *Áfangi á Evrópuför*, Háskólaútgáfan, Reykjavík 1996.

[38] Auðunn Arnórsson, Espen Barth Eide, Dag Harald Claes, Hanne Ulrichsen and Asle Toje: *Ísland og Evrópusambandið: EES, ESB-aðild eða „svissnesk lausn"?* (Iceland and the EU: EEA, EU-Membership or a "Swiss solution"?), Institute for International Affairs of the University of Iceland in and Norwegian Institute for International Affairs, Reykjavík 2003.

As matters stand at present, there appears to be no pressing reason for Iceland to seek full membership in the EU unless the weight and effectiveness of the EEA agreement should become severely reduced e.g. if Norway were to join the EU. There is greater prosperity in Iceland presently than in most of the EU states, and unemployment is unknown. Politicians have not forgotten the internal conflicts that arose from Iceland's participation in NATO or from the presence of US military forces in Iceland. Iceland's participation in EFTA and subsequently in the EEA also generated some considerable unrest.

Icelanders have always been more preoccupied with the economic effects of European cooperation than with its ideological aspects. Thus, no enthusiasm has been generated in Iceland for EU's peace-keeping mission. Discussion of the possibilities for Icelanders exerting influence on EU policy in particular matters has likewise failed to ignite a spark. In the wake of the recent EU expansion, it is obvious that the voice of a tiny nation will not have much impact within the Union as it has now become. None of this means, however, that Icelandic politicians may not conclude at some point that the day has come to consider EU membership. One thing that may bring us closer to that day is the recent change in the leadership of the Independence Party (Sjálfstæðisflokkurinn), with the departure of Davíð Oddsson. There is also the possibility of a government coalition between the Progressive Party (Framsóknarflokkurinn) and the Social Democratic Alliance (Samfylkingin) after the next elections, and both of these parties have exhibited a positive attitude toward EU membership.[39]

The different reasoning of the supporters and opponents of EU membership evidently reflect different visions of the role of Iceland in the community of Europe. Proponents feel that Iceland clearly fits in the group of states that together constitute the EU. They do not consider the economic advantages to be the principal point, but they emphasize that membership would increase Iceland's economic stability. Opponents think that the EU is well on the way to become a state, within which Iceland could not maintain any sort of meaningful independence. They also maintain that Iceland's economic progress is directly related to her political and economic independence, pointing to the achievements of past and recent years in support of their case.

It is nearly impossible to estimate the probability of Iceland's applying for EU membership in the near future. If there is no radical change in EU fisheries policy, or an EU exception granting Iceland control of its fishing grounds, an application for membership is unlikely. What is likely to have

[39] The Social Democratic Alliance (Samfylkingin) is a new party, founded in the year 2000 through the amalgamation of three parties, the social democrats (Alþðuflokkur), the socialists (Alþðubandalag) and the Women's Party (Kvennalistinn).

even more influence, however, is the development of the EU in the coming years. Will the EU be able to put its affairs in order following the recent expansion and the unsuccessful attempt to ratify an EU constitution? Icelanders will follow the progress of the EU with interest and attention and will form their own intentions in the light of developments. A severe economic contraction in Iceland could lead to pressure for an application for EU membership. However all this may be, Iceland will surely increase its cooperation with the nations of Europe in the near future, whether or not it seeks formal membership in the EU.

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Section 2

Chapter IV

Homogeneity and Differences: The Concept of a 'Core Europe' for the Future?

Rainer Arnold*

Introduction

Especially at times when European integration is stagnating, the idea of a 'Core Europe' is discussed as a possible solution. This concept embodies the idea of a group of states who continue to integrate and through this provide impetus for the remaining Member States to follow them, immediately or after a period of observation. Is this idea, which has notably and strongly been put forward in the German discussion of this matter, adequate in order to resolve barriers and resistance to integration?

In the German political and legal debate two events have been decisive. The first one concerns the questions surrounding EU enlargement and the second, EU institutional reform, in particular the project of a constitution for the European Union. This project, which has developed in a very short period,

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Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 45–53.

seems to be widely accepted and its contents are no longer a topic for discussion among the major political forces. The main issue of German concern, the allocation of competence, was resolved and the German debate moved to centre on the question of ratification. Initially the question was raised as to whether provisions for a referendum, to be used for the approval of the EU constitution, should be added to the German Constitution (Grundgesetz). This instrument is currently excluded on the federal level for historical reasons.[1] There were widespread proposals: to introduce it especially for the ratification of the European constitution; to generalise the instrument and allow the participation of the people in the decision-making process (the time was considered ripe as the historical reasons are now extinct due to prohibitions); or, a third position, to link a referendum to new developments in integration and therefore add it to the mechanism of Article 23 of the Constitution.[2] However, those three proposals have now been set aside and the EU constitution has been voted on and ratified in the normal way provided for international treaties: by the approval of Parliament and Federal Council and ratification by the Federal President.

The debate on EU enlargement continues to this day. A new central issue has appeared, as we know: Should Turkey be admitted as a full member or be tolerated only in some form of highly developed association status? This could be an advanced partnership and would be a new form of attachment to European Union, as yet not legally defined. With the recent political events in the Ukraine this same question also arises, but arouses much less controversy. Whereas Croatia has now been given the right to start its membership negotiations, neither Bulgaria nor Romania are even mentioned in the debate and their future right to full member status is not disputed.

Within this discussion, the idea of a 'Core Europe' is again emerging. The question is whether a Europe of twenty-five, soon to be twenty-seven or twenty-eight Member States, possibly more, could be manageable and successful in its current supranational embodiment. Is leadership by some strong Member States required? Is this compatible with the principle of equality (which is the very basis of community – a union which is accepted by all members)? Furthermore, is this compatible with homogeneity, which is a basic principle of political, social and legislative coherence in the common market? Is a 'Core Europe' a positive or a negative and destructive means of differentiation in the context of integration? Must differentiation be limited to the instruments already contained in the supranational treaties and the constitution project? The concept of a 'Core Europe' raises a series of difficult questions, some aspects of which shall be discussed below.

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[1] See M. Sachs, Article 20 GG/33, Commentary on the Grundgesetz, 3rd edition, 2002.

[2] See the initiatives of the Liberals (F.D.P.), http://www.bundestag.de/bic/hib/2004/2004-117/02.html; Deutscher Bundestag, Drucksache 15/2998.

1. The Concept of a 'Core Europe' within the German Discussion on European Integration.

A Europe-wide discussion on the future of European integration was aroused by the German Foreign Minister's speech at Humboldt University in 2000.[3] Two terms that Joschka Fischer used in his speech were of particular resonance: that European integration would end with a federation and that a 'Core Europe' would be necessary. As to the latter term, Fischer's speech revived a debate dating from ten years ago which Karl Lamers, the then CDU spokesperson on international affairs, had sparked. He had been supported by Wolfgang Schäuble, but his viewpoint was not adopted by the CDU/CSU parliamentary group, nor accepted by the Federal Chancellor or the Minister of Foreign Affairs.[4] Fischer's words were strengthened by the French President's speech on 'Our Europe', where he described Germany and France as an avant-garde group, acting outside of the institutions in order to reform the coordination of economic policy, to strengthen the Common Defence and Security Policy, and to make the fight against crime more efficient.[5] In 2003, Karl Lamers and Wolfgang Schäuble again explicitly raised the idea of a 'Core Europe' as a response to the refusal at the summit in December 2003 to accept the project of a European constitution[6] and also more generally in the debate on German Foreign Policy and the Iraq war.[7] In his Humboldt speech Joschka Fischer used the term 'centre of gravity' (Gravitationszentrum) as a description for a stage of development which he suggested could be an intermediate step on the way to the achievement of political union. Such a group of states could be the 'avant-garde' (Fischer uses the same term as Chirac) – a group of Member States acting as a driving force, pressing on with political integration.[8] It is interesting that this idea of an 'avant-garde' is connected with the conclusion of a European 'Basic Treaty' (Europäischer Grundvertrag),

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[3] http://www.europa-reden.de/chirac/rede.htm.

[4] See Christian Hacke, Die Aussenpolitik der Regierung Schröder/Fischer: Zwischenbilanz und Perspektiven, Aus Politik und Zeitgeschichte, B 48/2002, Internetversion, p. 2.

[5] www.Europa-reden.de/chirac/rede.htm.

[6] Karl Lamers,'Kerneuropa wird wie ein magnet wirken, TAZ 19.12.2003, http://www.taz.de/pt/2003/12/19/a0199.nf/text p. 1.

[7] Speech of Wolfgang Schäuble, 20 March 2003, http://www.documentarchiv.de/brd/2003/rede_schaeuble_irakkrieg.html, p. 4.

[8] See Joschka Fischer, "Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration", speech on 12 May 2000, p. 8, http://www.auswaertiges-amt.de/6_archiv/2/r/r000512a.html.

which would act as the nucleus of a constitution of a European Federation. Thus, the idea of a constitution is closely combined in this debate with that of a 'Core Europe', the latter being regarded as the vehicle for making such an important step in integration as a constitution. In light of this it is not surprising that the first problem encountered, the rejection of the constitutional project in December 2003, followed by its acceptance in June 2004, gave rise to a new reference to a 'Core Europe'. In this case it was even made by the Federal Chancellor, Gerhard Schroeder,[9] and it is along this line that the present day debate, on how to handle the possible situation of a non-ratification of the constitution treaty by several states, has progressed. Until now, however, it is not clear what the relation between the 'constitution accepting' and rejecting Member States will be. In particular since the Constitution has now been rejected by some Member States, this stands out as a huge problem.[10]

It should be mentioned that Joschka Fischer revised his comments, after protests, especially from smaller candidate countries, and renounced the use of the terms federation and 'Core Europe'. The United Kingdom vehemently opposed the prospect of a European Federation and also a Europe divided into two groups.[11] However, France, as a promotor of a Franco-German drive for European integration, accepted Fischer's position, which was partly inspired by the ideas of Jacques Delors.[12]

As the 'Core Europe' idea was renewed in the context of the European Constitution discussed above, Fischer spoke only of a system of enhanced co-operation and formulated a new position, rejecting the solution of a 'Core Europe'.[13]

In political practice, the intensive co-operation between Germany and France has continued and has been enlarged to include Poland, so that a triangle, known as the 'Weimarian Triangle' may be said to have existed in 2004. However this initiative was not linked to the concept of a 'Core Europe', even

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[9] Press conference on 13.12.2003, http://www.bundeskanzler.de/Kanzler-News-.7698.573449/a.htm?

[10] This issue is discussed by Nergelius in the article 'And now for something completely different: It's The EU Constitution – And Some of its formal Stuff', in Europarättslig tidskrift (Swedish Journal of European Law) 2005 p. 424 ss.

[11] See Cornelia Klust, Marzenna Guz, Markus Ziener, 'Fischer's Europa – Visionen wecken Sorgen über ein Vorauseilen der Kernstaaten', Financial Times Deutschland 15 May 2000, www.ftd.de/fischer-rede.

[12] Speech of Fischer, p. 8, with a reference in this context also to Helmut Schmidt and Jacques Delors.

[13] See Alexandra Föderl – Schmidt, 'Kerneuropa ist tot', http://derstandard.at/druck.asp?id=1597017. See also the Federal Chairman of Bundnis90/Die Grünen, Reinhard Bütikofer, http://www.gruene-partei.de/rsvgn/rs_dok/On55 310-print,00.htm.

if political representatives, such as the Commissioner for EU Enlargement, Verheugen, may regard it as a possible nucleus for integration.

Besides the important terms of 'Core Europe' (Lamers/Schäuble Fischer initially and Schröder), '*avant-garde*' (Chirac and also used by Fischer), 'centre of gravity' (*Gravitationszentrum*) (Fischer), further terms such as 'a Europe of two speeds', '*Europe a la Carte*' (which is similar but not identical to the two speeds term), 'variable geometry' (*variable Geometrie*), were common in early German discussions, but without any clear conceptual definition.

There are then three models of European development in which a 'Core Europe' is a key concept:

- A fixed core of nations, consisting of the first six Member States of the EEC or a determined group of states, for example France and Germany as the 'avant-garde' or France, Germany and Poland as the 'Weimarian Triangle'.[14]
- A variable core which centres around the drive and determination of those states which are willing to proceed with further integration. A particular example of this 'variable core' is the idea of enhanced co-operation. The 'variable core' model has two sub-forms: A group of states who want to be the '*avant-garde*' in general integration; or a group composed of states integrating only in certain fields of their choosing. This latter subtype is that employed in the idea of enhanced co-operation.
- A mixed form of core integration is also conceivable: a fixed group of states combined with a wider group of states following the model of a variable core.

The issue of models for a 'Core Europe' is linked to the question of what integration progress means. There can be progress in an institutional sense by extending supranational decision-making to more subject matters than before or by introducing the double majority. Another form of progress is a substantial one, realised by the transfer of new 'fields of action' to the EU. Progress in integration can also be seen in a functional sense: if there is a core of states advancing more rapidly, or even just steadily, in integrating, the more hesitant states may be attracted by them and follow. However, the impetus resulting from the 'core states' can sometimes fail to motivate the others. Further questions linked to the issues of what a core is and what the integration progress means are connected to questions regarding the desired final goal of integration.

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[14] See L. Kühnhardt/H. Ménudier/J. Reiter; Das Weimarer Dreieck, 'Die französisch-deutschen-polnischen Beziehungen als Motor der Europäischen Integration', www.zei.de/download/zei_dp/dp-c72-kuenhardt.pdf.

Existing supranational law gives no explanation of what this final goal of integration is. Political developments are open and we can but state the most likely outcomes: the creation of a federation, whatever this term means, or the creation of a non-state system.

As to the first, federation or federal system is a wide term, with uncertain structural elements. There are many kinds of federalism and no uniform, well established, form of a federal state exists. The term 'federation' used by Joschka Fischer in his Humboldt speech was somewhat undefined and had no sufficient explanation as to its structure. Only some basic structural elements which seem to be necessary for all truly federal systems can be advanced here. First of all, to end up with a federation means to end up with a state, with all the elements of a state: territory, people, and state power in the form of state organisation. Of course, the precise meanings of these elements are not clear in themselves and are therefore in continuous dispute.

Certain minimum characteristics should be exhibited in order for an entity to be called a federal state:[15]

1. There should be a distribution of competence between a central power and the members of the federation.
2. An equilibrium between the two levels of decision-making, whether through a principle such as subsidiarity, or by the adequate allocation of powers to each level, or by procedural participation of the members in the central power's decision-making should exist.
3. Some would add as a further structural requirement that the members of the federation should individually also be states.

The non-state model,[16] which is more likely to be realised as the final result of EU integration, is based on the idea that the Union is a new form of integration, the main characteristic of which is supranationality. The Union's final form could be reached through a further strengthening of supranationality or by continuing in the same way as now, without that. A not so frequently suggested idea is that the Union should be enlarged geographically and substantially, but internationalised, meaning that supranationality should be abandoned in favour of intergovernmental mechanisms. There could of course also be a sub-type of the 'Core Europe' model, in so far as the core remains supranational and other members adopt mere international forms of co-operation and association.

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[15] See R. Zippelius, Allgemeine Staatslehre, 14th ed., 2003, pp. 405–414.

[16] The difference between state and non-state structures is difficult to draw. In the view of the German Constitutional Court, lacking "Kompetenz-Kompetenz" is decisive (Maastricht decision, vol. 89, 155).

2. Political and Judicial Evaluations

2.1. Political Aspects

The idea of a 'Core Europe' acts as a vehicle for integration. On the other hand, when this 'Core' is pre-determined and stable, it can arouse fears of hegemony and the existence of two classes of Member States within the Community. As opposed to states playing different roles, with some taking a strong lead, equality can create and greatly improve stability. The future Europe of twenty-seven, twenty-nine, or even more Member States will contain some countries with a relatively small population. A 'Core Europe' model could easily lead to tensions.[17] It must also be taken into account that the supranational order has been created by the limitation of sovereignty upon the Member States. This voluntary step involves quite important modifications to the national constitutional order. Such a loss of sovereignty must be made palatable by adequate participation of the Member States in the decision-making process, such as co-decision. This would be hindered by a core Europe system. Differentiation of levels is not equivalent to a 'Core Europe' model as such. Differentiation in an institutional sense means that the political weight in the decision-making process corresponds to the importance of the state as far as the size of its population is concerned. Such a differentiated weight of vote must come into effect in the existing institutional system, not within a new core model, which is developed outside of the current system and would politically affect the existing institutions. To summarise, a 'Core Europe' model would in political terms weaken stability and reduce the acceptance of supranationally made decisions.

2.2. Legal Analysis

2.2.1. *The Principle of Community as an Obstacle for a Core Europe*

The principle of Union (or of Community) suggests that the political and institutional system at the supranational level must correspond to the basic requirements of "real union"; in particular, this implies that the basic decisions are made with the participation of all members. Consequently, this means that a core group of states must not be able to affect the law-making process through the exertion of political pressure. Political impetus by a group of states is not contradictory to the mentioned principle of Union, as long as it is of limited influence and leaves the voluntary decision of each of the

[17] See also H. Schneider, 'Die Zukunft der differenzierten Integration in der Perspektive des Verfassungsvertrags und der Erweiterung' (December 2004), pp. 259–273, in particular pp. 263–273.

Member States, even of the small and traditional states intact. The lack of legitimation within a 'core system' is derived from the fact that the European Council, as a political institution, gives impetus and influences the internal positions of the Member States. However, the main difference is that all the Member States are acting together within the European Council, whose decisions are unanimous and lead to the enactment of new primary law, which must be ratified by each of the Member States. The existence of the European Council and how it functions must be viewed as very useful in the process of integration, which is actually an argument against the validity of a 'Core Europe' system. If political direction emanates from the assembly of all the Member States' governments, the idea of 'Core' co-operation is politically and legally questionable.

2.2.2. *Loyalty*

The principle of loyalty, an old Community principle as laid down in Article 10 ECT, seems to be incompatible with the core concept. Loyalty is the obligation to do everything required by the existing Community law and to refrain from acting to the detriment of the other Member States of the Union. Were a 'Core group' to impose its will on the rest of the Member States, this would be against the principle of loyalty. This concept applies to the existing Community system and does not extend to developments of the system, such as the formation of a core group.

IV. The exclusivity of legal forms of differentiated integration.

The EC Treaty itself has established various forms of differentiated integration, which are exceptions from the general principle of homogeneity as a basis of Union law. Thus, only those differentiating mechanisms which are expressly foreseen in the supranational order are allowed. This is true both for legal and political differentiations of the core system, in so far as they have an effect on the legal system. Differentiation is well known in the context of the allocation of votes in the Council of Ministers and, even more importantly in our context, the enhanced and structured co-operation clauses[18] in the Treaties. Here, we have a legal form of core integration, although in a rather moderated form. This legal instrument avoids the dangers, which are connected with the 'Core' concept. Firstly, such enhanced incorporation must respect institutional coherence. This means that this form of progressive integration, within a certain number of states, must use the existing institutions

[18] See U. Becker, Commentary on the EU/EC Treaties, H. von der Groeben, J. Schwarze (ed.), 2003, Article 11 EC Treaty and Articles 40, 43–45 EU Treaty.

and their methods of action. In contrast, a core concept in the above-analysed form is not bound to the institutional framework because it has a political action system, which is on the same level as the European Council. The structural elements of the European Council are inapplicable to the 'Core' system. Of course, this does not mean that the 'Core' concept can not assimilate the forms of enhanced co-operation and use the existing institutional system. If the other requirements of enhanced co-operation were fulfilled, such a type of 'Core system' would be legally acceptable. Enhanced co-operation preserves and can not destroy the *acquis communautaire.* However, another difference is that the minimum number of participants in the enhanced co-operation is the majority of the Member States. A 'Core' system would have fewer members and would not have the participation or approval of the Commission and the Council of Ministers. In conclusion, it can be stated that both concepts must be distinguished from each other, despite their functional similarities.

With further reference to differentiated integration, some other of its forms can be discussed. Thus, not all Member States are automatically members of the monetary union and some have even made reservations when accepting the Maastricht Treaty.[19]

Lastly, it can be stated that differentiation mechanisms must be positively laid down in EC/EU law, in order to contribute to an institutional equilibrium. However, concepts of a 'Core Europe', which will be developed outside the Treaties, are not allowed to establish exceptions from equality and homogeneity as basic principles of the European Union.

Conclusions

1. The concept of a 'Core Europe' can only be accepted if it is to have an inclusive character, that is, if its constituent states are prepared to accept all other Member States, if they are willing to make progress in integration, into the 'Core'.
2. This form of 'Core Europe' is similar to the institutionalised enhanced co-operation.
3. Legally, if the 'Core' concept leads to instability or disturbs the equilibrium, its basis is doubtful. Politically, the dangers that such a concept creates outweigh the benefits for progress in integration.

If this concept affects the institutional system as it exists at present, it can not be legally permitted.

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[19] See U. Häde, Commentary on the EC/EU Treaties, Chr. Callies/M. Ruffert (ed.), 2nd ed., 2002, Article 122/28–34.

Chapter V

European and National Law in History and Future: Some German Perspectives

Joachim Heilman*

After listening to the amazing and very exciting papers presented in this conference, I decided to change the theme of my presentation into the following: European and National Law in History and Future. In order to explain this, some preliminary remarks must be made: I'd like to talk about the relationship between European law and national law and their respective development in the future. If, and to what extent national law could move at all, depends on the scope which is allowed to the national parliaments by the Union's legislation. Of course, this starting point could be discussed heavily.

The European legal history and traditions are rich of treasures and prerequisites to build up something reasonable. Without repeating all that Ola Zetterquist has said, I would like to refer to the possibilities involved in the construction of a new Europe. As pillars of the full-grown European law I'll mention the following. The European law sources consist of prescriptive law, "*droit coutumier*" and qualified law, this is a "*droit écrit*". Then we find the British or

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Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 55–60.

the English case law tradition. Further on, don't let us forget the received or admitted Roman law which has created diverse national legal systems. We have state or public law, which is normally stated or written law, as obligatory "*jus cogens*" which is now decreasing compared to the "arbitrary" law, set by the participants, which is "*ius dispositivum*". For our continental countries this evolution is of great importance. The citizens' obedience towards the law, which has been painfully generated through the centuries, presumes the following main functions of law. That is to say, production and securing of protection and freedom, of justice and more recently social compensation. Neither law nor state are unchangeable certitudes by tradition, but should be regarded as developing systems. So, which goal am I then heading for?

Legal history is comparative law in the journey of time, which just means that today we have to look at our own legal history in the last centuries, where we will find many different tools. Let us take a step forward on the road to a more Europeanised legal history, which has to be created by ourselves. One of the reasons to do this is to enhance international co-operation. This is interesting, I think, not least with the new EU Member States in Middle and East Europe.

Now I would like to summarise some statements. The scientific analysis must thoroughly work out the genesis and function of the older legal institutes, so that the European jurisprudence will contribute to the growth of genuine European law.[1] The supranational law is a new category of law above the national level, which will increase quicker than the national law. If it's good or not we shall see and discuss continuously.

The classical international public law will diminish as the supranational law is growing. EU enters the scene of international law as a subject of its own. The political unification in the EU, taking place together with the technical (r)evolutions, mainly the IT development, increases the need of ongoing legal harmonisation in the EU and the world. In the medium-term perspective, this will also comprehend civil and penal law. Between the continental codified law and the Anglo-American case law, the European law will produce more and more convergencies. Right now the continental legal thinking succeeds better, from my point of view, which I think that the ECJ jurisdiction is proving.

Let me now show you a few fields of legal harmonisation, seen from a German perspective. EU law is and will remain a mixtum compositum. We can imagine a continued legal harmonisation of the following fields, which could be declared as forerunners of unified legal issues.

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[1] Cf. U. Di Fabio, Mehrebenendemokratie in Europa – Der Weg in die komplementäre Ordnung, in: Walter-Hallstein-Institut für Europäisches Verfassungsrecht, Ed., Die Konsolidierung der Europäischen Verfassung von Nizza bis 2004, Baden-Baden 2002, p. 107 ff., 115 f., 122 f.

Firstly, let's take the equality of rights and equality of treatment of men and women at work and in the society. Possibly based on the ancient criticism towards the narrow understanding of the "égalité" during the French Revolution and all the constitutions emanating out of that, the EU organs changed direction from the pure equality before the law to the real equal treatment in everyday's life. This reminds us of Karl Marx and Anatole France, who sang in different writings an, of course ironical, hymn of praise to the noble civil code that forbade all people, the poor and the rich alike, to sleep under bridges.

The primary EU-law contains the prohibition of discrimination based on nationality in Article 12 ECT. No discrimination is allowed concerning sex, gender, race, ethnic origin, religion, conception of the world, disableness, handicaps, age and sexual orientation, which is written in Article 13, and specially for men and women in the working and social life in Article 141. The jurisdiction of the ECJ has brought about a total prohibition of discrimination based on sex or gender. Even positive discrimination is allowed, or may even be necessary according to Article 141, sect. 4 ECT, in order to avoid or to compensate injuries during the professional career. The German correspondent provision we find in Article 3, second paragraph and second sentence of the German constitution (Grundgesetz), which has been changed quite recently so as to meet the requirements of the EU Treaty.

The implementation of the equality regulations and directives in the German civil code was insufficient and many times the German legislator therefore had to change the Articles in the German civil Code. This is one example of the fact that the German lawyers at least are very conservative concerning "l'acquis Communautaire". I would like to add that here, the old Member States have a big disadvantage: they never had to learn the *Acquis* all of a sudden, with one big effort. It just went on. It grew slowly and nobody within a big country with 80 or at that time 64 million people have seen any possibility, or felt any kind of challenge by this new type of law. As a typical example for misunderstanding the provisions about prohibition of sex discrimination, I quote the highest German Labour Court, "Bundesarbeitsgericht"; in the famous case which you can find everywhere in labour life, whether or not the employer is allowed to ask female applicants if they are pregnant. The Court said that the question was inadmissible when at least one man applied for the job, too. In other cases this question should be admissible, which is, of course, badly wrong. To make a long history short, it is just to say that the ECJ has in many cases practically forced the German court to follow the right jurisdiction, which means in the end that this question is not admissible and that the women may lie without any sanctions.

A second field is the work environment. After 150 years in Germany of a repair system, finally something reasonable appeared. This is so easy and simple that the question why it came so late can't be answered. The idea came

from Sweden and Denmark and went through the EU authorities and now we have a new basic philosophy which means that damages should be avoided. This is better for the human beings concerned and it's better for the cost side, because it is simply cheaper. This positive view of prevention – prior to any repair system – for all legislative and legal activities is newly to be found not only within this specific labour law but also within civil law, and in general environmental law. Only some key words: We have the risk analysis, we have the evaluation of technical consequences of any activities. We have hazard consideration, the precaution principle, damage prevention or shortly: It has to be prevention, before any damage occurs. One example of new legislation of this kind is the ecological management and audit scheme (EMAS), which I think is a good example of this philosophy.

The directives concerning protection of health and safety at work and against accidents resulted in the German labour protection Act of 1996. Now we have this philosophy implemented in our own legislation, but it's very hard and complicated to execute it in practice and to bring it to the minds of lawyers and judges. After that, many additional regulations have appeared since 1996, like for instance the monitor working Act which takes care of all details of the working place, including the computer, the screen, the monitor and all other configurations like chairs and tables, the light, radiation, noise, psycho- and other stress factors, and last but not least what we call the software ergonomy.

Thirdly, there is a change in defining and understanding liability. As far as I can see, the European civil and public law do now both develop a new attitude concerning liability. There is a certain tendency which goes from culpa-based liability to more or less occasional liability. There is a trend in the EU law and jurisdiction concerning that more and more objectively dangerous situations and constellations lead to liability, for example for cars, all kind of carriages, houses, premises, products, processes and so on. Combining this topic with consumer protection, there is another example: the product liability in favour of the final consumer.

Let us come to the next topic, which is of great relevance in Germany. Are we able to proceed to a new social security system? In the 19th century, all discussions started with the "social question". The starting point was human labour in the frame of industrial work. Today this kind of normal employment contract disappears rapidly. New kinds of labour and work need new security measures. We have not found any solution for this until now. That situation could contain a chance for supranational law and for a legislation with a modern prevention philosophy. Also in this respect, prevention against anything which could be dangerous in the future is the best solution. Protection against discrimination, considering subsidiarity, aiming at a unified and harmonised social security system, according maybe to the Scandinavian model or even

following socialist patterns, which disappeared without any traces, could now be of interest. Maybe also some kind of citizen's all-inclusive insurance system, under current discussion in Germany, could be a possibility.

Furthermore, we need a common catalogue of human rights in the EU, and of course we need an EU constitution. I don't need to add something to what was said during two days' conference concerning those issues, but will mention only some headlines. We need harmony, not hegemony. On the road to a common EU constitution, there are of course still some basic problems to solve. Still ongoing is the struggle between the ECJ and the national constitutional courts. For instance, who has the definite competence to decide what rule is offending EU law or is in accordance to EU law, ECJ or the *Bundesverfassungsgericht*? The newly found co-operation model between the two courts, which means that in respect to secondary community law the Bundesverfassungsgericht is now able to find compromise solutions, seems to be at least a step forward.[2] But it's not only the German constitutional court, who takes a critical point of view towards the supremacy of EU law over national constitutions; it is e.g. the Polish one and the Danish Supreme Court, too. So, of course there are many lawyers and judges in high position in the constitutional courts, who are very critical against this kind of prevailing power by the ECJ. On the other hand, the European Parliament has now got a very strong position. Nothing is to say about this and we shall follow the future development and use of this position, carefully, not least in relation to some of the legislative issues mentioned above.

In the Member States, in the old ones and as well in the new ones who joined on the 1st of May 2004, there are many obstacles, anxieties and problems. The rich fruits of European legal thinking, which are to be conserved, include the idea of free citizens with their own dignity, with self-value in every relationship to the state, acting in democratically constituted states which recognise the European Charter of Fundamental Rights, not only in the EU but in the entire world. All Member States have to accept the common convictions of values and have to execute them in the internal life. Consequently, if this is respected, the growth of supranational structures has a good chance to continue.

Let me come to a short view into the future. The primary EU law is directly binding and obligatory. The secondary law, on the other hand, is partly still controlled by constitutional or supreme courts in Denmark, Germany, Italy and Poland. One helpful tool in the future process towards integration could be transparency[3] and access to all public documents, a fruit of long Scandinavian

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[2] Cf. Bundesverfassungsgericht, BVerfGE 89, 155, 175; and slightly critical M. Herdegen, Europarecht, 3rd edition, München 2001, marginal note 250.

[3] For example J. Söderman, Transparency as a fundamental Principle of the European Union, in: Walter-Hallstein-Institut, Ed. (see note 1), p. 53 ff.

political history, which is very good for a democratic practice and behaviour of the citizens. Just to take one example from the younger European directives, let us mention the Environmental Information Act.

So, let me summarise and underline my main thoughts. Legal history in Europe has a lot of constructive tools and contents to offer. The convergence of Anglo-Saxon case-law and continental Roman law based on codification is a promising view. Subsidiarity, which is not as new as it may appear for many, is a task and a lesson that all participants in the EU have to learn better. We have to realise the central mechanisms. One constitution in the United States of Europe means one single constitutional court, too. The German Bundesverfassungsgericht shows "learning capacities", indeed, but needs some time before it is fully used to this new situation.

If this picture contains the new structure of a federation or new federal structures, maybe with more levels than we are used to, with the EU commission as the loser and the EP as the winner, I agree with that perspective. A union does not necessarily mean equalisation. We need a union with persisting differences, harmony and varieties.

And I would like to finish by quoting a German colleague, Jürgen Meyer, who has edited a commentary on the EU Charter of Fundamental Rights: "The creation and implementation of a EU constitution is necessarily aiming at the EU as a community of values, not only as a community of business and currencies".[4] I would shorten it up to: Let us create and preserve "Values – not only valutas".

[4] Jürgen Meyer, Kommentar zur Charta der Grundrechte der Europäischen Union, Baden-Baden 2003, p. VI.

Chapter VI

A New Garment for an Old Question: 'A Clash between Man's Rights and Citizens' Rights in the Enlarged Europe?'

Pasquale Policastro*

1. The European Legal Tradition, Constitutional Transitions and the Question of the Human Rights

1.1.

In a significant contribution from the latest years of the 20th century, Brian Tierney highlights that the conception of the natural rights develops through the social conflict at the beginning of the XIV century. The relevance of the social problems related to the issue manifested in the arguments developed in the disputation between Pope John XXII and the Franciscans, with special

* Chair of European Union Law, The Catholic University of Lublin, Professor of Constitutional Law and European Law, University of Szczecin. "Rientro dei cervelli" professor, University of Salerno. ppolic@kul.lublin.pl. I would like to dedicate these reflections to the memory of Aleksander Peczenik who unexpectedly passed away some months ago, and with whom I discussed the assumptions and the results of this paper on our last talk, September 15th 2005.

Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 61–92.

reference to 'Fra Bonagrazia da Bergamo'.[1] Michael Stolleis[2] has pointed out that the reflections developed in the protestant universities of that time, were indeed the result of the attempt of the protestant society to protect itself from the consequences that the principles of the Westfalia Peace might have had towards the protestant minorities in Central Europe. His studies are grounded on the question of the use of the political power at the end of the wars of religion in Central Europe, and their relation with the development of different doctrines of the human rights. Many years before, Georg Jellinek[3] attempted to analyze the origins and the development of the concept of human rights that took its positive form in the French Declaration of 1789. His studies looked at the development of the democratic institutions in the American colonies that was possible due to the grounding assumption for the founding societies that no deliberation may have interfered with the religious creed of their members. In dealing with the question of the development of the concept of human rights in the Age of the Enlightenment, Habermas instead prefers to point out that the reasons of economic development led the bourgeoisie to champion the expression in legal shape of the preconditions for the exercise of their activity.[4] Marx also insisted on the relationship between the formulation of the rights and the influences of dominating social groups. He therefore refused the legal expression of the rights of the Declaration of 1789, because the social influences of the working class were not prevailing in it.[5]

1.2.

The relationship between societal needs and the formulation of the rights, has been playing so far a deciding role in the interest of the scholars aiming to study the legal foundations of the human rights. Along this path, there have been developing approaches, such as the Bobbio conception of the different generations of the human rights.[6] We may express the approach of Bobbio

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[1] Tierney B.(1997), *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law*, Atlanta, Ge.; It. ed. (2002) *L'Idea dei diritti naturali. Diritti naturali, legge naturale e diritto canonico 1150–1625*, Il Mulino, Bologna.

[2] Stolleis M. (1990), *Staat und Staatsräson in der frühen Neuzeit: Studien zur Geschichte des öffentliches Rechts*, Suhrkamp, Frankfurt; It. ed. (1998) *Stato e ragion di stato nella prima età moderna*, Il Mulino, Bologna.

[3] Jellinek G. (1909), *Die Erklärung der Menschen- und Bürgerrechte*, Leipzig; It. ed. (2002) ed. by G. Bongiovanni, *La dichiarazione dei diritti dell'uomo e del cittadino. Un contributo alla moderna storia costituzionale*, Laterza Roma-Bari.

[4] Habermas J. (1962), *Strukturwandel des Öffentlichkeit*, Neuwied; It. ed. (1985) *Storia e critica dell'opinione pubblica*, Laterza, Roma-Bari.

[5] Marx K. (1944), *Zur Jundenfrage*, It. ed. 1998[6] *La questione ebraica*, Roma.

[6] N. Bobbio (1997[3]), *L'Età dei diritti*, Einaudi, Torino.

concerning the rights of different generations in terms of transformation of the societal structure and of the social influences on politics. Indeed, the legal formulation of the freedoms in the Enlightenment and in the liberal constitutions were the result of the role that the bourgeoisie played in the development of those constitutional systems. Instead, the rights of the second generation, related to social protection, labor and other social matters, were showing the social and political role played by the working classes. The rights of the children, the women, the old people, the ill and disabled people, the rights to the nature and to the environment, that characterize the further generations of rights are the reflex of societal, technological and economical transformations and of the change of the structure of the societal influences on politics and policy issues.

1.3.

Another approach, attempting to rationalize the relationship between societal influences and legal formulation of the human rights, may be seen in the works of Peces Barba Martínez.[7] The author indeed underlines the following phases through which the human rights take a legal shape, assuming in the same time the function of fundamental rights. They are:

1) The 'positivization', where the strife of certain groups to have their morally justified expectations acknowledged takes the shape of positive law;
2) The generalization, where social groups other then the one who primarily supported the legal acknowledgment of given rights, justify the legal protection of the rights by means of their own morally justified expectation;
3) The internationalization, where the process of generalization goes as far as to justify the reception of the rights in international charters;
4) The specification, where the rights are gradually fit to the specific requirements of new social groups, whose morally justified expectations may not have been acknowledged in the former and general formulations of the rights.

1.4.

As it appears, according to the opinion of the said interpreters, who represent an almost undisputed approach to the analysis of the fundamental rights, the question of the structural change of the society has been affecting the evolution of the formulation of the rights themselves. In relation to this, it is worth

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[7] G. Peces Barba Martínez (1991), *Teoria de los derechos fundamentales*, Madrid 1991, It. ed. *Teoria dei diritti fondamentali*, a cura di V. Ferrari, Milano 1993.

mentioning that Erhard Denninger has been studying the tendency to the multiplication of the instances supporting the rights in a pluralist sense within the structural transformation of the German society after the reunification and its formal and substantive legal expression in the new Constitutions of the German Länder. On this ground, he concluded that a new paradigm of the fundamental rights replaced the traditional triadic formulation of the French Declaration of 1789. There took place, according to Denninger, the transformation of a triadic paradigm of the fundamental rights from liberté-egalité-fraternité into security, instead of freedom from formal equality to the acknowledgment of the right to difference and from fraternity to solidarity.[8] In an attempt to analyze the general validity of the conclusions of Denninger, taking as an example the American constitutional evolution, Michel Rosenfeld has been concluding that this process has not been taking place elsewhere, and in any case it is highly disputable also in the German case.[9]

Such a disputation shows in my opinion a possible watershed between two conceptions. The first one according to which the normative content of the fundamental rights relates in the present days to the emergency of a new relevance of the human person on politics, and the second one, according to which the normative strength of the rights is strictly related with the influences of different, and sometimes conflicting societal groups on politics and law. The question appears to be of outstanding significance for determining the normative relevance of the concept of constitutional traditions.[10] Indeed, it ought to be cleared up whether or not the foundation of the rights may be

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[8] E. Denninger, *Menschenrechte und Grundgesetz*, Weinhem 1994, Italian edition: *Diritti dell'uomo e Legge Fondamentale*, (edited and supplied by an introductory essay by C. Amirante), Torino, 1998.

[9] M. Rosenfeld, 'American Constitutionalism Confronts Denningers' New Constitutional Paradigm', in *Constellations*, Volume 7, issue 4, p. 529–548, Dec. 2000; Brazilian edition 'O Constitutucionalismo Americano Confronta o Novo Paradigma Constitutcional de Denninger', in *Revista Brasileira de Estudos Politicos*, Número 88, Dezembro de 2003, p. 47–49, especially p. 76–79 *passim*.

[10] The relationship between the European constitutional traditions and the European cultural identity is very well highlighted by Paolo Ridola in an essay published on *Diritto Romano attuale. Storia, metodo, cultura nella scienza giuridica* (Issue 9, June 2003: *In onore dell'Euro*, p. 136). The title of this essay 'I diritti di cittadinanza, il pluralismo, ed il "tempo" dell'ordine costituzionale europeo' takes into account the question of the constitutional traditions in the perspective of the 'citizenship'. So the author, in order to limit the development of legal constructions, that, influenced by different societal group, may jeopardize the development of persons belonging to other groups, postulates the need to interpret the emerging European constitutional law following an 'ethical neutrality' of liberal kind (p. 130). The author, that enriches is work with a significant bibliography, concludes looking with interest to the Court of Justice, and its recent tendency to "free the community rights from cultural conditionings" (p. 131).

found in the general importance of the human person for the legal orders, especially the European one.[11] Furthermore, we should explain how and to which extent such an approach might be consistent with the acquisition of a general normative strength of the rules determining the legal content of the fundamental rights. From the affirmative answer, there may be derived a powerful source of dynamic legitimization of the European legal order.

2. The Charter of Fundamental Rights and the Apparent Overcoming of the Dichotomy between Freedoms and Social Rights

2.1.

One of the first elements that has been taken into account by the interpreters of the EU Charter of Fundamental Rights (CFR), has been that in its approach the traditional dichotomy between freedoms and social rights seems to disappear. Such an approach, that finds a base of evidence starting from the preparatory works of the Charter, has been somehow reduced in the debate concerning the approval of the Treaty establishing a Constitution for Europe, where it has been pointed out that the Charter (section II of the Constitution) contains in some points given 'rights', and in some other points only 'principles'. We may summarize this approach, stating that the legal meaning of the

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[11] Our approach indeed aims to check the possibility to reconstruct the legal tradition that is developing through European law, by means of the use of the legal value of the human person. For the use of the values for the reconstruction of a legal order, and namely in order to 'recognize' what is constitutional law, we may mention the reflections of Antonio Cervati ('In tema di percorsi per il riconoscimento del diritto costitutionale' in *Diritto Romano attuale. Storia, metodo, cultura nella scienza giuridica,* Issue 9, June 2003: *In onore dell'Euro*, pp. 199–224). His deep analysis develops starting from the point that "A deeper understanding of the doctrines on the subject of the legal interpretation of the statutes, and of the paths of the legal argument, may not be possible until we limit only to the study of the acts in force and of the legitimization of the subject that may set legal norms. Instead, there have to be taken into consideration more substantive criteria, that legal scholars and practitioners use in order to identify the principles of law". An important feature of this analysis is that Cervati is able to bridge through it approaches grounded in different legal cultures, such as the ones of Dicey, of Giuliani, of Betti, of Paladin, of Hart, of Wróblewski, of McCormick. In this way, Cervati tries to permit the reconstruction of the European constitutional law. Indeed "The idea of constitution and of constitutional law recalls, today more then ever, the founding values of the legal experience, the ones that are considered as the starting point to find out what law is. Constitutional principles therefore end up with playing the function of recognition rules, criteria for the interpretation, that exercise their influence on all the legal order" (p. 218).

different norms included in the Charter, understood as a part of the Treaty Establishing a Constitution for Europe, might be different. In other words, the different parts of the Charter, as embodied in the Treaty, may have a different normative strength. We may find the reasons and the consequences of this taking into account some different theoretical approaches to the theory of multilevel constitutionalism. In such a theory, that in the latest years found different supporters and criticisms, we find two approaches that we may explore in their mutual relations. Synthetically, the tension between the two approaches highlights the tension between constitution and constitutionalism in a multi-layered system of sources of law. Indeed, according to the first approach,[12] different sources of law, and namely the European Convention of Human rights, the community law and the constitutional law of the Member States are giving rise to a European constitutional law. The presence of such a formal constitutional law is manifesting through the doctrines of the European Courts and through the development, both in the jurisprudence and in the legal practice, of 'transnational principles of law'. According to the second approach, the development of constitutionalism 'represents' a tradition that, in different historical conditions, calls for the overcoming of different forms of inequalities, therefore allowing a fuller development of the human person by means of the use of the political power.[13] Therefore, constitutionalism embodies the tension between the present situation and the "ideal" situation. The paradigms of constitutionalism are the relationship between human rights and the means for their achievement, the relationship between participation and representation

[12] For this approach see Rainer Arnold (2004), 'The Different Levels of Constitutional Law in Europe and Their Interdependence' in J. Nergelius, P. Policastro, K. Urata (eds.), *Challenges of Multi-Level Constitutionalism*, Proceedings of IVR 21st World Congress, Lund 2003, Polpress Publisher, Ratio Book Series, Kraków. See also Id. (2002), Europäisches Verfassungsrecht in Entwicklung, Regensburg, published by Prof. Dr, Rainer Arnold, Jean-Monnet Lehrstuhl für Europarecht, Regensburg 2002.

[13] P. Policastro (2005), 'On the Descriptive and the Prescriptive Nature of the Constitution. Constitutionalism and the Legitimization of the Constitution in the Practice of its Implementation', in L. Wintgens (ed.), *The Theory and Practice of Legislation. Essays in Legisprudence*, Aldershot, Ashgate 2005; See also Id. (2004a), 'On The Reconstruction of the Legal Strength of the Constitution in a World in Transition. Multi-Level Constitutionalism towards Multi-Level Democracy', in J. Nergelius, P. Policastro, K. Urata (eds.), *Challenges of Multi-Level Constitutionalism*, Proceedings of IVR 21st World Congress, Lund 2003, Polpress Publisher, Ratio Book Series, Kraków. Id. (2004b), 'Constitutionalism, Multi-Level Democracy and Fundamental Values', preface to J. Nergelius, P. Policastro, K. Urata (eds.), *Challenges of Multi-Level Constitutionalism*, Proceedings of IVR 21st World Congress, Lund 2003, Polpress Publisher, Ratio Book Series, Kraków.

and the relationship between norm and hermeneutic.[14] However, since such a tension addresses requirements to the different levels and situations in which power is exercised, constitutionalism requires a substantive coherence between those different legal orders. Therefore, in the age of European integration it appears suitable to name such a tension, within the substantive coherence of different dogmatically heterogeneous systems of rules, a multilevel constitutionalism.

2.2.

The required coherence to be attained between the different layers and levels through which power is exercised, addresses political power to the task of contributing to overcome inequality and support the individual development. We may consider the highlighting of such a task as a true progress in the field of constitutional theory and practice. Indeed, we acknowledge to the constitutional thought of enlightenment, that strove to overcome the feudal constraints underlining the role of human rights, understood in a rationalistic perspective. However, it was only after the first and the second World Wars, that the idea of centering the political power on the development of the problem of the human person and his development, was formulated and found its legal formulation at last. In this sense, we see that we may call the development of such an idea a legal tradition. We may see this legal tradition in a certain opposition to the competing tradition, according to which rights are legally acknowledged and implemented on the base of the support of a societal group. In this sense, a multi-level system of sources of law may be an opportunity for the development of the person-based tradition of the rights. We may consider the development of such a tradition as a grounding point for the development of the process of European integration, which started with a clear person-based approach. The question is, indeed, how we may preserve and enhance such an approach within the development of the process of European integration and which are the obstacles to the further implementation of person-based values. The question is not of small relevance, since the different societal structures in Europe have been supporting the development

[14] Policastro P. (2000), *La Costituzione di Weimar e la razionalizzazione democratica del potere politico tra metodo storico, paradigmi evolutivi del costituzionalismo e metodo giuridico*, in E. Amato A. Capo D. Viscido (eds.), *Weimar, le letterature classiche e l'Europa del 2000*, Helios Editrice, Salerno. Id. (2001), Political Parties, Participation and Representation Face to Globalisation, European Integration and Democratic Transition in M. Granat, P. Policastro, J. Sobczak, (eds.), Partie polityczne we współczesnym konstytucjonalizmie, Morpol, Lublin. Id. (2002), Prawa podstawowe w demokratycznych transformacjach ustrojowych. Polski przyklad (Fundamental Rights and Democratic Transitions. The Polish Example), Wydawnictwo KUL, Lublin.

of different institutional identities. In the process of European integration, they ought to join in order to support "the peoples of Europe, in creating an ever closer union among them". We will try to answer this question through an introductory analysis of the normative structure of part II of the Treaty Establishing a Constitution for Europe.

2.3.

The value structure of the different titles of CFR, underlining Human Dignity, Freedoms, Equality, Solidarity, Citizenship, Justice, appears reinforced by the Preamble, which mentions the need to develop the process of integration based upon common values. But the Preamble itself, while distinguishing between indivisible, universal values of human dignity, freedom, equality and solidarity and the institutional principles of democracy and rule of law, does not fully clarify which tradition of the understanding of human rights it refers to. In this sense, the paradigm of the human rights appears not fully elucidated, since there is no clarification concerning the choice of a person-based approach to the acknowledgment and the implementation of the rights or of a societal-based approach. On this ground, the concept of European citizenship to which the preamble refers, reveals some ambiguities, namely related to the unsolved question whether the concept of human rights, notwithstanding some declaration, may have, after all, only a nominalistic character, since they may depend on the political will of the Union and its Member States. If so, the Fundamental Rights of the Union may be reduced to be only citizens' rights, with a potentiality of exclusion. The subjects that may be in danger to be excluded, can be of two kinds:

1) The people whose life is related to the life to the Union, to which they participate as migrant workers, as migrants as such, as people aspiring to come and live or work in the area of the Union, or aspiring to live in a country that is a member of the Union;
2) The people that are living in a Member State, but due to their personal situation are 'excluded' or are in danger to become 'excluded' from the advantages of the process of European integration.

We may not understand these 'weak subjects'[15] as those subjects that, as individuals and as groups, have been obtaining a life situation that appears to be 'advantaged' with respect to other groups of people living in other European

[15] For a general approach to the situation of the different kind of persons, that can be considered 'weak subject' see P. Stanzione, (2004), *Tutela dei soggetti "deboli"*, San Paolo, Cinisello Balsamo.

countries. The latter subjects indeed may approach the further process of European integration, especially with respect to the enlargement, with reserves and opposition. On this base, we ought to search a form of rationalization of the public power in the process of European integration that may preserve the free development of the human person against the pressure of the different social groups. In fact, we may understand that, we may not attain the free development of the human person as a 'person-based' synthesis of the basic universal values included in the Charter at the cost of the free development of other human persons.

The exercise of a 'person-based' rationalization of the political power in a multi-level context, may affect, for example the substance and form of the process of ratification. Certain considerations on the need to consider the 'partial ratification' possible for the Treaty Establishing a Constitution for Europe, have recently been developed.[16] Nevertheless, what we mean to point out is that, if we wish to center the people's participation on the key political issues that refer to a given European Treaty, not relating it to contingent and internal questions, we need to go some step forward in the theory of the interpretation of the international treatises. We need to do so, at least for what concerns the treatises that produce processes of integration such as the European ones. Indeed, the treatises that have been leading to the European integration have been strongly characterizing the interpretation of the fundamental values of the national constitutions. Therefore, a break in the integration process may lead to a break in the flow of the legal expression of the constitutional values[17] and thus may be an element of democratic evolution. We believe that an important element in the theory of interpretation of international treatises is the conception of principles binding for the states towards the international

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[16] E. Piontek, (2005), *Consequences for EU Constitution if five or less Member States encounter difficulties in its ratification, Regensburg* VII. Internationaler Kongress zum Europäischen Verfassungsrecht 1.–2. Juli 2005 in: R. Arnold (ed.) *The Future of the European Union: Constitutional Union or Confederation of States? The enlarged EU: Evaluation of the first Year*, broschure.

[17] Betti, E. (1990), *Teoria generale dell'interpretazione*, II volumes, ed. G. Crifó, Giuffré Milano. See vol I, pp. 265–266 passim. Each discourse, says Betti, has the nature of a dialogue. The author and the interpreter, according to the said author, are submitted to a principle of reciprocity. In this sense we find that the principles grounding the reconstruction of the international society after World War II, and the ones that have been grounding the process of European integration have been manifesting their strength of communication, through the legal and political 'activities' through which the founding principles have been manifesting and developing. This hermeneutic approach underlines a 'phenomenology' of the legal tradition that has been developing within the process of European integration.

community as a whole.[18] We will analyze these aspects in further sections of this work.

2.4.

For what concerns the normative structure of the fundamental rights in the Charter of the Fundamental Rights of the European Union, I have to point out that it takes into account the multi-level system of European law. Indeed, we may distinguish between:

a) Rules concerning the acknowledgment of rights and freedoms in the Union, which are formulated without reference to the statutes that ought to implement them. For example, we may mention different categories of rights:
   a1) the human dignity, the right to life, the right to the integrity of the person (with the exception of art. II.63.2.a), the prohibition of torture or inhuman treatment, of slavery and forced labor;
   a2) the right to liberty and security, the respect for private and family life, the protection of personal data;
   a3) the freedom of thought, conscience and religion, the freedom of expression and information, the freedom of assembly and of association;
   a4) the freedom of arts and sciences, the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business, the right to property (though limited by law under the principle of proportionality);
   a5) the protection in the event of removal, expulsion or extradition;
   a6) the rights of the elderly, the integration of persons with disabilities;
   a7) the right of access to placement services, to fair and just working conditions, the prohibition of child labor and the protection of young people at work, the right to family and professional life;
   a8) the right to vote and to stand as candidate at the elections to the European Parliament and at the municipal elections, the right of

[18] Picone P. (1983), 'Obblighi reciproci ed obblighi *erga omnes* degli stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento', in V. *Starace, (1983), Diritto internazionale e protezione dell'ambiente marino*, Milano 1983 p. 27 passim. Id. (1996), 'Il peace-keeping nel mondo attuale: tra militarizzazione e amministrazione fiduciaria'*, Rivista di diritto Internazionale*, vol. I, pp. 5–33; Id. (2003), 'La guerra contro l'Iraq e le degenerazioni dell'unilateralismo'*, Rivista di diritto Internazionale*, vol. II, pp. 329–393; Id. (2005), Le autorizzazioni all'uso della forza tra tra sistema delle Nazioni Unite e diritto internazionale generale, Rivista di diritto Internazionale, vol. I, pp. 5–75.

access to documents, the right to refer to the European Ombudsman, the right to petition the European Parliament;

a9) the freedom of movement and residence, the right to diplomatic and consular protection; the right to an effective remedy and to a fair trial, the presumption of innocence and the right to defense, the principles of legality and proportionality of criminal offenses and penalties;

b) Rules acknowledging rights to be enforced according to international treatises, such as in the case:

b1) of the article II-78, where there is reference to the Geneva Convention of 1951 and the Protocol of 31 January 1967 on the refugees,

b2) or the cases in which the reference to rules contained in the international document having the scope to acknowledge and protect given fundamental rights is implicit, such as, for example in the case of the right of collective bargaining and action. In this category of rules, a first and foremost importance is played by the clause of article II-112, according to which the meaning and the scope of the rights corresponding to the ones guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same as those laid down in the Convention;

c) Rules acknowledging rights to be limited simply by 'law', such as in the following examples:

c1) the right to the free and informed consent in the field of medicine and biology;

c2) the equality before law,

c3) the principle of limitation of the rights and freedoms recognized in the Charter by means of law;

d) Rules acknowledging rights to be implemented by means of national law, such as in the case of the right to marry and to found a family, and the right to the conscientious objection;

e) Rules acknowledging rights to be implemented through European Union law and national law and practices, such as in the following cases:

e1) the workers' rights to information and consultation within the undertaking;

e2) the right to collective bargaining and action;

e3) the protection in the event of unjustified dismissal;

e4) the entitlement to social security and benefits; the access to services of general economic interest;

f) A final category of rules concerns the rights to be implemented through the Union policies. We find such rules in the question of ensuring a high level of consumer protection, of health care and of environmental protection.

One of the main questions is why the rules containing freedoms and rights not subjected to the classical forms of statutory reservation represent the overwhelming majority in the CFR of European Union. One of the main reasons of this relates to the multi-level structure of the European constitutional system at the present stage of its development. The interpretative clauses of the Charter are an important element on which base one can study the said issue.

3. For a New Classification of the Rights, Related to the Evolutionary Achievements in the Protection of the Rights Themselves: Rights of the Person and Rights of the Societies

3.1.

The presence in the CFR of European Union of a bulk of rules that acknowledge rights and freedoms without referring to the statutes for its implementation, is in my opinion one of the most relevant manifestations of the development of different layers of constitutional rules. Such layers are embodied in different legal enactments having a heterogeneous nature: indeed their legal foundation may be in an international treaty, in the acts of international organizations and in the decisions of international courts, in a national constitution and in the decisions of national constitutional courts.

Different approaches have been so far considering the question of the internationalization of constitutional law in various ways, especially for what concerns the fundamental rights. In relation to this, we can pose two questions, related to the relationship between form and substance[19]: the first is what is the relationship between the descriptive nature of the rights embodied in the international treatises, in particular the European ones and the ones embodied in the national constitutions. The second one instead attempts to define what is the relationship between the prescriptive characters of the rules contained in those two layers of norms.

The acknowledgment of the fundamental rights in a multi-level system shows, in the European example, the attempt to overcome the system of the rights of the societies in favor of the rights of the person. It takes place in this

[19] P. Policastro (2005), 'On the Descriptive and the Prescriptive Nature of the Constitution. Constitutionalism and the Legitimization of the Constitution in the Practice of its Implementation', op. cit.; Troper M. (2004), 'The Influence of Judicial Review of Statutes on Substantive Law' in J. Nergelius, P. Policastro, K. Urata (eds.), *Challenges of Multi-Level Constitutionalism*, op. cit.

context, where the transformation of the scope of the rights relates to a transformation of the relationship between rights and institutional structure, helping their implementation and protection. We may clarify such an aspect by a historical consideration, namely that, for what concerns the 'first generation' of the rights, they were rights supported by the rising 'bourgeoisie' that attempted to find a space of participation in the political power, getting rid at the same time of the remnants of the feudal institutions. In that context, where the bourgeoisie arrived to control the parliamentary representation, the statutory reservation for the regulations of the rights played a fundamental role in anchoring the 'rule of law' to the will of the bourgeoisie. Beyond the concept of parliamentary representation, and of the statutory reservation, as well as of other institutional developments, one could find a struggle for power between the aristocracy and the rising 'bourgeoisie'. Such a struggle describes, among other things, the relationship between the enunciation of the rights and the institutional system, where the concept of human rights retains a cultural and 'rationalistic' value.

3.2.

In Europe, nevertheless, the development of the nation-state suitable to the growth of the capitalistic economy demanded a wider participation in the process of development of the wealth of nations, that permitted wider social groups to gradually develop skills and social consciousness in order to compete for the power. Therefore, the centre of the social struggle became the tension between capital and labour. In any case, as became clear after World War I, the institutional system permitting the functioning of the 'rule of law' has allowed the gradually increased participation of the working classes in the exercise of the power.[20] In this context, the reinforcement of the relationship between executive and legislative and the development of the system of constitutional rights including rights permitting the social promotion and development of everyone, as well as a tendency to 'constitutionalize' the system of the political relations, characterized the new approach to the 'rationalization' of the political power. The aim of such an approach was to 'balance' the influences of the different groups that were attempting to exercise the political power. In this context, the constitution became the legal framework on which it was attempted to base the balancing between the different interests. The joining of economic freedoms with social rights, the reinforcement of the

[20] F. Neumann F. (1957), *The Change in the Function of Law in Modern Society*, in F. Neumann, *The Democratic and the Authoritarian State*, Free Press, New York, It. ed. (1973) *Mutamenti della funzione della legge nella società borghese* in *Lo Stato democratico e stato autoritario*, N. Matteucci (ed.) , Il Mulino, Bologna.

executive power, the need to consider the constitution in its normative meaning, led to the appearance of new legal institutions such as the ones responsible for control of the constitutionality of laws, at least in a limited extent. Even though we may say that the political developments from the beginning of the World War I and the rise of authoritarian and totalitarian powers in Europe[21] show that the particularistic approach to the national interest contributed to give a new meaning to the citizenship, indeed, that concept ranged in this context from the social aspects to the political and economic ones. It sometimes included even the ethnic aspect, and was attempting to integrate all of them. The development of such an 'integrating' function of the citizenship took place also in a context where mass parties played a significant role in the political life, and was due to the specific political developments that followed World War I. The concept of citizenship that followed manifested a more exclusive character than we can find today, in the tendency to find 'internal and external enemies' of the community.[22]

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[21] For further reading, see H. Heller (1931), *Europa und der Faschismus*, Berlin und Leipzig, It. ed. (1987), *L'Europa ed il fascismo*, C. Amirante (ed.), Giuffrè, Milano; G. Leibholz (1933), *Die Auflösung der liberalen Demokratie in Deutschland und das autoritare Staatsbild*, München und Leipzig, It. ed. (1986), *La dissoluzione della democrazia liberale in Germania e la forma di stato autoritaria*, F. Lanchester (ed.), Giuffrè, Milano; R. Smend (1928), *Verfassung und Verfassungsrecht*, München-Leipzig, It. ed. (1988), *Costituzione e diritto costituzionale*, G. Zagrebelsky (introduction), F. Fiore, J. Luther (translation), Giuffrè, Milano.

[22] It is remarkable that we may refer such remarks also to the Soviet system. There the Constitution of 1934 had the task to 'describe' the achievements of the Soviet system and to consolidate the Soviet power. In order to do so, a strong concentration of the political and economic power was required. Such an exercise of power led to the formulation of the doctrine of the 'intensification' of the class struggle, and by the hunt of the 'external and internal enemy'; see J. Trzciński (1978), *Funkcja prawna konstytucji socjalistycznej*, Wroclaw Acta Universitatis Vrastislaviensis (The Legal Function of the Socialist Constitution). – The authoritarian transformation of the exercise of the political power is a symptom of concentration of political power. Such concentration takes away from different social groups and the individuals the possibility to use law as a system of accounting political power. To this extent, the idea of Carl Schmitt that the state of exception may absorb within law the exercise of power is not convincing. This approach of Schmitt is consistent with the idea of friend-enemy, that bases his conception of the 'political'. On this issue, we may mention Michel Troper, who in the review of a book of Broszat (*L'Etat hitlérien. L'origine et l'évolution des structures du Troisieme Reich*, Paris, Fayard, 1985) arrives to the conclusion that "a regime that is not a state, a power that is not exercised in a legal form, produces, also because of its form, decisions of oppressive character" (see M. Troper (1994), *Pour une théorie juridique de l'Etat*, Paris, Presses universitaires de France, It. version ed. by A. Carrino (1998), *Per una teoria giuridica dello Stato*, Napoli, Guida, p. 171). The concentration of power puts at risk the same existence of the legal form.

3.3.

I have tried so far to show that the relationship between the descriptive and the prescriptive character of the institutions embodying the citizenship, have shown, within the development of the European legal approach to the citizenship, a strong dependence on political and social values. The attempt to give a legal 'garment' to those values must be considered a progress in the constitutional science, although, such as in the case of Weimar constitution, this was not accompanied by a politically, socially and economically happy end.[23] The crisis of the Western civilization as such was manifested in the rise of authoritarian systems, of totalitarianism, in the war and the practices of destruction and of extermination in a scale unknown so far. All this concentrated the attention of the peoples, of the thinkers and of the politicians on the importance of the choice of the values on which to ground the legal process. Already in the first half of the 20th century, lawyers such as Gustav Radbruch[24] or Giuseppe Capograssi[25] and philosophers such as Immanuel Mounier,[26]

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[23] Under the Weimar Constitution, also the attempt to institutionalize the confrontation of the different interest, as we can see for example with reference to art. 165 of it, was developed. That article tried to support a compromise between the conceptions of the social democracy and the ones of the free trade unions. The system of the councils, based upon firm councils of the workers and economic councils, that articulated from the company level up to the national level, tried to vest the workers of the same right of the entrepreneurs to participate to the economic development of the productive forces (G. A. Ritter (1991), *Der Soozialstaat. Entstehung und Entwicklung in internationalen Vergleich*, It. ed. 1999 (with conclusive chapter of L. Gaeta i P. Visconti and with introduction of L. Plombeni) *Storia dello stato sociale*, Laterza, Roma-Bari, p. 217). Ernst Fraenkel commented on this issue, developed under the influence of Sinzheimer, saying that, as the right to vote generates in the workers the consciousness of being citizens of the State, the Act on the company Councils, approved after art. 165 of Weimar Constitution may open to the worker the citizenship in the world of labor (E. Fraenkel (1930) 'Zehn Jahre Betriebsrätsgesetz' in *Die Gesellschaft*, 7, p. 117–129 now in T. Ramm (ed.) (1966), *Arbeitsrecht und Politik. Quellentexte 1918–1933* Neuwied/Berlin-Spandau, p. 111 passim.). The workers on the other hand criticized the jurisprudence of the High Court of the Reich as too much supporting social peace. For further reading, see H. Heller (1931), *Europa und der Faschismus*, Berlin und Leipzig, It. ed. *L'Europa ed il fascismo*, C. Amirante (ed.), op. cit.

[24] G. Radbruch (1932), *Rechtsphilosophie*, Verlag von Quelle & Meyer, Leipzig. Now ed. by R. Dreier and S. L. Paulson (2003), C. F. Müller, Heidelberg. The attention to the law as value, the relationship between law and moral, and the person appear very interesting form the methodologic point of view.

[25] G. Capograssi (1918), *Saggio sullo stato*, Torino, Bocca, now in (1959) *Opere di Giuseppe Capograssi*, vol. I, Giuffré, Milano.

[26] Mounier I. (1934), *De la propriété capitaliste à la propriété humaine*; Id. (1935), *Révolution personnaliste et communautaire*; Id. (1936) Maniféste au service du personnalisme. All these works are collected in (1961) *Oeuvres de Mounier*, vol. I, 1931–1939, Éditions du Seuil, Paris.

Jacques Maritain[27] or Martin Buber[28] on this ground produced a line of reflection, the roots of which appeared linked, among others, to scholars of the past such as Gian Battista Vico,[29] and focused its attention on the human person. The importance of such reflection is above all that through it, some scholars clearly perceived the end of the nation-state.[30] Therefore, the legal science was for a time opened to other forms of co-operation and coexistence between the polities. Such an approach had a very important global resonance and was set as one base for the reconstruction of the international legal sphere after World War II. From the point of view of the legal interpretation, we may say that the values of the individual human person has obtained a paramount legal status. The importance of such values are visible in different branches of law, such as international law, both private and public, constitutional law, criminal law, trade law and so on, irrespective of the relations of hierarchy or of dependence between the different kinds of sources of law.

3.4.

The way to define a new, so far unknown coherence between the different layers of legal enactments, based upon the human person and the human personality, may be called a *multi-level constitutionalism*, since it underlines that the relationship between the different layers of rules is based upon values that are founding the theory of constitution and constitutionalism itself. Such an approach has had very big legal and political repercussions. From the political point of view, one of the cornerstones of the influence of the person-based approach may be seen in the agreement between Robert Schuman, Konrad Adenauer and Alcide De Gasperi for the development of the European Communities. Indeed the perspective of the European construction does not enhance the role of the states, but supports primarily the individual.

From the legal point of view, the UN San Francisco Charter of Human Rights from 1948 has been initiating and leading to the development of many

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[27] Maritain J. (1942), *Les droits de l'homme et la loi naturelle,* New York, Éditions de la Maison Française; It. ed. (1976[2]), V. Possenti (ed.), *Diritti dell'uomo e legge naturale*, Milano, Vita e Pensiero; Id. (1943), *Christianisme et démocratie*, New York, Editions de la Maison Française; It. ed., *Cristianesimo e democrazia*, Milano 1977, with foreword by G. Lazzati.

[28] Buber M. (1923), *Ich und Du*, Engl. Version (1970), I and Thou, Touchstone, New York. The personalistic approach can be seen in this work by the attempt to show that the dialogic principle, is a reality that goes beyond the discursive language.

[29] G. Limone (2005), *Dal giusnaturalismo al giuspositivismo. Alla frontiera geoculturale della persona come bene comune*, Graf, Napoli. The author tries to join in continuity the developments of the theories of natural law in the person-based approach to law. In this sense he includes the thought of Gianbattista Vico as immersed in the said process.

[30] Capograssi (1918), *Saggio sullo stato*, op. cit., pp. 6–7, 139 s. passim).

different declarations of human rights. Among them, The Convention for the Protection of Human Rights and the Fundamental Freedoms, signed in Rome in 1950, has played a very important role, supporting a transformation in the understanding of the human rights in a person-based direction. The development of the person-based tradition in the approach to the national constitutions, especially the ones approved after World War II, such as the Italian Constitution of December 1947 and German Fundamental Law of 1949 supported this evolutionary tendency, which has also been confirmed by the constitutional developments that accompanied the democratic transitions in Greece, Spain and Portugal in the second half of the 1970's. The development of the ECHR, as it can be seen from the sequential contents of its protocols, has stressed its scope directed to ensure the widest possible protection of the human person, and this has been an element of stabilization and of support to the democratic transitions in Central and Eastern Europe in the last fifteen years.

3.5.

The additional protocols to the European Convention start by stressing the relationship between human rights and legal security, claiming already in Protocol no 1 that "every natural and legal person is entitled to the peaceful enjoyment of his possessions", and the relationship between human rights and democracy with the right to free elections. The right to education that shall be denied to no person is a very important element for the free development of the personality. Later on, the prohibition for the imprisonment for debts, the freedom of movement, the prohibition of expulsion of nationals, and the prohibition of collective expulsion of aliens have also been stressed. The approach to the prohibition of death penalty, included in the protocol of 1963 with no reservation, appears significantly inspired by humanistic values, although this prohibition did not include the periods of war. The protocol of 1984 shows a remarkable attention to the procedural guarantees for the human person. Apart from the right to appeal in criminal matters, and the right not to be convicted twice, the protocol in question sets the right for compensation against wrongful convictions and the equality between spouses. These rights show the interest to implement a sufficient level of guarantee of the person, both in its relations with the state and in its relations with other persons within the social communities where his life takes place. The procedural safeguards concerning the expulsion of aliens integrates in this protocol the formerly established prohibition of collective expulsions, which means developing a block of rights for the person as such, not only constrained within the burdens of the citizenship. Protocol 12 developed a key issue, concerning the prohibition of discrimination as such, and later on protocol 13 extended the principle forbidding the death penalty to the periods of war. These elements have been

supporting the developments that took place through the establishment of the individual complaints and the affirmation of the central role of the jurisdiction of the ECtHR. Here we also have to underline the importance given to coherence by the protocols and the Convention. This aspect adds further evidence to the development of a multi-level constitutionalism, grounded upon values.

From the considerations that we have been developing so far, we may derive that we cannot consider the rights in the ECHR only as 'liberal rights', namely rights of the first generation. They are rights of a multi-level system that tries to overcome the system of the rights of the societies in favor of the rights of the person. The system of protection of the human rights in the convention does not have the aim to derogate from the national provisions, but to create standards of individual protection that may support a gradual evolution of the system of rights' protection and enforcement in the different countries. The analysis of the protocols, and a punctual study of the arguments used by the decisions of the European Court of Human Rights, may better clear our statement. Indeed, the binding nature of international law is in principle different from the one of the national constitutional law. The jurisprudence of the European Court of Human Rights, together with the other international practice in the field of human rights, has created a tradition that coexists, in a multi-level context, with the tradition of the implementation in the different systems, trying to make them converge according to values and standards supporting the person-based approach. In this way, a circular relation between national constitutional law, ECHR and the European Community Law is being created. This circularity strengthens the person-based values, that we find at the base of the constitutional construction following World War II.

The phenomena of constitutional reception of the jurisprudence of the Court of Strasbourg as in the Italian case, or the rejection of some solutions as in the German case, are examples of the tensions that take place within such circularity. In any case, such tensions show that the system is not prone to be self-referential. Indeed, as we have already been underlining, the relationship between the values embodied in the national constitutions, and its implementation by means of statutes, highlights the political approach to the legal potentialities of the constitution itself. However, also the activity of different societal groups, through the intermediation of representation, highlights the hermeneutic potential of a constitution. The system of individual complaints to the European Court of Human Rights, creates a tension between person-based values of the Convention and societal influences in the implementation of the constitutional values. A national constitution based upon the standards of the Convention may create a self-referential approach of the political power to the constitutional rights. When such a thing takes place, the constitutional rights are seen 'by definition' as complying with the standards of the

ECHR.[31] Then, the continuous attention to the jurisprudence of the ECHR is extremely important, as we can see for instance, by the German example.

As we have seen, the developments in the interpretation of the European principles concerning the human rights, especially with reference to the ECHR, has been supporting an understanding of the rights centered upon values supporting the human person as such. Although in continuity with the constitutional values that have been affirmed after World War II, we thus overcome the system of understanding and interpreting the rights in a way adapted for the politically relevant societies and societal groups of the nation-states. The multi-level system of, substantively speaking, constitutional rules has thus facilitated this task.

4. Are There Rights that can be Enforced by the Person, Without the Support of Any Significant Societal Group? The European Convention of Human Rights vs. the Economic Freedoms Granted by The European Union Law

4.1.

The value-based ground of multi-level constitutionalism has so far constrained the democratic representation from playing an essential role outside the limits of the nation-state. This aspect affects the way in which the statutory reservation for the regulation of the human rights has been used.

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[31] The importance of a clear theory of human rights emerging from the national constitutions, fully aware of the tools needed to implement the human rights, such as the statutory reservation or the motivation of the decision limiting the personal freedoms, clearly shows just in those countries where decades of deprivation of the guarantees of the rule of law have left a cultural sign. For this reason, the mere reception of the overall normative solution of the Convention is not enough. Also an internal debate, that may produce true effects on the legal culture, is needed. In relation to this we may mention, for example, the decision of the Fourth Section of the ECtHR, Al-Nashif vs. Bulgaria, of June 20th 2002 (Application no. 50963/99), which underlines that, "even where national security is at stake, the concept of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence". The Court adds that: "The individual must be able to challenge the executive's assertion that national security is at stake. While the executive assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the fact or reveals an interpretation of 'national security' that is unlawful or contrary to common sense or arbitrary". Under Bulgarian law the Ministry of the Interior was empowered to issue deportation orders interfering with fundamental human rights without following any form of adversarial procedure, without giving any reason and without any possibility for appeal to an independent authority.

However, it does not impede that the person-based value included in international law conventions and the legal remedies developed in those, coherently with the ones that are founding the national constitutional structure, from functioning efficiently.

Looking at the question of the continuity between the values embodied in the national constitutions and in the international treatises, founding the normative European framework for the human rights may be seen as a 'value-based continuity' and not as a 'principle-based continuity'. The affirmation of the person-based values in the context of a multi-level system of constitutional rules may lead to a transformation of the way in which, so far, certain legal principles have been applied. Legal scholars have expressed different considerations in relation to this. On the one hand, this value-based interpretation may set apart the achievements of the social-state and the rights deriving from the 'status' acquired by the societies within the developments of the social state.[32] Secondly, a transformation of the constitutional principles into 'flexible' law, prone to new balances[33] with respect to new interests that appear within the legal sphere may emerge. From this comes the criticism, that a concept such as 'market economy' may jeopardize the development of the state intervention to support the development of equality between the different social groups, and therefore may inhibit the application of some of the most fundamental constitutional principles.[34] This criticism has a significant importance, and anyhow appears to be extremely close to the sensitivity of the Western European societies, as shown by the results in the referenda for the ratification of the Treaty Establishing a Constitution for Europe. In my opinion, it hides a conception of a vertical relationship between European law and national law, that may be solved either by supposing the transformation of the nation-state into an European state or by developing a hermeneutic of national constitutional norms that is flexible with respect to the interests joining within the internal market. In both these cases, the constitutional rights appear in their traditional character of rights, supported by social groups, with values and ideas attempting to prevail in society.

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[32] See the critical considerations of C. Amirante, (2001), 'Unione Monetaria e Unione Politica: Contraddizioni e prospettive del processo di integrazione Europea', in Id., *Unioni sovranazionali e riorganizzazione costituzionale dello stato*, Giappichelli, Torino; Id. (2003), *Costituzionalismo e costituzione nel nuovo contesto europeo*, Giappichelli, Torino.

[33] J. Charbonnier (1979), *Flexible droit*, L.G.D.J., Paris; G. Zagrebelski (1992), *Il diritto mite*, Einaudi, Torino.

[34] C. Amirante (2001), 'Unione Monetaria e Unione politica', op. cit.; Id. (2003), *Costitutionalismo e costituzione*, op. cit.; see also Id., Principles, Values, Rights, Duties, Social Needs and the Interpretation of the Constitution. The Hegemony of Governance and Multi-Level Constitutionalism in a Globalised World' in: J. Nergelius, P. Policastro, K. Urata (2004), *Challenges of Multi-Level Constitutionalism*, op. cit.

4.2.

We will try now to prove our conception of the formation of a European legal system, making use of legal and judicial doctrines. Indeed, according to a conception developed by Arnold,[35] the inherent legal foundation of the European Union and of the European Community produces the formation of a European constitutional law. In accordance with the decision of the ECJ of April 1986 in the case Les Verts v. European Parliament,[36] the European Community is a community based upon the rule of law. The meaning of 'rule of law' in this context appears directed to point out that, although the European Community is based upon international treatises, such treatises are not to be interpreted as an expression of a mere political will of the states, whose interpretation has, at any good rate, remained basically 'political'.[37] They indeed developed a 'rule of law' with modalities inherent to the communities and the union of states in the contemporary sense. The transformation in the 'normative strength' of international law that takes place in the form and within the limits of the ground of the treatises, may well be defined as a constitutional law in 'another sense', although fundamentally substantive (Arnold). The approach in the decision 'Les Verts' to this European concept of 'rule of law' is constructed stressing that, in the Community "neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional Charter, the

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[35] Arnold (2002), *Europäisches Verfassungsrecht in Entwicklung* (op. cit.).

[36] Case (294/83), ECR 1986 p. 1339.

[37] See the advisory opinion of the International Court of Justice of May 28, 1948, concerning the "Conditions of Admission of a State to Membership in the United Nations", according to article 4 of the UN Charter. In this opinion, the question was if a state, voting for the admission of a new state, could express its vote under the condition that another new state would be admitted. The International Court of Justice excluded the possibility of such an interpretation, since not only did it contrast with the letter of art. 4.2 of the Charter, but because it would lead to confer on members "an indefinite and practically unlimited power to impose new conditions" and such conditions may constitute political super-impositions giving to the members a power that "could not be reconciled with the character of a rule which establishes a close connection between the membership and the observance of the principles and obligations of the Charter". A different wording would have been adopted if the authors of the Charter would have meant otherwise, the Court stressed, but it did not go back to preparatory work itself. The Court in this decision stresses an inherent, ontological dimension of law that goes beyond the mere political logic of the state reason. In such a context the legal approach to international law was ready to leave behind 'bilateralism' or the 'private law' approach (Picone), and find its own inherent 'rule of law', for example through the rise of state obligations towards the whole international community (collective or 'erga omnes', obligations see Picone, 1983, op. cit.) or in the development of a 'rule of law' of the Communities of states.

treaty". Furthermore, the Court says, "the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected". The existence of legal remedies and procedures permitting to review general acts on the ground of basic legal rules, has thus been considered as one of the expressions of constitutionalism in larger sense.

For what concerns the concept of European 'rule of law', the Court of Justice has been pointing out that "as far as the Community is concerned, the rules on free trade and competition have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.[38] Indeed, the EC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union and the objective of all the Community treaties is to contribute to making concrete progress towards European unity". In order to do so, the ECJ continues, "the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its supremacy over the law of the Member States and the direct effect of a whole series of provisions". The objectives of the European legal order may be, from the dogmatic point of view, classified as including 'material' objectives and modalities for the attainment of the objectives themselves. The material purposes may be considered in strict relation to the policies of the community, and therefore we may distinguish between economic objectives, political objectives and social objectives. Among the principles determining the modalities, through which the material objectives have to be attained, we may mention the principle of the open market economy with free competition, and the price stability as a priority.[39]

Therefore, we observe within the system of the European Union and of the European Community a system of values, of principles, of objectives, as well as of an institutional framework, in other words a legal order on whose base a system of fundamental rights may be implemented. This legal order is the product of an evolution of the grounding legal values, both in the nation-states

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[38] See the Opinion 1/91, delivered on the "Draft agreement between the Community, on one hand, and the countries of the European Free Trade Association, relating to the creation of the European Economic Area" (December 14, 1991), ECR 1991, p. I-06079.

[39] As we can see from art. 6.1 of the EU Treaty, these objectives are supported by principles, such as the ones of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The fact that, these principles are common to the Member States, shows the need to interpret the EU treaty in continuity with the basic constitutional principles of the Member States, although the national constitutions and the European treatises appear to

and in the international societies, that appears to be supporting the development of the human person, independently from the different societies that may support the different rights.

4.3.

The doctrines of the ECJ in the field of the general principles of law,[40] may be classified broadly as referring on one hand to the European rule of law, including the economic rule of law, and on the other hand they may be seen as referring to essential elements of constitutionalism. Indeed, the question about the general principles is considered by the ECJ in a certain light of continuity with the legal orders of the Member States. As expressed in the decision Wührer,[41] the legal principles admitted in the Member States, have equally to be admitted in the community order. But what we really find in the decisions of the ECJ, is not as much as a common denominator of the general legal principles, as a system of principles that form a 'condicio sine qua non' for the existence of a legal system joining the laws of the different Member States, in a way that appears to be compatible with the achievements of constitutionalism and with the grounding values of the constitutional states and the international community. In this sense, the general principles of law appear to be more similar to the principles of international law binding 'erga omnes', rather than being a way to replicate on a 'supranational' ground the rules of law characterizing the different legal

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be characterized by different objectives. An important aspect of the multi-level approach that ought to be followed in the interpretation of the European treatises comes from the principle that 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". It comes also from the principle that "the Union shall respect the national identities of its Member States".

[40] A significant part of the different aspects of the debate on the general principles of European law can be found in Bernitz U, Nergelius J. (2000) General Principles of European Community Law, edited by, The Hague (Kluwer, European Monographs vol. 25; Tridimas T. (2000), *The General Principles of EC Law*, Oxford University Press, Oxford; we have to mention also X. Groussot (2005), Creation, *Development and Impact of the General Principles of Community Law: Towards a Jus Communae Europaeum?*, Lund University Press 2005, a doctoral dissertation characterised, among others, by a rich and well articulated bibliography. I wish here also to mention the essay of Joakim Nergelius, 'The Role of General Principles of Law within EU Law – Some theoretical and Practical Reflections', to be published in a collection edited by Domenico Amirante.

[41] ECJ, Judgment of the Court (Fifth Chamber) of 13 November 1984, Birra Wührer SpA and others v Council and Commission of the European Communities. Joined cases 256, 257, 265, 267–80, 5 and 51–81 and 282–82, ECR 1984, p. 03693.

national systems. This is not a minor issue, since the latter solution may appear to open the way to the question of the 'hegemony' of different national legal systems in the formation of the European legal order, as an element of potential clash or potential 'homogeneization' with different national legal traditions.

The reconstruction of the general principles of law, on the ground of the decisions of the ECJ, may not be seen as the attempt to find 'rational' principles of adjudication.[42] We should see it instead as the attempt to find a 'new level of coherence' embracing the values that led to the formation of the new international cooperation after World War II, and therefore, as we mentioned already, as the development of a new legal tradition. For this reason, to implement person-based values on the European level, we do not need in principle the transformation of law into 'flexible law' as such, but another level of coherence. The interpretation of the general principles of law is an important aspect of this level of coherence, because they arrive, in the European experience, to coordinate between the values of the national legal order and the construction of a European legal order.

Indeed, what we may say is that the decisions of the ECJ show an attempt to create a multi-level system of public law that tries to acknowledge the fundamental principles of public law in the different countries acknowledging the specificity of the European system. Taking as an example some statements of law in the historical development of the decisions of the European Court of Justice in the field of legal security, we firstly find that the principle of legal security from the first years helped to temper the rigor of the legal certainty, acknowledging at the same time individual rights and interests. The declaration of nullity of a decision 'conferring subjective rights' or the invalidation of an agreement have on this ground been acknowledged as displaying effects for the future (ex nunc) and not also for the past (ex-tunc: see ECJ, Judgment of the Court of 1 June 1961. - Gabriel Simon v Court of Justice of the European Communities, case 15-60. ECR 1961, p. 115; see also ECJ, Judgment of the Court of 6 April 1962, Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, case 13-61, ECR 1961, p. 45). Secondly, we find that the respect of legal security limits the possibility to annul illegal decisions with retroactive effects (ECJ, Judgment of the Court of 13 July 1965, Lemmerz-Werke GmbH v High Authority of the ECSC, case 111-63, ECR 1963, p. 677) and guarantees the agreements notified to the Commission, in case there is not yet a decision (ECJ, Judgment of the Court of 9 July 1969, S.A. Portelange v S.A. Smith Corona Marchant International and others, case 10-69, ECR 1969,

[42] See M. O. Bayles (1987), *Principles of Law. A Normative Analysis*, D. Reidel Publishing Company (Kluwer Academic Publishers), Dordrecht/Boston/Lancaster/Tokyo, p. xviii passim.

p. 309).[43] Thirdly, it also requires that the legal situation having force in the time of the application of a given text shall also be the starting point for its interpretation (ECJ, Judgment of 14 July 1971. - Günther Henck v Hauptzollamt Emmerich, case 12, 13, 14-71, ECR 1971, p. 743, 767, 779).

The doctrine of the legal security in a multi-level context shows the tendency to develop a diachronic coherence within the European legal system. This is a feature that seems to characterize the interpretation of the general principles of European law. We can consider as an example the maxim that the principle of non-retroactivity of criminal law as stated in the article 7 of ECHR is also a general principle of community law, which requires that the sanctions are the ones fixed at the time in which the infraction has been committed.[44] Furthermore, in this field we find principles concerning the necessary clarity of the legislation, since the addressees ought to be able to figure out in

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[43] Indeed, the Commission may not indefinitely delay the exercise of its power to give penalties (ECJ, Judgment of the Court of 14 July 1972. - Imperial Chemical Industries Ltd. v Commission of the European Communities, case 48-69, ECR 1972, p. 00619. But see also the other decisions of 14 July 1972, grouping several cases against the Commission: ECJ, Judgment of the Court of 14 July 1972, Badische Anilin- & Soda-Fabrik AG v Commission of the European Communities, case 49-69, ECR 1972, p. 713; ECJ, Judgment of the Court of 14 July 1972. - Farbenfabriken Bayer AG v Commission of the European Communities, case 51-69, ECR 1972, p. 745; ECJ, Judgment of the Court of 14 July 1972. - J. R. Geigy AG v Commission of the European Communities. - Case 52-69. European Court reports 1972 Page 00787; ECJ - Judgment of the Court of 14 July 1972. - Sandoz AG v Commission of the European Communities. - Case 53-69. European Court reports 1972 Page 00845; ECJ - Judgment of the Court of 14 July 1972. - SA française des matières colorantes (Francolor) v Commission of the European Communities. - Case 54-69. European Court reports 1972 Page 00851; ECJ - Judgment of the Court of 14 July 1972. - Cassella Farbwerke Mainkur AG v Commission of the European Communities. - Case 55-69. European Court reports 1972 Page 00887; ECJ - Judgment of the Court of 14 July 1972. - Farbwerke Hoechst AG v Commission of the European Communities. - Case 56-69. European Court reports 1972 Page 00927; ECJ - Judgment of the Court of 14 July 1972. - Azienda Colori Nazionali - ACNA S.p.A. v Commission of the European Communities. - Case 57-69. European Court reports 1972 Page 00933).

[44] See ECJ, Judgment of the Court (Grand Chamber) of 28 June 2005. - Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities. - Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P. ECR 2005. In particular, see points, 202, 216–219, 222–224, 227–231. But this argument had already been used in order to stress that the community law may not have retroactive effect with respect to criminal law national rules, that at the moment in which they were approved, were incompatible with community law (ECJ, Judgment of the Court of 10 July 1984, Regina v Kent Kirk, case 63/83. ECR 1984, p. 2689. In particular see points 21–23 including the reference to the art. of the European Convention of Human Rights).

advance the possible application of the community legislation.[45] This statement of law is especially important in the cases in which community law may have financial consequences for the addressees (ECJ, Judgment of the Court of 15 December 1987, Ireland v Commission of the European Communities, case 239/86, ECR 1987, p. 5271),[46] and poses requirements also to the national legislation in the community field (ECJ, Judgment of the Court of 21 June 1988, Commission of the European Communities v Italian Republic, case 257/86, ECR 1988, p. 3249. In particular, see point 12).

This brief comment ought to be extended, saying that in the field of the general principles we find doctrines of the ECJ in the field of acquired rights, legitimate expectations, state of necessity, rights to defense, force majeure, proportionality, legitimate self-defense, right to a jurisdictional remedy and others. The question of such principles is whether they only reflect principles belonging to the national legal orders, or if they show some of the new ontological features of the right in a multi-level context. The first conclusion may support a reconstruction of European law on a comparative base,[47] whilst if we support the idea of new ontological features of the European legal order within a multi-level context, we ought to try to show, as clear as possible, the link existing between the person-based values and the principles of the European legal order. We assume indeed that the person-based values constitue

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[45] And this precludes in principle the retroactive coming into force of a legal act (Kloppenburg, 70/83).

[46] Therefore the rules that set a preclusion delay to different forms of help, especially the helps towards the states, have to be expressed in a clear way, in order to permit the states to figure out the consequences of their delay (Germany v. Commission, 44/81).

[47] See M. Kiikeri (2001), *Comparative Legal Reasoning and European Law*, Kluwer Academic Publishers, Dordrecht/Boston/London, pp. 101–106, pp. 313–314 passim. The author, after exploring the comparative foundation of the arguments used in the interpretation of European law, and after acknowledging a comparative foundation to the general principles of law, arrives to the conclusions that the comparative method is especially important for the hard cases. This, in relation to its possibility to permit to acknowledge and confront the different values that character. From a point view more close to Betti's hermeneutic, Antonio Cervati (see Cervati A. (2001), 'Il diritto costituzionale europeo e la crisi della dogmatica statualistica', *Diritto romano attuale. Storia, metodo, cultura nella scienza giuridica*, vol. 6: Il giurista europeo, pp. 21–47, especially p. 44) points out the existence of a European law rather then a 'Community law'. Indeed, the European legal order may be understood as different from the Community law, as a system deriving from the praxis, that presents a degree a flexibility and adaptability unknown to the legal order of the nation-states, both at the age of the great codifications. However, the rules of European law have a certain degree of stability and coherence that we may understand, according to Cervati, if we look at law as an historical experience. In this way the pluralism and the heterogeneity of the sources and the plurality of legal layers may be understood as a system that gains with the time a higher degree of consistency.

a feature that characterizes the reconstruction of the world political order since the end of World War II, and which grounds the process of political and legal integration. Such values therefore ground the development of a legal system that coexists with the national legal system, but permits the implementation of person-based values on a wider scale with respect to the possibilities of the national level.

4.4.

We may give some evidence of the developments of the European legal order in a system having an autonomous, person-oriented legal feature, with an attempt to relate the arguments used in the decisions of the ECHR and the ones of the ECJ. From the brief analysis of the decisions of the ECJ conducted above, we see that they develop general principles in a certain continuity with the judicial doctrines of the Member States. My thesis is oriented to believe that such general principles embody a feature of law that is indeed more general than the written constitutional norms. The European Court of Human Rights in a recent decision (30-6-2005, Bosphorous v. Ireland) has tried to present in a dynamic framework the mutual relationship between the Convention, its jurisprudence, the European treatises and the jurisprudence of the ECJ. The ECHR underlined that, although the founding treaty of EC rights did not contain an express provision for the protection of human rights, the ECJ stressed, beginning from the end of the sixties, that fundamental rights were enshrined in the general principles of Community law. In their protection, the ECJ very early took into account the constitutional traditions of the Member States. Later on, the ECJ started to explicitly refer to the Convention. Successively, it recognized the importance of the European Convention of Human Rights amongst international treatises.[48] Thereafter the ECJ began to refer extensively to Convention provisions, the more recent ECJ judgments not introducing such convention reference with an explanation of their relevance for EC law. This conclusion may support the thesis that the jurisprudence of the International Court of Human Rights and the Jurisprudence of the European Court of Justice mutually reinforce each

[48] See ECHR, Grand Chamber, Case of Bosphorous Haya Yollari Turizm ve Ticaret Anonim Şirkety v. Ireland, Application no. 45036/98, 30 June 2005, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en. In particular, see point 73, where the ECHR analyzes the developments in the approach to the role of the Convention in the decisions of ECJ. In particular see the extensive quotation of the ECJ judgment of of 18 June 1991, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT v. DEP), case C-260/89 ECR 1991, p. I-2925

other,[49] but it may also support the idea of the formation of a new order with its principles, that appear to some extent also vertically related to the national order. Indeed, the mutual reference, developed by time, gives a level of mutual consistency that makes it impossible to consider the use of the arguments of the ECJ with respect to the ECHR only as having a rhetoric function.

We may give a special importance to this question by considering the decision of the ECJ in the case 'Pupino' (C–105/03), decided by the Grand Chamber of the Court on June 16, 2005 (Reference for a preliminary ruling from the Tribunale di Firenze (Italy), in the criminal proceeding against Maria Pupino, OJ C 193, 06.08.2005, p. 3). The Court referred in this case not to a matter regulated by Community law, but to a question concerning the police and judicial cooperation in criminal matters. The Court affirmed its jurisdiction in the matter concerning the case rejecting the different objections of the Member States, in particular the one that framework decisions and Community directives are completely different and separate sources of law, and that therefore framework decisions cannot place a national court under the obligation to interpret national law in conformity with community law (§ 25). The Court answered to the different objections concerning the binding character of the framework decisions, saying that, since they 'bind' the Member States 'as to the results to be achieved', they place in the hand of the national authorities, and in particular the national courts, the obligation to interpret national law in conformity with community law. And the Court adds that: "the fact that, by virtue of Article 35 EU, the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion". The Court reaches this conclusion by invoking article 1 of the Treaty on European Union, that sets a fundamental principle, namely that the treaty marks a new stage in the process of European integration of creating an ever close union among the peoples of Europe, "in a manner demonstrating consistency and solidarity". After that, the Court uses the argument of the loyal cooperation (art. 10 ECT), to require the implementation of adequate means to fulfill their obligations. For all these reasons, the Court concluded that the principle of interpretation of national statutes in conformity with the European Union law is binding also with respect to the framework decisions. Here, the Court invokes the generality of the legal system of European public law, to limit the binding effects of the framework decisions. Indeed it states

[49] See J. Nergelius, 'La Costituzione Europea e la Tutela dei Diritti Umani. Una Complessità indesiderata', in Gambino (ed.), *Il Trattato che istituisce una costituzione per l'Europa. Le Costituzioni Nazionale e i diritti fondamentali*, Giuffrè, Milan 2006 p. 315–325.

that, "the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by the general principles of law, particularly those of legal certainty and non-retroactivity". In doing so, it is not possible to give a decision 'contra legem' in the national law. Furthermore, the framework decisions must be interpreted according to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions. In particular, the right to a fair trial must be guaranteed.[50]

So, the relationship of continuity between the national constitutional order, the constitutional national traditions and the European public law order, is based upon the legal strength of the general principles of law. Such principles assume, in the European order, a legal strength that is similar to the one that so far different scholars have attributed to the fundamental principles of the national constitutional order. In particular, they have a superabundant hermeneutic potential[51] and they give a strong rigidity to the order they ground.[52] Furthermore, they assume relevance within the international legal order, and they link it to the individuals, in a manner that so far seemed rather inconceivable, although still limited to the hypothesis of strong political integration, as it takes place in Europe.

The considerations developed so far, allow us to present the conclusive steps in our argument.

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[50] Cfr case C-105/03, Pupino, June 2005, cit.

[51] E. Betti, (1990), *Teoria generale dell'interpretazione*, op. cit., vol. II, pp. 812–864. In his monumental work about hermeneutic, Emilio Betti considers the question of the legal interpretation first of all pointing out that the legal dogmatic is a representation of the legal order addressed to an evaluation. Such an evaluation may refer both to the historically defined positive law, as well as to the more abstract questions of the general theory of law (p. 813). Therefore dogmatic, as any kind of knowledge may not be independent form an historical approach, since knowledge has to make use of concepts, more or less abstracts (p. 814). Within this framework, Betti approaches the question of the principles saying that a principle is "the germinal idea, the criterion of evaluation, of which the norm is the implementation, in the form of a specific precept" (p. 846). In this sense Betti presents a conception of the general principles, in forms of 'values' that need to develop within history, in order to mature and in order to be accompanied with "adequate of means chosen in order to guarantee their protection" (p. 847). "The general principles then as evaluation criteria immanent to the legal order present an excess of … axiological content with respect to the individual norms" (p. 849). Such aspect is consistent with a phenoment inherent to the language, and namely that then the expression has a quantity of superabundant meaning (p. 850). When we deal with natural law, adds Betti we find principles that have an expansive force, that come from ethical values, that gradually mature and that find their affirmation within given historical situations (p. 850). Therefore such an approach may very well be used, in our understanding to explain the development of the legal traditions.

[52] On the influences of the ideas developed of Bryce on constitutional rigidity see A. Pace (1996), *La causa della rigidità costituzionale*, Cedam, Padova, and the rich bibliography referred to by the author.

5. An Apparent Incoherence of the 'Treaty Establishing a Constitution for Europe' and the 'Pomus Discordiae': The Question of the Generally Binding Nature of Constitutional Law and the Accession Treaty

5.1.

The Enlargement of European Union has been accompanied by different reservations of the old Member States concerning the transformations of the labour markets that developed so far. When preliminarily considering such reservations, we ought to take into account that the enlargement itself is a process that has been starting practically together with the democratic transitions in Central and Eastern Europe. A deep restructuring of the economic and the political system has characterized this process. Its aim was to attain the West European political standards of respects of human rights and democracy, as well as to take part of the EU economic freedoms. Indeed, the process of attaining the political and economical standards required for the admission to the European Union was a true transition for Central and East European countries. The hopes that accompanied such transitions were related to the respect of human rights and political rights, but also with an improvement of the economic situation. Therefore, we can see the importance of the admission to the Council of Europe, and the possibility to enforce the individual rights both through the jurisdiction and through the influence of the jurisprudence of the European Court of Human Rights. The hopes that the Central Eastern European societies had so far, with respect to the improvement of the economic situation, were jeopardized by the difficulties of the transition and of the restructuring of the societies. On the other hand, since the beginning of the transition in Central Eastern Europe, the Western Economic societies have benefited from the opening of the former socialistic economies. Although we can question the substantive benefit of the opening of the economic system in Central and Eastern Europe for the laborers of Western Europe, we cannot deny that the societies of Central Eastern Europe have gone through true economic problems. This aspect of the European enlargement has been a failure for what concerns the needs of the political process according to the person-based values.

In this context, it is extremely important to reflect on the question of the values in the Treaty Establishing a Constitution for Europe. Apart from the fundamental values of the first part of the Constitution, the institutional question needs our attention. We can preliminarily observe two elements: the reduction of the role of the Commission and, secondly, a lack of acknowledgment of the need of the European Court of Justice to develop its institutional role into a true constitutional court, at least for what concerns the possibility to admit direct complaints on fundamental rights. Such a possibility of direct complaint

would be a significant step forward in the development of a European framework of multi-level public law. This is extremely important given the relationship between the fundamental values and the policies of the European Union. Indeed, for what concerns the values, article I-2 of the CT stresses 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 persons belonging to minorities. We can say that these values are the founding values of the process of European integration, and so we can look at them as the main components of the European legal tradition. Nevertheless, we can say that the European legal order stresses its continuity with the values supported in the national systems. In doing so, article I-2 of the Constitutional Treaty stresses a balancing criterion, since it points out that those values are common to the Member States, but within a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

5.2.

In order to permit us to develop a 'consistency' within the European system of public law, and a coherence between the national constitutional values and the person-based values upon which the European construction is based, we therefore ought not to neglect the importance of the whole system of international rules supporting the implementation of the legal principles in the European Union. First of all, the ECHR plays a 'modal' role for the implementation of the European Union rules. The EU rules therefore have to respect, among others, the jurisprudence of the European Court of Human Rights. In the Constitutional Treaty, the obligation of the Union to accede to the ECHR strengthens this aspect. In this perspective, we have to interpret the principle that, in its relations with the wider world, the Union shall uphold and promote its values and interests. The promotion of its values implies an external action directed to general objectives such as the contribution 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. It implies also the duty to operate within the strict observance and the development of international law, including respect for the principles of the UN Charter. On this ground, we have many claims that the European legal order ought to include not only the states but also the citizens. Indeed, the relationship between the legal order of the Union and the individuals, that in the first decisions of the European Court seemed to derive from the 'transfer of sovereignty' to the Communities, found with time another legal foundation, in ECHR and the common constitutional traditions of the Member States. Taking into account the development of the relationship between the interpretation of European

law and the interpretation of the ECHR, we see that on this ground legal principles with a degree of generality that overwhelms the European boundaries have been developed. Nevertheless, such principles developed within the process of European integration.

5.3.

The degree of 'generality' of the general principles of law makes them true 'fundamental' principles of the European order. Does this mean that, in any kind of relation between a person and the European Union legal system, we may allow arbitrary distinctions between citizens and third country nationals? Indeed, the principle of 'fairness' towards that group, which regulates the EU policy on asylum, immigration and external border control, appears to be a slight, although insufficient, normative acknowledgment that an inherent quality of the multi-level European legal order consists in the fading away of the distinctions between citizen and non-citizen, as two substantively different legal subjects. These conclusions support a conception of the need to underline in Europe certain 'fundamental rights', directly related to the person and its full development, that not necessarily include the rights traditionally supported from different societal groups. These fundamental rights ought to acknowledge the features of the human person and its full development, coherently with the implications coming from the person-based approach to the construction of the multi-level legal order in Europe. They ought therefore to have a normative formulation that permits us to acknowledge a degree of generality that goes beyond any arbitrary distinction between citizens and non-citizens.

A corollary to this conclusion is, that we may not deny a substantive protection to a non-citizen who in the European free market finds a factual solution to his search for a paid occupation. In the opposite case, we would acknowledge all the necessary guarantees to the persons committing a substantive crime, but not to the ones that are trying to make use of the general principles of law, such as the market economy, to their advantage. Hannah Arendt[53] has shown the fearful consequences for democracy of treating citizens and non-citizens as two inherently different subjects of law.

Another corollary relates to the protection of the people belonging to new Member States. Indeed, by no means may we understand the temporary regime envisaged in the system of the Accession Agreements as a permanent derogation from the general and fundamental principles of European law.

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[53] H. Arendt (1951) *The origins of totalitarianism*, new ed. with added preface (1973) San Diego, New York, London, Harcourt Brace Jovanovich.

Chapter VII

The Italian EU Presidencies And The De-Legalization Policy

Carlo Rossetti*

Introduction

The Nordic democracies have much to teach the rest of Europe at this crucial stage of European integration. This is the case especially in the area of freedom of expression and transparency, as well as of the rule of law, as stated in the first Article of the Instrument of Government of the Kingdom of Sweden.

In his introductory remarks to the conference, Joakim Nergelius addressed the key question which we confront today in Europe, namely what kind of Community will emerge out of the tensions and difficulties of the present time. Are we abandoning the respect for legal rules, thereby altering the original inspiration and model of the European integration? Are we in search of new rules that while promoting integration will jointly protect the original

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Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 93–112.

legal and constitutional vision of the founding states? These issues are not currently debated among lawyers, sociologists and political scientists. Herein lies the importance of our symposium.

Joakim Nergelius has taken this approach, pointing to the processes of de-legalization and *constitutionalization*.[1] This approach shapes the context of this symposium. I will here try to take this line of reasoning one step further.

More specifically, first, I will discuss the policy of institution-building and integration and explore the complex outcomes of the historical trajectories of the integration of each nation, especially the eastern European states, into the European Union. Second, I will consider the results of a policy of integration *and* de-legalization both sought by the two Italian prime ministers, Mr. Berlusconi and Prodi and their friend, Mr. Giuliano Amato, drafter of the Constitution, a powerful mediator of Italian domestic politics.

1.

In an *intervention orale* Gil Carlos Rodriguez Iglesias, President of the European Court of Justice, writes

> *En effet, une partie essentielle de tout ordre constitutionnel est la règle de droit, dont la Cour a pour mission d'assumer le respect. C'est d'ailleurs dans la jurisprudence de la Cour que s'est manifestè un début de constituionalisation de l'ordre juridique communautaire.*[2]

Then President Rodriguez Iglesias adds:

> *A cet ègard la situation actuelle n'est pas pleinement satisfaisante. En effet, on peut signaler que le passage des Communautées européennes à l'Union européenne en 1993 n'a pas entrainé à une situation dans laquelle les mécanismes de protection jurisdictionelle variente en fonction des différent piliers. La Cour a comme règle de ne pas revendiquer un élargissement de ses compétences, mais elle ne peut que regretter le developpement de telle disparités dans le controle jurisdictionnel au sein de l'union.*[3]

Nergelius stresses the same critical aspects in his study of EC constitutional law, widening the scope of analysis, adopting a socio-legal view, considering the EC fundamental treaties. He writes:

> *The most striking feature of EC constitutional law, from the spring of 1999 until the middle of 2001, has undoubtedly been the tendency not to lean as much as before on written*

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[1] J. Nergelius, *Reasons why a small country would want to become a member of the European Union* (*taking the Nordic Countries as Examples*), Sonderbruck, publications de l'Institut Suisse de Droit Comparé, 45, Lausanne, 7 et 8 November 2001, 65–76. See also the article "De-legalize it" – On Current Tendencies in EC Constitutional Law, YEL 2002 pp. 443–470.

[2] La Convention européenne, Le secrétariat, *Texte de l'intervention orale de M. G. C Rodriguez Iglesias*, Bruxelles, le 20 février 2003. See also the webpage http://european-convention.eu.int.

[3] La Convention européenne, Le secrétariat, *Texte de l'intervention orale de M. G. C Rodriguez Iglesias*, Bruxelles, le 20 février 2003, 2.

> *EC law, in the treatises or elsewhere. The Commission, the Council of Ministers and of course the Member States themselves have on numerous occasions during the last two years shown by their actions that the wording and literal meaning of the written rules are, in their view, obviously not as important in determining what happens in the EU as they used to be. Instead De-legalize it seems to be the spirit of the day.*[4]

Nergelius delineates a "case history", offering a number of key examples of "illegal" events in 1999–2000. One of the most important, I believe, is the resignation of the Santer Commission and the appointment of the Prodi Commission. The Santer Commission's resignation and Mr. Prodi's appointment are discussed as two distinct phases of a unitary process. What Nergelius conveys to us is that, after the crisis opened by the Commission's wrongdoings and the independent experts report in March 1999, the appointment of Mr. Prodi did actually prevent the debate opened by Parliament and the independent experts on the accountability of the commission powers, under the umbrella of the need to re-establish the credibility of the institution.[5]

It would be difficult to give a different interpretation of Mr. Prodi's request to be appointed in a manner that was not in line with the rules in the Treaties.[6] After the resignation of the old Commission, the governments of the Member States had to start looking for members of the new Commission. According to Article 214, the first step to be taken, then, was to find a new President who should be nominated by common accord and then approved by the Parliament. In April 1999, Romano Prodi was proposed by the Member States as the new President of the Commission, before the Parliament had been heard on the issue. The Governments were to nominate their candidate for President having heard the Parliament on the issue. Thus, the Member States anticipated the entry into forces of the new Treaty Text, an action for which they later got the approval of the Parliament when it approved the nomination of Mr. Prodi (in June 1999, in accordance with the then new text of the Treaty of Amsterdam, entry into force 1 May, 1999).

In early September 1999, the Parliament should approve the Commission as a body. The problem was that the old Commission, despite the fact that it had resigned in March, was actually elected until 31 December. The Parliament then interpreted the vote of approval of the new Commission as covering the period of September until December 1999, at the expiry of which a new vote of confidence for five full years should take place. But the newly appointed

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[4] J Nergelius, *De-legalize it-On Current Tendencies in EC Constitutional Law*, in P. Eeckhout and Tridimas, eds., *Yearbook of European Law*, Oxford, Oxford University Press, 21, 2001–2002, 443.

[5] Committee of Independent experts. *First Report of Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999); *Second Report on Reform of the Commission. Analysis of Current Practices and Proposals for Tackling Mismanagement, Irregularities and Frau*d, vol. VI (1999) par 3.2.2.

[6] J Nergelius, op.cit. p. 452.

President, Mr. Prodi, declared that in that case, the proposed Commission would refuse to serve. Subject to that threat and the crisis it might have led to – for which the Parliament might have been held responsible – the Parliament bowed and approved the new Commission for a period of five years and four months, i.e. until the end of 2004. This decision, as Nergelius points out, was formally quite clearly contrary to Article 214, section 1, according to which the Commission is to be appointed for a period of five years.

2.

Prodi's case is interesting. It casts some light on a constitutional crisis in the EU which has gone almost undetected.

It was a constitutional crisis because what was at stake was the accountability of the Commission power. The Report put forward by the independent experts in March 1999 does indeed clearly suggest that the Santer Commission has committed a number of improper acts and abuses.[7] But since the Commission is elected for five years and was appointed as a whole single body (Article 214), without any possibility for the Parliament to vote on the fate of individual commissioners, there was at this time yet no possibility for the President to force them to resign unless the Commission or the Council would bring such a case before the ECJ (Article 216).[8]

By resigning as a whole on 15 March 1999, instead of facing a new vote of confidence in the Parliament, which might have led to a negative result, the Santer Commission simply prevented a general debate on the accountability of Santer Commission in particular, as well as of the general prerogatives pertaining to the Commission in the EC fundamental law. By resigning, the Santer Commission thus evaded a parliamentary debate on corruption and mismanagement, on the rule of law governing the Commission and the public scrutiny that such a debate would have drawn on the Commission's accountability in Europe. Prodi's appointment then simply closed the debate on corruption and mismanagement, by announcing that he was prepared to reform the structure of the Commission, taking seriously the recommendations put forward by the two committees of inquiry appointed to review the Commission activities and suggest reforms. The crisis, which is one of the most critical in the entire history of the European Community, came to a close with a kind of implicit

[7] See "First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999. A second report from the Group, called "Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", was published 10 September 1999.

[8] Such a possibility was later introduced in the Nice Treaty. According to art. 217 sect. 4, the President of the Commission, having obtained its approval, is able to ask a commissioner to resign.

invitation to Prodi to provide for the necessary changes. With Mr. Prodi's promise to put the house in order, the accurate analysis of independent reviewers failed to take a stable shape in the constitutional debate opened some time later, after Mr. Prodi's access to the Presidency (leading, among other things, to the so-called White Book on EU governance).

Paradoxically enough, then, the solution of a crisis which had challenged the Commission's integrity and accountability to the rule of law, and the grounds of the European constitutional architecture, was entrusted to the very same authority whose domain had come under scrutiny for nepotism, corruption and mismanagement. This could be seen as a move which has transformed a constitutional problem, addressed by both Parliament and the independent experts, into a mere administrative procedure, breaking the fundamental rule of law, at the core of constitutional traditions, law of torts, and legal doctrine epitomised by the principle *nemo judex in sua causa*.

3.

The years following the completion of the single market program have seen a marked decline in the volume of primary legislation, that is, of new legislative initiatives, adopted by European institution, as demonstrated in Figure 1.

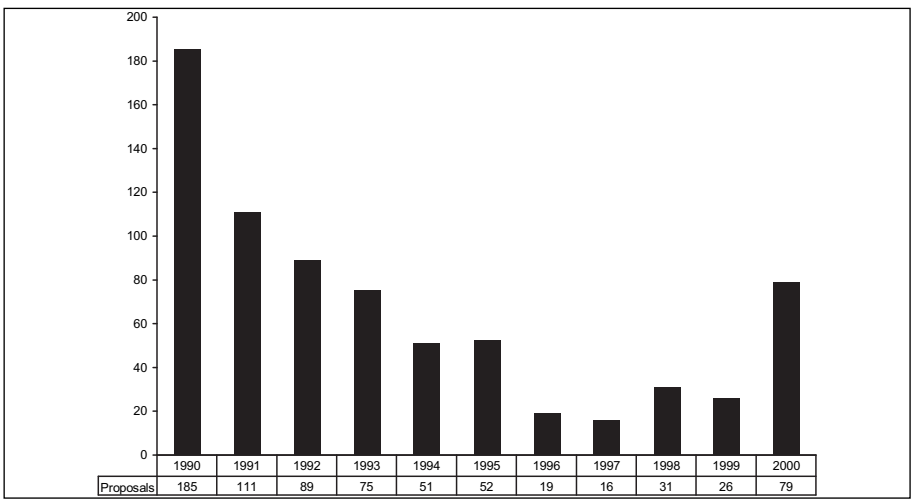

Figure 1. Proposals for Primary Legislation Introduced by the European Commission[9]

[9] Sources: Reinforcing Political Union and Preparing for Enlargement, Commission Opinion for the Intergovernmental Conference 1996, 1995, p. 87, for years 1990–1995; COM (95) 512 final for year 1996; SEC (96) final for year 1997; for year 1998; http://europa.eu.int/comm/off/work/1999 http://europa.eu.int/comm/off/work/2000 for year 2000.

The shift is far from being merely formal. It suggests that important decisions are taken by other actors – technocrats, be they bureaucrats or scientific experts, instead of politicians – and according to procedures that do not necessarily allow for the degree of transparency or citizen participation required by a democracy.[10] In Dehousse's words, Europe is therefore confronted with a phenomenon akin to the emergence of what some American authors have described as a technocratic fourth branch of government.[11] Similarly, US administrative law has struggled to define the proper status of federal agencies, whereas European technocratic structures have a clear multilevel character, given their role as a connecting device between the EU and national administrations. Notwithstanding these differences, the growing importance of technocratic governance has given rise to serious legitimacy concerns in both cases. It has also represented an analytical challenge for legal systems that were accustomed to regard administrative decision-making as necessarily constrained by the will of the legislator.[12]

Accounts of committee members suggest that their voting tends to be a rare event and that the Commission – which normally chairs committee meetings – exerts considerable influence over their work. In its proposal for a new framework decision on Comitology, the Commission deliberately omitted any provision aimed at enhancing the transparency of Comitology proceedings.[13] The view of committees, frustrating the principle of transparency, has received more importance in recent years.[14] Furthermore, the mushrooming of specialized European agencies is one of the most interesting developments in the functioning of EU bureaucracy in the post-Maastricht years. The Commission is by far the largest sector of the EU administration; in 1999, its number of authorized staff totalled 21,438 persons (including temporary agents) compared to 4,102 in the European Parliament and 2,671 in the Council of Ministers. Between 1995 and 2000, Commission staff, including clerical and logistical support staff as well as translators, increased from 15,836 to 17,087. In roughly the same period, ten European administrative

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[10] R. Dehousse, *Misfits: EU law and the transformation of European governance*, Jean Monnet Working Paper 2/02, European Union Jean Monnet Chair.

[11] Strauss, *The Place of Agencies in Government. Separation of Powers and the Fourth branch of Government*, 84 Columbia Law Review, (1984) 573–669.

[12] R. Dehousse, at 6; R. Stewart, *The Reformation of American Administrative Law*, 88 Harvard Law Journal, (1975) 1667–1813.

[13] Article 7 of the *Council Decision* 1999/468 of 28 June 1999.

[14] Curtin *Democracy, transparency and Political participation*, in V. Deckmyn and I Thomson, eds, *Openness and transparency in the European Union,* 1998, 107–120. See also Carl Fredrik Bergström, Comitology – Delegation of Powers in the European Union and the Committee System, Oxford 2005.

agencies with a total staff of 1,045 were created. These covered areas from the environment or health and safety at work, to racism and xenophobia and reconstruction in Kosovo. The establishment of agencies for food safety, aviation safety, maritime safety and other issues is currently considered. The Commission has authority over specialized agencies, and Mr. Prodi made a plea in favour of the necessity of preserving it.[15]

The provision on review of legality in the above-mentioned framework decision has been controversial.[16] The initial draft regulation for the decision stipulated that the legality of the acts of an executive agency could be reviewed under Article 20 on the same conditions as the act of the Commission itself.[17] Decisions of agencies could then, as a matter of principle, be reviewed under Article 230 ECT. The ECJ has read article 230 broadly, so as to facilitate review of the acts of the EP and the Courts of Auditors, holding that the rule of law demanded that their actions should be susceptible to legal control.[18] The EP argued that the executive agencies were the Commission's responsibility, that the Commission should be legally responsible under Article 230 for their activities and that it should monitor the legality of every agency's action.[19] The final version of the Regulation is a compromise between these two views: the initial legal responsibility lies with the agency, and the legality of its acts can be reviewed by the Commission, with a further review of the Commission by the ECJ under Article 230 if the commission rejects the appeal. So, article 22(1) of the Regulation provides for a novel form of internal review of agency decisions by the Commission. An act of an executive agency that injures a third party can be referred to the Commission by any person directly and individually concerned or by a Member State, for a review of its legality. The Commission must then take a decision within two months.

The regime for internal monitoring by the Commission is complemented by recourse to Article 200 ECT. Thus, article 22(5) states that an action for annulment of the Commission's explicit or implicit decision to reject an administrative appeal may be brought before the ECJ in accordance with Article 230. Article 22(5) is framed in terms of an annulment action where the

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[15] R. Prodi, Speech/00/352 of 3 October 2000.

[16] P. Craig, *The Constitutionalization of Community Administration*, Jean Monnet Program, Working Paper 3/03.

[17] COM (2000) 788 final Art. 21.

[18] Some of the most well-known cases in this respect are Les Verts v. Parliament, 294/83, ECR 1986 p. 1339 and C-170/88, Parliament v. Council (Chernobyl), ECR 1990 I p. 2041.

[19] *Report of the European Parliament on the Proposal for a Council Regulation laying down the Statute for Executive Agencies* A5-0216/ Amendment 12.

Commission rejects the administrative appeal. It seems therefore that the executive agency itself has no such recourse where the Commission upholds the appeal. Complaints against executive agencies are reviewed by the Commission, in accordance with the rules on the legality of agency acts. A patent conflict of interest arises here which could paralyze the proper exercise of judicial review.

The agencies being an instrument of the Commission, the difficulties to review them properly determines, in President Rodriguez Iglesias' words, a

> "*disparité dans le controle jurisdictionnel au sein de l'Union*", or even "*Une situation das laquelle les mécanismes de protection jurisdictionelle varient en fonction des différent piliers*".[20]

The executive power of the European Community is thus not transparent and somehow secret, which goes against the normal, horizontal arrangement of the legal protection in the Community.

4.

It is in this context of de-legalization that Silvio Berlusconi, the Italian prime minister (formally president of the council of ministers), and leader of the right-wing coalition, *La Casa della Libertà*, took over the presidency of the Union in the second half of 2003. Mr. Berlusconi is well known for the number of judicial proceedings he has faced over the years, the most important of which is the *All Iiberian* case.

Milan prosecutors needed access to the *Fininvest* papers in London, denied by Mr. Berlusconi. He and others were alleged by the Italian prosecuting authorities to be involved in a huge fraud, whereby at least Lire 100 billion (about £51 million £ sterling) had been surreptitiously removed from Fininvest and used for criminal purposes. Prosecutions were already afoot against Mr. Berlusconi respectively for bribing Revenue inspectors (Proceeding No. 12731/94) and for making illicit donations of Lire 10 billion to Mr. Craxi, the former Prime Minister and Leader of the Italian Socialist Party (Proceeding No. 9811/93). Such donations were illicit because they were made without proper authority of *Fininvest*'s Board of Directors and without proper records; Italian law requires transparency of political payments both from donors and recipients.

The applicants and others were also investigated in relation to other offences involved in this overall fraud, notably offences of false accounting

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[20] Rodriguez Iglesias, supra at 2.

within the *Fininvest* Group whereby the source of these large sums was concealed.[21]

The Italians requested assistance in obtaining documents relevant to the allegations of false accounting, in particular documents held by C. M. M. *Corporate Services Limited* (CMM) at an address in Regent Street, London. CMM is a company founded by Mr. David Mills, a solicitor and a partner in Messrs. Withers. The request was referred by the Home Secretary to the Director of the Serious Fraud Office (the SFO) under section 4(2A) of the 1990 Act (introduced by amendment by the Criminal Justice and Public Order Act 1994).

The Milan prosecutors, Colombo, Boccassini and Greco, had been checking the *Fininvest* secret offshore banking system.[22] They believed that it had financed political party corruption in Italy, corruption of the tax police inspectors,[23] and illegal acquisitions of companies in 1991. The prosecutors suggested that the Italian *Socialist Party*, and its leader Craxi, received billions of euros, as illicit payments, during the critical decades of Berlusconi's ascent as a media tycoon,[24] which eventually led him to high office. What was at stake was the mysterious financial system of bank-holding companies created to come in control of national and perhaps European politics. Money-laundering means transmitting illicit funds through the banking system in such a way as to disguise the origin and ownership of the funds, usually in collusion with third parties. The enormous flow of resources raises suspicions on the sources from which they come. Usually, companies cannot count upon resources of such a massive scale, even if they usually practice kick-backs.

The flow of billions of euros from secret offshore financial companies into politics is a terrible menace to the existence of democracy in Italy and Europe.[25]

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[21] High Court of Justice, Queen's Bench Division, (Divisional Court) Co-1540–96, *Application for leave to appeal to the House of Lords, R. v. The Secretary of State for the Home Department ex parte Fininvest* Spa, 25 October 1996.

[22] A Commission of Inquiry established by the French Parliament to investigate on the Mafia does detail the background of this system and its history. See F. D'Aubert, *L'argent sale. Enquete sur un krasch retentissant*, Paris, Plon, 1993. M. D'Aubert has been the president of the Parliamentary Commission and Finance Minister.

[23] *Proceeding No. 12731/94.*

[24] *Proceeding No. 9811/93.* Such donations were illicit because they were made without proper authority of *Fininvest's* Board of Directors and without proper records.

[25] See, for instance, R. H. Lord Justice Bingham, *Inquiry into the supervision of the Bank of Credit and Commerce International*, Return to an Address of the Honourable the House of Commons dated 22 October 1992. *Bcci v. Morris*, Chancery Division, (2000) BLCC 263, Hearing Dates: 13 October 2000, 18; USA before the SEC, File n. 3-89-10, *Sec v. Fiorini*, January 3, 1996. Fiorini was tied to Mr. Berlusconi and to BCCI.

It should be noted that, according to the Milan prosecutors, *Fininvest Spa* tried to illegally acquire a number of communication companies and publishers.

The *Law Lords*, ruling against the Home secretary, stated that Mr. Berlusconi's *Fininvest Spa* stood on a *gigantic fraudulent system.* The *Law Lords* upheld the charges brought by the Milan judges.[26] The *Fininvest* probes met with enormous difficulties. Eventually, the Berlusconi cabinet managed to change the law defining the crime of falsification of accounting records,[27] the creation of companies to facilitate and disguise it, making undocumented loans, fictitious transactions, regulatory breaches, pay-offs to employees, misuse of deposits, deceptive routing of funds and false confirmations.[28] What the Government did was to write them off from the Italian criminal code. In September 2005, the *All Iberian* trial, under way at the Milan court, has come to an end. The trial judges write that they cannot judge on the alleged *Fininvest*'s crimes because they cannot be categorized and recognized legally as such according to the new law, enacted by the Berlusconi Government. This is an *abolitio criminis*, as the advocate general Mr. Kokott writes.[29] But this does not mean that Berlusconi was acquitted. The judgement does not consider the acts which would have been punished under the previous Italian law and for which the British magistrates gave a search warrant to the *Serious Crime Office* in London, under the provisions of the *European Convention on Mutual Assistance in Criminal Matters 1959* (the 1959 Convention), implemented in the United Kingdom by the Criminal Justice (International Cooperation) Act 1990 (the 1990 Act). The *Law Lords* ruled that the offence of making an illicit contribution to a political party, committed with the intention of *inducing a requesting government to change its policy*, is "a political offence" within the meaning of Article 2 of the *European Convention on Mutual Assistance in Criminal Matters 1959.*

The policy that the EU Italian Presidency and the President of the European Commission jointly deployed could be evaluated in the context of the constitutional difficulties I have described above. Although "President" Berlusconi

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[26] Lord Justice Simon Brown & Mr. Justice Gage, *In the manner of application of judicial review, Regina v. Secretary of State for the Home Department, ex parte Fininvest Spa*, Queen's Bench Division, Royal Courts of Law, Wednesday. 22 October 1996, CO- 1540–96. C. Rossetti, *What the Law Lords say:*

[27] Presidential Decree of 11 April 2002 and Decreto legislativo n. 61/2002, Official Gazette of the Italian Republic, 15 April 2002, n. 88, at 4.

[28] Article 2640 of the Italian Civil Code.

[29] ECJ, Conclusioni dell'avvocato generale, Joined Cases C-387, C-391/02, C-403/02, Silvio Berlusconi e altri, (Domanda di Pronuncia Pregiudiziale Proposta dal Tribunale di Milano e dalla Corte di Appello di Lecce), 14 October 2004.

and "President" Prodi are the leaders of two different political alignments, Mr. Prodi being a leading representative of the coalition of the opposition center-leftwing parties, they have in fact worked harmoniously to achieve the same target: the consolidation of the prerogatives of the President of the Commission and the opening of the Union to new Member States.

Having weakened the constitutional protections of fundamental rights, the first being accountability to the rule of law, and the right to an independent and impartial judge, the way was opened to push forward a policy of de-legalization. A design that contemplates a weak review system, unarmed before the old and new powers.

In fact, the constitutional problems raised by Mr. Prodi's accession to office, and the advice given by the Experts Committees, have never been addressed by the Presidency of the Council of Ministers of the EU. The consolidation of the prerogatives of the President of the Commission and the opening of the Union to the newcomers, Cyprus, Slovakia, Slovenia, Czech Republic, Malta, Estonia, Hungary, Latvia, Lithuania and Poland are closely interwoven moves. Indeed in an EU with 25 Member States, the de-legalization policy could be devastating.

A system with a weak legal review leads to the supremacy of presidential powers, which tends to encroach upon the judiciary. The President of the Commission moves to consolidate the executive powers that tend to shield the executive from an effective legal review.

The new Member States are transitional democracies.[30] Most of them are building or rebuilding their government institutions and the rule of law on the ruins left by communist rule.[31] In the course of this process, especially in the critical years in the immediate aftermath of the downfall of the Soviet Union, a number of new political and financial entrepreneurs have come to the fore, establishing commercial companies, financial services, especially banking, media, both the press and television channels. The gray and black economies provided the foundation for those individuals to secure their power-bases in the early 1990s. Many of them worked as *tsekhoviki*, underground entrepreneurs, during the Soviet era, or Black Millionaires with capitals to

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[30] R. Teitel, *Transitional Democracies*, Oxford, Oxford University Press, 2000. V. Tismaneanu, *Reinventing Politics. Eastern Europe from Stalin to Havel*, New York, Free Press, 1992.

[31] A. Janos, *What was communism? A retrospective in comparative analysis*, " Communist and Post-Communist Studies", 1996, 29, 1, 1–24. B Nunberg, *The State after Communism. Administrative Transition in Central and Eastern Europe*, World Bank technical Paper, n. 466, 1998.

invest in a plethora of business opportunities now available.[32] The chaos of the immediate aftermath of independence, in which the ensuing power-vacuum left by a weakened state was no longer able to preserve order and impotent in its ability to create and implement appropriate legislation for the revolutionary economic changes, provided fertile ground for organized crime. The complex banking wars of 1993–95 involved some of the leading political figures of the day, as well as the top echelons of the security and law enforcement agencies. The myriad and often bewildering relationships between the criminal underworld new business and officialdom helped simultaneously to shape and stymie Latvia's reforms.[33]

In the post-communist countries with the less favourable starting-point, like Romania, Bulgaria, Albania, impediments and resistance to change have proved formidable. High personalization of exchange relations, vested interests, systematic rule-breaking and bureaucratic inertia have blocked reforms. There are indicators that the level of corruption is raising in most eastern Central European states since the fall of communism, with Romania and Bulgaria as leading examples.[34] This consideration is corroborated by the weakness of the system of political representation,[35] which could facilitate the rise of criminal entrepreneurs to public office and their ascent to a dominant position in markets.[36] The democratic institutional threshold has actually, in my view, not been crossed in any of the former communist countries.

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[32] P. Rawlinson, *Russian Organized Crime and the Baltic States*, ERSC "One Europe or Several?" Working Papers 4144, 38/01. Just to give a few examples, Estonia became a haven for the black trade in armaments. The burgeoning of organized crime in Latvia followed a similar pattern to that in Estonia.

[33] The economic and political upheavals witnessed in Estonia and Latvia reverberated throughout Lithuania, that was particularly sensitive to illegal transit routes bordering as it does the Belarus and the Russian enclave of Kaliningrad. Figures by the Prosecutor's General Office in 1993 estimated that there were approximately one hundred criminal groups in Lithuania, of which some are well-armed and about thirty of which had international links. See United Nations Development Program (UNDP) *Lithuanian Human Development Report*, 1998, Vilnius 1998.

[34] M. Rice, *Public Administration in Post-Socialist Eastern Europe*, "Public Administration Review", 52, 2, 1992, 116–25. J. Heinrich, *Toward a Cultural Theory of Transition. The Strange Architecture of Post-communist Societies*, Collegium Budapest Workshop Series, N. 7, 1999, 121–125.

[35] B. Crawford, (ed.) *Markets, States and Democracy. The Political Economy of Post-communist Transformation,* Boulder, Westview Press, 1995; J. Hall, *After the Vacuum: Post-communism in the Light of Tocqueville*, in B. Crawford ed., *Markets*, 82–100. R. A. Dahl, *Pluralist Democracy in the United States. Conflict and Consent*, Rand McNally & Co., Chicago, 1967, 297.

[36] L. Stefan Scalat, *Pacts in Conflict in Post-communist transformation. In Search of a New Social Contract,* in *A Captured Moment in Time,* IWM Junior Visiting Conference, vol. 10, ed by Anne Rubel and N. Vucevick, Vienna, 2000.

The European Union is thus facing the dramatic choices that Italy had to take in the decades following the national unification, after 1860. The unification *from above* incorporated the southern local communities, controlled by cliques of entrepreneurs having the monopoly of violence, the *Mafiosi*, as violent power-brokers.[37] Following the waves of extension of electoral suffrage, they moved from the rural regions to the cities, to urban markets and building areas as well as into the organization of the public administration and financial services. They came in control of the local political markets and sent their own men to the Italian Parliament.[38] This is the process which has been described as the *politicizazione* of *the mafia.*" *Prima c'era la mafia. Ora c'e' la politica.*" ("Before it was *mafia*; today it is politics.") This opaque and ambiguous statement was made to Anton Blok by a local Sicilian man resident in Palermo in the 1960's, employed by the Agrarian Reform Board. According to Blok, the rise and development of the Sicilian *mafia* must be understood as an aspect of a long-term process of centralization and national integration of Italian society.

This process altered the centre of gravity of the political system, setting forth an irreversible historical process which brought the Mafia well into the system of government (with tragic results). By giving equal vote to the southern representatives, and establishing a state from above, rather than a federal order, the founders of the state, a learned and cosmopolitan élite, decried its death sentence. The political transformations ushered in by the extension of suffrage brought about an utter change of the moral collective identity of the ruling elite. Paradoxically, this phenomenon was then accompanied by the gradual weakening of the commitment to the basic values and principles underpinning the institutions of modern Constitutionalism.

When referring to the European integration, one Lithuanian prosecutor was reported to wearily remark *It used to be Moscow*, *and now it is Brussels*. His comment applies to Italian history very well. One could say: *It used to be Palermo and Rome and now it is Brussels*. The Community enlargement may in fact even work against the processes of consolidation of democracy and even undermine the creative energies in the post-communist societies. The heirs of the communist secret system of government, organized exactly like the Mafia, as Varese aptly writes, could become the new political entrepreneurs, the new constitutional players in Europe. Avoiding this outcome is one of the dramatic challenges the EU enlargement addresses.

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[37] A. Blok, *The Mafia of a Sicilian Village, 1860–1960. A Study of Violent Peasant Entrepreneurs*, Oxford, Basil Blackwell, 1974. See also Federico Varese, *The Russian Mafia: Private Protection in a New Market Economy*, Oxford University Press, 2001.

[38] C. Rossetti, *Constitutionalism and Clientelism in Italy*, in L. Roniger ed *Democracy, clientelism and civil society*, Boulder, Lynner Rienner Publishers Inc., 1994, 87–104.

It does not come as a surprise, then, that Raymond Kendall, chairman of the OLAF supervisory committee, heard by the House of Lords on 24 May 2004, has recommended that the law enforcement function that is working within the Union should be totally revised.[39] Furthermore, as Mr. Kendall himself suggests, the investigative bodies, like OLAF and EUROPOL, should come under judicial supervision. But at the present they are not, which is an alarming situation. It is an aspect of the de-legalization policy that the Prodi Commission has pursued, in fact, giving to the executive a prominent power over investigations.[40]

5.

It is interesting that the Italian President of the EU, Mr. Berlusconi, and the President of the European Commission, Mr. Prodi, together with Mr. Amato, one of the drafters of the constitutional charter,[41] insisted so keenly upon this

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[39] House of Lords, Minutes of Evidence Taken Before the Select Committee on the European Union, (Sub-committee E), *Strengthening OLAF: Inquiry in the European Anti-Fraud Office*, Mr. R. Kendall, Evidence heard in public. Wednesday 19 May 2004.

[40] In Kendall's own words: *The major problems that OLAF has had, and we as a Committee have seen, over their insistence, is the reclamation that are made by people who criticize the way in which OLAF does not respect simple things that we would all respect in terms of interviewing suspects and this kind of thing, and all the complaints, I have to say objectively, many of them are justified. For example, there is the recent case of the journalist. The OLAF people will say if you talk about this journalist that they had passed information to the Belgian judicial authorities and the Belgian judicial authorities acted on the information in the way they did, and they acted in a pretty high-handed way by going along and arresting this guy and keeping him in custody for 11 hours with no access to a lawyer, seized all his records, his computers and everything else, and you have to say there must have been some pretty strong information for them to have reacted like that, but when we finally saw last week the information that was actually sent at one and the same time to the Belgian authorities, who acted upon it, to the German authorities in Hamburg, who did not, it was purely on the basis of hearsay evidence from an informant, one informant, who happened to be in one of the public relations offices of the Commission before he was sacked. Any normal person would have to say that somewhere along the line OLAF were probably trying to get back at this man. An interesting thing about it as well – and I can say this too – is that OLAF has an obligation to tell the Committee before it refers anything to a judicial authority. They came to us in January and said, "This is highly confidential. We would prefer it, if you would allow us, to tell you next time as opposed to this time," but it was very clear to me, being the suspicious person that I am, that there had been obviously some agreement between the magistrate in the OLAF office from Belgium and the magistrate who was going to receive the information from OLAF, and that there was going to be a search warrant.*

[41] G. Amato, *From Nice to Europe,* Jean Monnet Lecture, European University Institute of Florence, Florence, 2000.

agenda: 1. the integration of the post-communist states into the EU: 2. the removal of any qualified majority voting in Parliament 3. the parliamentary election of the President of the Commission. Mr. Berlusconi did not even hesitate to announce the imminent entry of Russia into the EU.[42] He insisted on the imminent entry of Romania and Bulgaria. The newcomers, all marked by weak and shaky legal institutions, could form a powerful coalition. More importantly, perhaps, Russia shows very little respect and understanding for the human rights which have given birth to the new Europe. Be it enough to mention that, in Moldova, annexed by the Soviet Union after the Molotov-Ribbentrop Pact, Russia still maintains military bases regardless of protests from Moldova, the OSCE and the European Union. To this day Russia maintains that Estonia, Latvia and Lithuania were never occupied by the Soviet Union. In August 2004, Russia refused to apologise for standing by, just outside the city of Warsaw, as the Nazi soldiers crushed the uprising of 1944. Worse yet, Russia refuses to apologize to the victims of communism. The crimes of communism are not condemned.

The three policy guide-lines proposed, and actively promoted by the Italian Presidency, could, if taken together, give a powerful blow to the European legal order. They may even be envisaged as a perfect de-legalisation plan, opening the way to the political ascent of secret societies, shielded behind executive powers, controlled by coalitions of the new-comers with States like Italy with a strong influence also in the EU parliament. The present and historical identity of the EU would then be shattered in a decade.

As against this background, the Italian Presidency has surely done what it could to ensure that judicial power remains confined within its traditional scope, unarmed before the new powers: the media and financial systems, and political corruption. The result is a limited judicial autonomy and a fundamental constitutional unbalance, in favour of the executive and legislative branches, that the EU should try to overcome.

This hostility to the rule of law has serious outcomes. The Italian Presidency has done everything in its power to impede the adoption of more effective measures against organized crime, especially in the field of co-ordination of investigation and prosecutions of complex, dangerous crimes. Measures that the judges have been urging for years have not been introduced. This de-legalization policy has given a blow to judicial independence and efficacy in the investigations touching on fraud, money-laundering, terrorism, corruption and security, thus putting Europe at serious peril.

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[42] "*I'm acting as President Putin's defense lawyer here, even though he hasn't asked me to*", said Mr. Berlusconi at a joint press conference between the two in November 2003, praising the Russian President's actions in the breakaway republic of Chechnya – although they have been widely condemned.

6.

It is particularly interesting that these de-legalization policies are closely associated with the plan embraced by Berlusconi, Amato and Prodi that would shift the centre of gravity of the Union by introducing their voting system. In a sense, it is a manoeuvre against accountability and the rule of law.

It is in this context, on 1 July 2003, that Italy took over the Presidency of the European Union. It was expected to play a key role in the formulation of the EU Constitution, as Mr. Berlusconi himself had announced. As of July 2003, Berlusconi and Prodi came to hold the two most powerful posts in the EU.

The Italian Presidency of the EU did surely not work to consolidate the legal architecture of the Union.

According to the former EU Commissioner Mario Monti, the Italian Prime Minister, Berlusconi, had worked against his efforts to check international monopoly powers and secret monopolies, anti-competitive forces, emerging in that arena and to keep markets open, especially in the new media sector. Incidentally, one of the allegations by the Milan prosecutors is that Mr. Berlusconi was a party of an international financial secret scheme. Mr. Monti claims that Mr. Berlusconi in 1992 and then the Italian EU Presidency did not endorse his IPO project providing safeguards against hostile take overs in the Union,[43] which means that secret networks can come in control of companies. Italian, and Union markets, could then be at the mercy of players pursuing criminal and other illegal projects, acquiring an European identity, then being free to move in Europe. In this context, the ones who would benefit most would be the illegal associations or networks of post-communist Europe, working together with the international crime families, as judicial studies confirm. These networks would be unfairly privileged in the competition in markets, including political markets, open to corruption, which needs a veil of anonymity to work. This is especially important in the new media markets, a province where Mr. Berlusconi has many interests. Tracking and targeting anti-competitive behaviour in emerging markets is a clear priority, for two main reasons. The first is that new markets are of key importance for the development of the European economy. Their unhindered growth is an essential condition of Europe's ability to stand its grounds in increasingly internationalized markets. Building a knowledge-based society, as set out in the Lisbon strategy, depends heavily on the vigour of competition and innovation.

It is in this setting that the Italian presidency's failure to provide this guidance comes dramatically to light.

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[43] M. Monti, *All'Italia non conviene favorire i potenti. Germania e Francia non ricambieranno*, "Corriere della Sera", Friday July 30, 2004, 3.

The man who actively opposed Monti's project is Mr. Buttiglione, then minister for European Affairs in Berlusconi's cabinet. Buttiglione is one of Berlusconi's closest associates, a political philosopher, with an uncertain intellectual profile, a leader of the conservative and populist movement *Comunione e Liberazione*. He was designed by Berlusconi as Justice Commissioner, but in the fall of 2004, the EU Parliament opposed and rejected his nomination, thus opposing the message that de-legalization policy should go on.

The Italian presidency's policy is well documented by a recent and crucial controversy. I refer to the decision taken on 25 November 2003 at the ECOFIN ministers meeting, by Germany and France, to break the stability and growth pact (SGP) regarding the deficit procedures, a move that changed the nature of budgetary surveillance and the Commission role in budgetary surveillance. The Commission challenged this decision before the European Court of Justice, who annulled the decision taken by France and Germany and ruled that was illegitimate, breaking article 104 EC (Regulation EC) N.1467/97 and the Stability Growth Pact Resolution(SGPR).[44] But the Luxembourg judges also said that Member States have a certain amount of discretion in applying the Stability Pact and rejected the Commission's request of further budget cutbacks.

The Pact is a mechanism designed to constrain the Council to oblige the Member States to take the necessary measures to correct excessive deficit. Germany and France objected that the deficit parameters should be changed in accordance with the present problems and contested the Commission's interpretation of the Pact and its decision to sanction the two Member States, as the Luxembourg Court maintained.

The SGP was conceived and signed to guarantee a monetary stability to the Member States and the Union's citizens in the difficult years of the transition to the Euro. But since then the recent economic and financial trends have changed the situation. A prolonged international recession and the unprecedented rise of oil-prices did require new measures, dictated by the international economy, by the global flow of prices, goods and jobs. All members agreed that the stability pact was a temporary measure and that a new legal framework would be necessary after the transition period and the consolidation of the Euro, which has now been achieved. Indeed, the Euro-zone economy is still growing in August 2004. But the new and by now urgent steps needed a concerted efforts of Parliament, the Commission, the Council and the Member States, as the ECJ remarks. To curb excessive deficit exceeding 3% EU limit, Germany is trying to restructure labor and product markets, as well as employment benefits, while unemployment remains 9%. In the

[44] C–27/04, Commission v. Council, ECR 2004 I p. 6649.

second week of August 2004, an estimated 40,000 Germans took to the streets in Dresden, Magdenburg and Berlin to protest against a law that will cut unemployment benefits next year as an incentive to get people back to work.[45]

The Italian Presidencies could have played a key role co-ordinating and promoting the search of a new and more flexible framework within the existing legal compact. For many reasons, the Italian presidency did almost nothing to guide in this dispute between the Council and the Commission. It showed no interest in a legal framework which would give proper consideration to the parties and their reasonable interests. Mr. Berlusconi played none of the legal functions and duties pertaining to the presidential function in the EU. One reason for this is that he does not particularly like legal frameworks in general. But in this case, his lack of action was a blow delivered to the new Europe architecture of and the mutual understanding among the branches of government, and the Member-States, on which the Union rests. On the other hand, the Commission, and Mr. Prodi, unable to exercise an effective leadership, insisting that Germany and France should be sanctioned, not mentioning the others, opened a political and legal dispute at the core of the EU's institutions. As the Luxembourg judges write, both the Council and the Commission should have acted jointly, within the legal framework of the SGP, exploring an efficient solution to the very complex problems.

Again, the Italian Presidency thus inflicted another *vulnus* upon the rule of law which will have serious consequences. Europe is a community of law and changes have to be debated and decided through clear, transparent, community procedures. The efficiency of economic governance has suffered from these recent episodes. The two presidents apparently joined forces to impede a concerted reconsideration of the Stability Pact.

Mr. Berlusconi and Prodi apparently harbour a similar hostility towards the core European nations. Prodi even lamented their *arrogance* in a public meeting in the fall of 2003, celebrating his decision to return to Italian politics in 2004, as a national coalition leader. But he did not offer any proposal regarding the key questions of the specific historical conditions in which the Member States find themselves, their different needs and the policies necessary to promote both growth and stability. This is a critical question for

[45] After an emergency meeting with key economic advisers, Chancellor Gerhard Schröder conceded to watering down the law slightly. The reform will replace earnings-indexed benefits for the long-term unemployed with flat-rate payments, resulting in stable benefit cuts for about a third of those affected. This measure has sparked outrage in the six east German Laender, where unemployment stood at 18.5 per cent last month, more than double the level in the east. B. Benoit, *Schroeder moves to build bridges with the east*, " Financial Times", August 31, 2004.

Europe's future, which was openly addressed by the European Court of Justice recommending that structural and historical specifics should be carefully taken into account and balanced in European policy-making.

To take an example, Portugal's problems and needs are different from Germany's local problems. Understanding history is the key to the EU's future. The Presidency and Commission duty and function is to provide a legal framework for co-operation, stability and innovation through deliberative procedures. Instead, the Italian Presidency policy raised feelings of hostility and the lack of trust between the largest members of the Union and the small states, between east and west.

Concluding Remarks

The core of what we may today call *Western Europe*[46] is the result of the interplay of ideas, interests and institutions, interrupted by years of wars and destruction, that has been developing over the centuries. It is the key premise of the European founding charter: legality, peace, co-operation, justice, solidarity.

If successful, the strategy of the Italian presidencies would give Italy a prominent position in the new European parliament and, most importantly, a dominant power in the management of agencies. The regulatory policies and the culture underpinning them, and constitutional democracy standing on them, could be undermined.[47]

The costs of this operation would be immense. If successful, this policy would shift the cultural and moral center of the European Union toward the regions where the rule of law and the influence of the great constitutional traditions is either weaker or ineffective or has never taken root.

It would be lethal for the European dream renouncing to pretend that the newcomers put their house in order, regarding transparency, the entrenchment of the rule of law, the institutionalization of the procedures and safeguards of fair trial and an independent and impartial judiciary.[48]

De-legalization could also bring about the decline and fall of the original European conscience, or collective moral identity, of l'*ésprit des lois*, the *Bildung* ideal, which have inspired the history of constitutional democracies and provided the foundations for the new Europe.[49]

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[46] F. Chabod, *Storia dell'idea d'Europa*, Bari, Laterza, 1958.

[47] O. Zetterquist, *A Europe of the Member States or of the Citizens? Two Philosophical Perspectives on Sovereignty and Rights in the European Community, Lund, 2002.*

[48] R. Stevens, *The English Judges. Their Role in the Changing Constitution*, Oxford and Portland, Hart Publishing, 2002.

[49] O. Zetterquist, *op.cit.*

It is troubling that the EU presidency office has been held by an entrepreneur under trial, charged of judicial and political corruption, as well as serious commercial and financial frauds. The legal safeguards of the integrity of the EU government have proved to be inadequate. It is a terrible *vulnus* inferted to the legal values and institutions of the Union and to those Member States who still nourish a sense of public dignity. Very few voices in the national judiciaries and parliaments, or in the Union Parliament, have dared to address the matter. (Judge Garzon of Madrid is a clear exception.)

A minimum request in order to avoid this future development would be that the European constitution should enshrine a provision stating that elected officials, under trial, should resign from office, as the Basic Law of Israel does.

Section 3

Chapter VIII

The EU Constitutional Treaty and the Member States: Reflections on a Quasi-Federal Polity

Takis Tridimas*

Introduction

The Treaty establishing a Constitution for Europe[1] provides the latest search for a European constitutional identity and marks, overall, a successful response to the Laeken agenda from 2001. There is, however, no denying that, at the beginning of the new millennium, the European Union finds itself in a constitutional turmoil. Over the last twenty five years, there have been eight

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[1] The Treaty establishing a Constitution for Europe was adopted by the Convention on the Future of Europe on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome on 18 July 2004. It formed the basis of negotiations in the Inter Governmental Conference, which began under the Italian Presidency on 4 October 2003, but the European Council held in Brussels on 12 December 2003 failed to reach agreement

Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 115–138.

major constitutional revisions, which include four waves of accession, bringing the total number of Member States to 25,[2] and four substantive revisions of the founding treaties.[3] There is no nation state which has had its constitution revised so frequently in such a short period of time. This constant need for revisions and adjustments reflects the quest for optimal structures, procedures, and rules to make the project of European integration workable and sustainable, but also, equally importantly, the quest for Union legitimacy. This paper discusses selected aspects of the Constitutional Treaty and the process of constitutional adjudication focusing on the relations between the EU and its Member States. It begins by tracing the tendency towards the formalisation of EU law and discusses the values of the Union, as laid down in Article I-2 of the Constitutional Treaty. Then, after a brief reference to the principle of supremacy, it reviews recent case-law on EU competence and subsidiarity and examines the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution. There is no attempt to be exhaustive but rather to highlight trends and developments.

1. The Gradual Formalisation of EU Law

One of the most striking features in recent years has been the trend towards the formalisation of Community law. This refers to the tendency to provide for the express recognition and entrenchment of rights in Treaty texts. There has been an increase in the adoption of legislative instruments, principally of

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on the final text. The major stumbling block proved to be the provisions allocating voting rights in the Council of Ministers. Following some amendments, it was adopted by the European Council on 17/18 June 2004 under the Irish Presidency. Under Article III-447(1) the Constitution cannot come into force unless it is ratified by all Member States in accordance with their respective constitutional requirements. As of the end of June 2005, it has been ratified by ten Member States but France and Netherlands failed to ratify it as it was rejected in referenda held on 29 May and 1 June respectively. Both countries rejected the Constitution decisively (France by 54.68% and the Netherlands by 62.8%). The European Council of Luxembourg held on 16/17 June 2005 called for a period of reflection. Some Member States have declared their commitment to continue with the ratification process. It is however very difficult to imagine how the Constitutional Treaty could be adopted in its present form. For the text of the Constitutional Treaty, see OJ 2004 C 310 (16 December 2004). For a discussion, see inter alia, Ziller, La nouvelle Constitution européenne, Editions la Découverte, Paris, 2004; D. Triantafyllou, La Constitution de l'Union européenne, Bruylant, Brussels, 2005.

[2] Greece acceded to the Communities in 1981; Spain and Portugal in 1986; Austria, Finland and Sweden in 1995; the latest accession took place on 1 May 2004 following the signature of the Treaty of Accession in Athens on 16 April 2003. The new States are Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

[3] These are the Single European Act (1986), the Treaty on European Union (1992), the Treaty of Amsterdam (1997) and the Treaty of Nice (2001).

a "constitutional" nature, outlining the limits of lawful government and asserting rights. As Professor Sunstein has noted in a different context, we are "in the midst of a period of enormous enthusiasm for rule-bound justice".[4] The origins of this process can be traced in the Treaty of Maastricht. The TEU enshrined for the first time respect for fundamental rights at Treaty level and provided expressly for fundamental constitutional doctrines, namely the attribution of powers, subsidiarity, and proportionality.[5] The Treaty of Amsterdam reiterated this tendency. Along with declaring commitment to the principles of liberty, democracy, respect for human rights, and the rule of law,[6] it introduced a system for the enforcement of those principles in the event that a Member State failed to respect them.[7] Further, it accorded constitutional status to the right of access to documents,[8] a right not traditionally recognised in the constitutions of the Member States, and expanded the principle of non-discrimination.[9]

This trend was reiterated by the adoption of the EU Charter of Fundamental Rights in 2000,[10] which sought to enshrine "the very essence of European acquis regarding fundamental rights".[11] It was further followed by the adoption of secondary Community legislation.[12] The EU Constitution, of which the Charter now forms part, represents the (unfulfilled) culmination of the process of formalisation.

Although the above-mentioned developments have been based to some extent on diverse political motives and serve a variety of objectives, taken together they illustrate that we live in the era of legislative general principles.

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[4] C. Sunstein, Legal Reasoning and Political Conflict (Oxford University Press, 1996), ix.

[5] See Article 6(2) (formerly Article F(2)) TEU and Article 5 EC.

[6] See Article 6(1) TEU as amended by the Treaty of Amsterdam.

[7] See Article 7 TEU which has now been amended, and further extended, by the Treaty of Nice.

[8] Article 255 EC.

[9] Article 13 EC. This all-embracing provision provides the legal basis for adopting measures "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

[10] The Charter received the unanimous agreement of the Heads of State in the Biarritz European Council held on 13 and 14 October 2000. It has been solemnly proclaimed by, and binds, the Community institutions. Given, however, the strong objections raised by some Member States, it was decided in the Nice summit that the Charter will not have binding effect on the Member States.

[11] See Commission Communication on the Legal Nature of the draft Charter dated 18 October 2000, para 1.

[12] See e.g. the equality directives: Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16; Directive 2002/73 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002, L269/15.

To a great extent, statutory recognition of individual and Member State rights illustrates the quest for Union legitimacy in the post-Maastricht era. But its bases may lie deeper. It represents a new political awareness on the part of the politicians and the citizens, a cry for participation in an era of globalisation, where sovereignty eludes the nation State and exposes it to new centres of power. In an era of subtle but far-reaching political change, enshrinement of values in constitutional texts makes for legitimacy, protection, legal certainty and historical continuity. At the heart of this new European constitutionalism lies an aspiration that a new social and political order can be attained and that the transfer of powers to supra-national organisations is acceptable, provided that it is accompanied by shared commitment to abstract principles imbued by liberal ideals. Whether such aspirations are justified remains to be seen. The recent referenda in France and the Netherlands suggest that the people are not in tune with the politicians and that the project of European integration may be going too fast.

How do these developments relate to the Court of Justice? Two points may be made here. The first refers to the interaction between the Court and the Member States, which as sovereign political actors, are competent to amend the founding treaties. The second relates to the workload of the Court.

Many of the principles which have been entrenched by successive Treaty amendments were first recognised by the Court of Justice. This is true, for example, in relation to fundamental rights and the principle of proportionality. At a more concrete level, it is also true with regard to the iconoclastic judgment in *Chernobyl*.[13] In that case, led by the Opinion of Advocate General Van Gerven, the Court held that the Parliament had *locus standi* to challenge the validity of Community acts although, at that time, Article 173 EEC, the predecessor to Article 230 EC, did not mention the Parliament as a potential plaintiff.[14] The *Chernobyl* judgment itself was based on the fundamental right to judicial protection and the principle of institutional balance. The judgment subsequently found express recognition in the Treaty of European Union, which amended Article 173 EC in accordance with the pronouncements of the Court. Thus, in relation to the general principles, the Court has followed a pro-active approach. The case-law has showed the way, with subsequent Treaty amendments endorsing in many cases judicial developments.[15] The fact that the case-law has prompted law reform in that way is

[13] Case C-70/88 *Parliament v Council (Chernobyl case)* [1990] ECR I-2041.

[14] See also the earlier Opinion of Darmon AG in Case 302/87 *Parliament v Council (Comitology case)* [1988] ECR 5615.

[15] For another such example, see Case 294/83 *Partie Ecologiste "Les Verts" v European Parliament* [1986] ECR 1339. The ruling of the Court in that case was inserted in Article 173(1) (now 230(1)) EC by the TEU.

telling of the Court's contribution to the political process and the evolution of the Union. This is not to say that the Member States have always *willingly* endorsed judicial developments, nor that the Court is always a step ahead of the legislature. In some cases, the ECJ has anticipated legislative amendments by interpreting existing provisions in the light of forthcoming changes[16] or has heeded to interpretations formally endorsed by the Member States,[17] or has refused to take a step forward seeking instead guidance from the politicians.[18] Yet in other areas, Member States have sought to limit the remit of the Court as a *quid pro quo* for allowing Community competence.[19] The relationship between the ECJ and the other organs of government is a dialectical one and the development of Community law has been the result of their interaction.

The second point is the following. The recognition of new rights has profound repercussions for the Court of Justice. It enhances its constitutional jurisdiction. More importantly, it adds to its workload which, in turn, has both quantitative and qualitative consequences. In quantitative terms, it affects the length of the proceedings.[20] Its qualitative effects are more subtle. Inevitably, an increase in legislation, countenanced by greater awareness of Community law among citizens and successive enlargements, leads to more litigation. In terms of judicial time, new rights compete with existing ones. To give an example, the right of access to documents has already generated considerable case-law. The case-law itself has a tendency to generate more litigation, as a judicial pronouncement which solves one problem may itself give rise to others. Shortly stated, the point is this: Excessive workload forces a court to rely on precedent more than it might otherwise do and poses the risk that such reliance may be mechanical. A busy Court favours self-restraint over activism, but this is a self-restraint which is the result of neither conviction nor studied deference to the legislature. It is rather one which is liable to hinder conceptual

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[16] See e.g. Case C-361/91 *Parliament v Council (Fourth Lomé Convention Case)* [1994] ECR I-625.

[17] See e.g. the post-*Barber* case-law which interpreted the *Barber* judgment in accordance with the *Barber* Protocol. See Case C-109/91 *Ten Oever* [1993] ECR I-4879, C-110/91 *Moroni* [1993] ECR I-6591, Case C-152/91 *Neath* [1993] ECR I-6935, and Case C-262/88 *Barber* [1990] ECR I-1889.

[18] See e.g. Opinion 2/94 *on the Accession of the EC to the ECHR* [1996] ECR I-1759;Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621; Joined Cases C-122/99 P and C-125/99 P D and *Sweden v Council* [2001] ECR I-4319.

[19] Note in this context the limitations imposed on the Court's jurisdiction by the Treaty of Amsterdam as regards Title IV of the EC Treaty (visas, asylum and immigration, (Article 68 EC) and Third Pillar matters (Article 35 TEU).

[20] See the detailed study of C. Turner and R. Munoz, Revisiting the Judicial Architecture of the European Union, (1999–2000) 19 YEL 1.

innovation and disadvantage liberal causes.[21] One could counter-argue that excessive case-law produces the opposite effect. The uncontrollable proliferation of judgments may have a liberating effect, in that, faced with too much precedent, the judges may be tempted to ignore it. In such a case, precedent ceases to fulfill its function. The losers are clear, namely coherence and certainty, but the winners are not. Either way, judicial protection may suffer. It is not suggested here that new rights should not be recognised. Nor is there any intention to criticise the Court. In fact, the Court of Justice and the Court of First Instance have coped admirably with the overwhelming increase in their case-loads and have made a major effort to push forward proposals for reform. The discussion is intended to illustrate precisely the need for reform in the Community judicial architecture, so as to enable the Court to perform its function as the Supreme Court of the Union. This reform is currently taking place through the broadening of the jurisdiction of the CFI and the establishment of judicial panels.[22]

2. The Constitution and Its Values

The process of formalisation of Community law reached its apex with the adoption of the Treaty establishing a Constitution for Europe. Following its rejection in the French and Dutch referenda, the future of the Constitution is highly uncertain but it is condusive to examine here its values as reflected in Article 2. These values have a declaratory character and represent the EU legal order as it currently stands. They have also, to a great extent, been based on the case-law of the ECJ on general principles.

Article 2 states as follows:

> "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 rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Article 2 is more comprehensive than the provision of Article 6(1) TEU currently in force.[23] It operates at three levels: moral, political and legal. It seeks

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[21] See R. A. Posner, The Federal Courts: Challenge and Reform (Harvard University Press, 1999), 324 *et seq.*

[22] See Articles 225 and 225a EC.

[23] Article 6(1) TEU states as follows: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

to encapsulate the spirit of liberal democracy and, more generally, "the cultural, religious and humanist inheritance of Europe".[24] It provides ideological continuity with the constitutional traditions of the Member States and defines what the Union stands for.[25] It doing so, it seeks to forge a common political identity and also serves as a postulation: respect for the values enshrined therein becomes a political and legal imperative both for the Union institutions and the Member States. Article 2 provides a declaration of nascent nationhood and lays down the underpinnings for the recognition of European citizenship in subsequent provisions of the Constitution. The values of Article 2 are "indivisible and universal".[26]

The legal significance of the provision is twofold. Respect for these values is a condition for admission to membership of the European Union.[27] Also, Article 2 occupies a distinct position in the Constitutional Treaty and features at the top tier of the hierarchy of norms of EU law. It thus provides a prime point of reference for the interpretation of other provisions of the Constitution and, in effect, enhances the constitutional jurisdiction of the ECJ. There is no doubt that the values listed therein are abstract. However, shared commitment to abstract ideals is a feature of all constitutions. The purpose of Article 2 is precisely this, i.e. to function as a source of convergence, to lay down a set of parameters within which political conflict can be resolved and social unity achieved.[28] Whether such idealism will survive the test of time remains to be seen. There is however a clear intention to cultivate the emergence of a European demos by laying down the attributes of a moral identity and a political community. A concept which is of particular relevance in this context is the concept of "solidarity". This transcends the relations between the individual and the State and refers to a sense of community. According to von Bogdandy, it embodies an aspiration to make life better, "to create new bonds" and "the social basis for a broader polity in which the individual acts as a responsible *social* being".[29]

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[24] See Preamble to the Constitution, recital 1.

[25] Note also the grand and emotive language used in the Preamble to the Constitution and the Preamble to the EU Charter of Fundamental Rights which is included in Part II of the Constitution. The former at recital 1 refers to the "universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law". The Preamble to the EU Charter on Fundamental Rights, paragraph 2, states that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity".

[26] See Preambles, op.cit.

[27] See Article I-1(2).

[28] See here the discussion by Sustein, op.cit., p. 4 and pp. 35 *et seq.*

[29] A von Bogdandy, "The Preamble" in Bruno de Witte (Ed), Ten Reflections on the Constitutional Treaty for Europe", EUI, 2003, 3–10, at 9.

Article 2 underwent several revisions in the process of the drafting of the Constitution and the final text is, overall, better than previous versions. It is noteworthy that the reference to the rights of minorities was included in the final text by the Intergovernmental Conference of June 2004. This follows the pattern of many Central and Eastern European Constitutions, which make express reference to the protection of minority rights separately and in addition to classic human rights.[30] The reference to human dignity as the first value in Article 2 is not accidental. Human dignity "constitutes the real basis of fundamental rights".[31] It is granted a prevalent position in the Constitutions of many Member States,[32] features in the very first Article of the EU Charter[33] and lies at the "very essence" of the ECHR.[34] It has also been recognised by the ECJ[35] and underlies key judgments on non-discrimination law.[36] Some of the values laid down in Article 2, such as democracy and non-discrimination, are exemplified and elaborated upon by other provisions of the Constitution. In relation to democracy, suffice it here to say that Article 2 defines the Union as "a society of pluralism, tolerance, justice, solidarity and non-discrimination". This statement, which is reminiscent of the case-law of the European Court of Human Rights,[37] envisages a notion of democracy which extends beyond majoritarianism and incorporates a broad conception of human rights. A further change made by the 2004 Intergovernmental Conference was the express reference to the principle of equal treatment between men and women in the final sentence of Article 2.

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[30] See e.g. the Slovakian Constitution of 1992, Articles 33–34.

[31] See Updated Explanations relating to the text of the Charter of Fundamental Rights issued by the Praesidium of the Convention, CONV 828/1/03, p. 4.

[32] See e.g. Article 2 of the Greek Constitution.

[33] See Article II-61 of the Constitution which declares that "Human dignity is inviolable". See also the preamble to the 1948 Universal Declaration of Human Rights which states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

[34] See *SW v United Kingdom* and *CR v United Kingdom* 91995) 21 EHRR 363, paras 44 and 42, quoted by S. Millns, Bio-Rights, Common Values and Constitutional Strategies in Tridimas and Nebbia (Eds), EU Law for the 21st Century, Vol II, 387–402, at 393, n. 20.

[35] See Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras 70–77.

[36] Case C-13/91 *P v S and Cornwall County Council* [1996] ECR I-2143; Case C-117/01 *K. B. v National Health Service Pensions Agency and Secretary for Health*, judgment of 7 January 2004.

[37] The Court of Human Rights has stressed that the hallmarks of a democratic society include "pluralism, tolerance and broadmindedness": See e.g. *Smith and Grady v United Kingdom*, (2000) 29 EHRR 493, judgment of 27 September 1999, para 87.

3. Supremacy under the EU Constitution

The Constitution refers expressly to the principle of supremacy. Article I-6 declares as follows:

> "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have supremacy over the law of the Member States."[38]

In constitutional terms, the express reference to supremacy is an indication of maturity of the Community legal order and should be welcomed. It would be odd if the document which purported to be the constitutional charter of the Union made no reference to one of the most fundamental principles of Union law.

Supremacy attaches not only to the Constitution, but also to all measures adopted by the Union institutions provided that they are binding.[39] The only limitation imposed by Article I-6 is that they must have been adopted in exercising competences conferred on the Union. Thus supremacy is dependent on the valid adoption of Community law and, therefore, on the prior existence of Union powers. A Union measure cannot take precedence over national law unless it is compatible with the principles of conferral, subsidiarity and proportionality as laid down in Article I-11 of the Constitution.

Although Article I-6 determines the types of Union law to which supremacy attaches, it gives little guidance as to the provisions of national law which become subordinate. It simply states that Union law shall have supremacy over the law of the Member States. It may therefore be argued that it leaves open the issue whether EU law takes precedence over the national constitutions. Such a reading of Article I-6 would not be correct. Since the judgment in *Internationale Handelsgesellschaft*,[40] it is established case-law that Community

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[38] This provision was originally contained in Article I-10(1) of the final text of the draft Treaty establishing a Constitution for Europe, as submitted to the President of the European Council in Rome on 18 July 2003. See Conv 850/03, 18 July 2003.

[39] Note however than not all Union measures have binding legal consequences. See Article 249 EC and Article I-33(1) of the Constitution. Non-binding measures, such as recommendations and opinions, by their nature cannot give rise to rights and obligations although they may have other legal consequences: see Case 322/88 *Grimaldi v Fonds des Maladies Professionelles* [1989] ECR 4407.

[40] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. See also the classic dicta of Lord Bridge in *R v Secretary of State for Transport ex parte Factortame and others* [1991] 1 AC 603, where, in explaining the impact of EC law on Parliamentary sovereignty, he stated as follows: "If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972

law has precedence over the constitutions of the Member States. If the EU Constitution wished to depart from such a fundamental principle, it should have stated so clearly and expressly. There is nothing however to suggest that it intended to depart from the case-law. By contrast, a declaration annexed to the Final Act of the Inter-Governmental Conference confirms that Article I-6 reflects existing case-law of the Court of Justice and the CFI.[41] There is, in addition, a textual argument. Since Article I-6 is all-embracing and does not distinguish between constitutional and non-constitutional laws of the Member States, there seems to be little textual basis for such a distinction.

Further, if it were accepted that the principle of supremacy does not extend to the constitutions of the Member States, it would become important to determine what is included under the term "national constitution". What is a national law of constitutional status may be an open question. Problems could arise not only in the United Kingdom where there is no written constitution, but in other Member States as well. This highlights that opting for a qualified principle of supremacy, which does not include the national constitutions, opens a can of worms. At best, it breeds uncertainty and at worst, it may drive coach and horses through Article I-6 wounding supremacy fatally.

Article I-6 however does not determine whether it is for the Member State courts, rather than the ECJ, to decide on the validity of Union law. This question is of fundamental importance, since the court which has final jurisdiction to determine the outer limits of the Community powers also has jurisdiction to determine the limits of the competence of the Member States. Constitutional doctrine and case-law suggest the following conclusions: the issue of *Kompetenz-Kompetenz* is not conclusively determined by the founding Treaties as they currently stand; the EU Constitution does not resolve the issue; and there is here a divergence between the ECJ and the national constitutional courts. This divergence of views can better be viewed not as a disagreement, but as a constructive dialogue which leads to the dialectical development of Community law and a symbiosis of the national and supra-national polities.[42]

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was entirely voluntary . . . there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy." At 658G–659C. These dicta apply with the same force here. The authors of the Constitution were perfectly aware of the scope of the principle of supremacy under the case-law of the ECJ and, by ratifying the Constitution, the Member States should be taken to have agreed on the terms of that bargain.

[41] See Declaration 1 adopted by the Inter-Governmental Conference and annexed to the Final Act of the IGC, Brussels, 25 October 2004, CIG 87/04.

[42] For a detailed discussion, see House of Lords, European Union Committee, The Future of the European Court of Justice, 6th Report, Session 2003–04 (HL Paper 47), pp. 54 *et seq.*

4. Community Competence

I turn now to discuss selected aspects of constitutional adjudication, in particular, some recent judgments on competence and the way the Court has treated the principle of subsidiarity.

One of the main ways in which the Court has traditionally influenced the development of the Community legal order and contributed towards the constitutionalisation of the Treaties has been through an expansive interpretation of Community competence.[43] There are signs that, in recent years, the Court is prepared to adopt a more critical stance. In Opinion 2/94,[44] the ECJ interpreted narrowly Article 235 (now Article 308) ECT, holding that the Community did not have competence to accede to the European Convention of Human Rights. In the *Tobacco Advertisement Directive* case,[45] it went a step further challenging the powers of the Community legislature in the core area of the internal market. The Court annulled Directive 98/43 prohibiting the advertisement and sponsorship of tobacco products[46] on the ground that it provided for excessive regulation and fell beyond the scope of Article 100a (now Article 95) EC. The Court gave for the first time a narrow interpretation to that provision, stating that the Community legislature has power to adopt measures which are intended to improve the conditions for the establishment and functioning of the internal market but is not vested with a general power to regulate it.[47]

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[43] For a detailed discussion, see e.g., S. Weatherill, Competence Creep and Competence Control (2004) YEL ; G. Bermann, Competences of the Union in Tridimas and Nebbia (Eds): "EU Law for the 21st century: Rethinking the New Legal Order", Hart Publishing, Oxford, 2004, Vol. 1; A. Von Bogdandy and J. Bast, The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform, (2002) 39 CMLRev 227.

[44] Opinion 2/94 *Accession to the ECHR* [1996] ECR I-1759, discussed in Ch.

[45] C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

[46] OJ 1998, L 213/9.

[47] See para 83 of the judgment. For a detailed analysis, see G. Tridimas and T. Tridimas, The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health? (2002) 14 European Journal of Law and Economics, 171–183. The Court's reasoning was as follows: It concluded that the need to ensure the free movement of goods did not justify the adoption of the Tobacco Directive. First, the prohibition imposed by the Directive was too general. It extended to all forms of advertising even though in relation to some, there was no risk of obstacles to trade. This was true, in particular, with regard to the so-called static advertising media, i.e. advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafes and advertising spots in cinemas. Secondly, the Directive did not in fact ensure free movement of products which were in conformity with its provision because Member States retained power to lay down stricter requirements concerning the advertising and sponsorship of tobacco products. The Court also held that the Community legislature could not rely on the need to eliminate distortions of competition either in the advertising sector or in the sale of

The judgment reverses a long trend towards the expansive interpretation of Community competence and makes clear that the powers of the Community institutions are finite: Community legislation may supplement but not replace state regulatory intervention. By drawing the distinction between the Community as a facilitator of free trade and as a regulator, the judgment circumscribed the limits of supranational intervention and asserted the regulatory power of the nation state.

The comparatist may hear in the *Tobacco Advertisement case* echoes of the US Supreme Court judgments in *Lopez*[48] and *Morrison*.[49] But why did the ECJ appear to favour a deceleration of integration and greater deference to nation states? The judgment may be seen as a response to a discernible sentiment of Euro-scepticism and criticisms that the Community polity lacks legitimacy, a feeling that had already been evident in *Keck*.[50] Having seen their sovereignty diluted by the rulings of the Court from the mid 60s to the mid 90s, the national governments clipped its powers by keeping it out of the Common Foreign and Security Policy and restricting its engagement in Justice and Home Affairs. The more cautious approach of the Court was perhaps a recognition of this uneasiness on the part of national governments.

The *Tobacco Advertisement* judgment endorsed a more "nation state – friendly" theory of integration, but did not set in motion an uncompromising trend towards the dilution of Community powers. Far from it. In subsequent cases, the Court refused to annul directives at the instigation of state and private actors on the ground that they were *ultra vires* the Community and sought to empower rather than curtail Community regulatory intervention.[51] In *Netherlands*

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tobacco products in order to adopt the Directive. It held that, in determining the lawfulness of a directive adopted on the basis of Article 100a, it is required to verify whether the distortions of competition which the measure purports to eliminate are appreciable. It accepted that advertising agencies and producers of advertising media established in Member States which impose fewer restrictions are at an advantage in terms of economies of scale and profitability. It held however that the effects of such advantages on competition are remote and indirect and do not constitute appreciable distortions. The Court identified some appreciable distortions in that the prohibition of tobacco sponsorship in some Member States lead to the relocation of some sporting events (e.g. formula one racing). It conceded that such distortions could be a basis for recourse to Article 100a in order to prohibit certain forms of sponsorship but held that they could not justify an outright prohibition.

48 514 U.S. 549.

49 529 U.S. 598.

50 Joined Cases C-267 and C-268/91, [1993] ECR I-6097.

51 Apart from the judgments discussed in the text, see on Article 95 EC: Joined Cases C-154 and C-155/04, *The Queen on the application of Alliance for Natural Health v Secretary of State for Health (Vitamins case)*, judgment of 12 July 2005; Case C-210/03 *The Queen on the application of Swedish Match AB v Secretary of State for Health*, judgment of

v Parliament and Council[52] the Court rejected the argument of the Dutch Government that Directive 98/44 on the legal protection of biotechnological inventions[53] could not be adopted under Article 95 EC.[54] In the *BAT Industries* case,[55] the Court refused to annul Directive 2001/37 on the approximation of national laws concerning the manufacture, presentation and sale of tobacco products.[56] The Directive reduced the maximum levels of tar, nicotine, and carbon monoxide permitted in cigarettes and provided for the health warnings which must appear on cigarette packets. The Court reiterated that recourse to Article 95 is possible even if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, provided that the emergence of such obstacles is likely and the measure in question is designed to prevent them.[57] It also recalled that, if the conditions for recourse to Article 95 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.

The Court pointed out that the market for cigarettes in the Community is one where trade between Member States represents a relatively large part. It also stated that, despite previous harmonisation measures in this area, differences in the national laws had already emerged or were likely to emerge by the time the Directive came into force. This is because the previous measures only provided for minimal requirements and covered only certain aspects of the manufacture and presentation of tobacco products.

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14 December 2004; Case C-434/02 *Arnold André GmbH & Co KG v Landrat des Kreises Herford*, judgment of 14 December 2004; In Case C-222/02 *Paul and Others v Bundesrepublik Deutschland*, judgment of 12 October 2004, the ECJ appeared to suggest that it would be beyond the powers of the Community under Article 95 EC to harmonise the rules governing the liability of banking regulators in the EU stating that intervention must be restricted to "the essential harmonisation necessary and sufficient" to secure mutual recognition. This however was an *obiter dictum*. The Court did not intend to make a general pronouncement on Community competence in the field. For other aspects of Community competence, see Case C-93/00 *Parliament v Council* [2001] ECR I-10119 (annulment of a Council regulation adopted on the wrong legal basis); Case C-11/00 *Commission v ECB*, judgment of 10 July 2003 (annulment of ECB decision on fraud investigations as being *ultra vires*).

52 Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079.

53 OJ 1988 L 213/13.

54 For its reasoning, see below pp.132–133.

55 Case C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco Ltd* [2002] ECR I- 11453.

53 OJ L 2001, L 194/26.

57 *BAT case*, op.cit., n. 55, para 61.

BAT Industries can be distinguished from the *Tobacco Advertisement* case. The Tobacco Advertising Directive over-regulated whilst Directive 2001/37 did not. Also, the first directive concerned selling arrangements whilst the second concerned product-related requirements which are more pernicious to free movement. In that respect, the Court's differential approach finds support in *Keck*.[58] Finally, unlike the Tobacco Advertisement Directive, Directive 2001/37 contained a provision which guaranteed the free movement of products which complied with its requirements. As the Court pointed out, by forbidding Member States to prevent the import, sale or consumption of tobacco products which complied with its requirements, Article 13 of the Directive "gave the Directive its full effect".[59] By contrast, the Tobacco Advertisement Directive permitted Member States to lay down stricter requirements concerning the advertising and sponsorship of tobacco products and did not take any measures to ensure the free movement of products which conformed with its provisions.

In *BAT Industries* the Court was keen to safeguard the prerogative of the Community legislature to amend existing harmonisation measures. It declared that, even where a provision of Community law guarantees the removal of all obstacles to trade in the area that it harmonises, that cannot make it impossible for the Community legislature to adapt that provision in step with other considerations. It also held that progress in scientific facts is not the only ground on which the Community legislature can decide to adapt Community legislation since it must, in exercising its discretion, also take into account other considerations such as the increased importance given to the social and political aspects of the anti-smoking campaign.

5. Subsidiarity and the ECJ

Since its introduction, the principle of subsidiarity has had virtually no impact as a ground of review or as a rule of interpretation in the case-law of the ECJ or the CFI. This contrasts with the judicial application of proportionality. It is true that, where it applies proportionality, the Court leaves ample discretion to the legislature and the chances of success for an applicant are limited. Nonetheless, it pursues a robust and structured enquiry. This is not the case in relation to subsidiarity which in no case so far has been a pillar of the Court's reasoning. What accounts for this difference? Proportionality is a well-established instrument of judicial review and owes its origins to the protection of human

[58] Op.cit.

[59] *BAT case*, op.cit., para 74.

rights. Subsidiarity, by contrast, does not share a human rights ancestry. It is perceived by the judiciary as being *par excellence* a political principle which seeks to influence the legislative process *ex ante.* It pertains to the allocation of power among different levels of government and, as such, it is less susceptible to judicial determination.

The case-law contains only a handful of references to subsidiarity. The principle may function as a rule of interpretation or as a ground of review, but there has been no spill-over effect in its judicial application. Thus, the ECJ has resisted attempts to restrict the scope of application of the fundamental freedoms on the basis of subsidiarity.[60] The principle has not prevented the Court from following an activist case-law in the field of European citizenship or expanding its human rights jurisdiction.[61] Nor has it had much impact on the field of national remedies, recent developments in which suggest that there is a resurgence of interventionism.[62] This is not intended to be a criticism. Both the perception of subsidiarity as primarily a political principle and its restriction to the exercise of Community legislative powers are fully in conformity with the intended use of the principle.

In some cases, the ECJ has used subsidiarity as an aid to interpretation. An example is provided by *AvestaPolarit Chrome Oy.*[63] The case concerned the interpretation of Directive 75/442 on waste,[64] Article 2(1)(b) of which, as amended by Directive 91/156,[65] excludes from the scope of its application certain types of waste "where they are already covered by other legislation". The question arose whether Article 2(1)(b) covers only national legislation which entered into force before 1 April 1993, the date of entry into force of Directive 91/156, or extends to national legislation that has entered into force after that date. The Court referred to the principle of subsidiarity and held that, since the Community legislature provisionally allowed Member States to entrust

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[60] See Case C-415/93 *Bosman* [1995] ECR I-4921, para 8, where, in response to an argument by the German Government, the ECJ held that the principle of subsidiarity cannot lead to an situation where the freedom of private associations to adopt sporting rules restricts the exercise of rights derived from Article 48 (now 34) of the Treaty.

[61] See e.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, judgment of 17 September 2002; Case C-109/01 *Secretary of State for the Home Department v Akrich* , judgment of 23 September 2003; C-112/00 *Schmidberger*, judgment of 12 June 2003.

[62] See e.g. C-224/01 *Köbler v Austria*, judgment of 30 September 2003; Case C-129/00 *Commission v Italy*, judgment of 9 December 2003; Case C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren*, judgment of 13 January 2004.

[63] Case C-114/01 *AvestaPolarit Chrome Oy*, judgment of 11 September 2003.

[64] OJ 1975, L 194/39.

[65] OJ 1991, L 78/32.

the management of certain categories of waste to the national authorities and since Article 2(1)(b) did not expressly provide otherwise, it should be interpreted as including national legislation in force before or after that date.[66]

In most cases subsidiarity is used as a supporting argument to strengthen the Court's reasoning or because the measure which the Court is called upon to interpret itself refers to the principle[67] or because one of the parties has expressly relied on it. An interesting example is provided by *Commission v Germany*.[68] The Commission there brought an enforcement action seeking a declaration that Germany had breached the provisions of Directive 89/686 on the harmonisation of national laws relating to personal protective equipment,[69] because the legislation of certain länder made firefighters equipment subject to additional requirements not provided for in the Directive. The Court rejected the argument that the Directive should be interpreted in accordance with the principles of subsidiarity and proportionality as allowing the imposition of additional requirements. The German government submitted that the organisation of fire brigades came within the legislative competence of the *Länder* and that it was up to them to decide whether fire brigades were bodies responsible for "securing public safety or order", and could therefore take advantage of the exception provided in Annex I, point 1, to the Directive.

The Court pointed out that the ordinary tasks of the fire brigade differed from those of forces whose main responsibility was the maintenance of law and order. Since the national provisions relating to protective equipment differed significantly from one Member State to another, they might constitute a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions could, by reason of its scope and effects, be undertaken only by the Community legislature. The Court added that the Directive did not encroach on the competence of the States to define the tasks and powers of fire brigades, nor on the organisation of the forces responsible for the maintenance of law and order.[70]

The Court has also rejected subsidiarity as an argument against the exercise of Commission's powers to enforce competition law. In *Van den Bergh Foods v Commission*, it held that the existence of parallel proceedings before

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66 Op.cit., para 57.

67 See e.g. Case C-271/01 *Ministero delle Politiche Agricole e Forestali v COPPI*, judgment of 22 January 2004, para 39 et seq. (power of national authorities to manage structural funds and revoke the granting of financial assistance from Community funds in case of irregularities).

68 Case C-103/01 *Commission v Germany*, judgment of 22 May 2003.

69 OJ 1989, L 399/18.

70 Paras 47–48 of the judgment.

national courts did not prevent the Commission from initiating proceedings under Articles 81 and 82 if inter-state trade was potentially affected, even if all the facts of the case were confined to the same Member State.[71]

Subsidiarity is a legally binding rule compliance with which is subject to review by the Court. A Member State or a person who considers that a Community measure has been adopted contrary to it may seek its annulment by the Court of Justice. Given, however, that the principle is political in nature and allows scope for subjective judgment, the Court cannot employ a high level of scrutiny. According to standard case-law, where the Community legislature is called upon to make complex assessments, it must be allowed wide discretion corresponding to its political responsibilities.[72] The Amsterdam Protocol on Subsidiarity and Proportionality, and the Edinburgh Council Guidelines on which it was based, opened the door to judicial control by laying down certain parameters within which the institutions must exercise their discretion.[73]

Subsidiarity has greater potential as a procedural ground than as a ground of substance. Much will depend on how far the ECJ is prepared to press the Community institutions to justify their belief that the tests of comparative efficiency and scale are met. The statement of reasons must explain in substance why the Community legislature considers that the measure is necessary and satisfies the tests. Failure to do so will render the reasoning deficient and may lead to annulment. It is not necessary however for the statement of reasons to refer expressly to the principle of subsidiarity. It suffices if the reasoning of the legislature can be derived by implication from the preamble of the measure.[74]

Notably, the Amsterdam Protocol states that the reasons for concluding that a Community objective can be better achieved by the Community must be

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[71] T-65/98 *Van den Bergh Foods v Commission* judgment of 23 October 2003, paras 197–199. See also the *Cements cases:* Case T-25/95 *SA Cimenteries CBR v Commission*, paras 752–754. Note now the new Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

[72] See e.g. Case C-331/88 *Fedesa and Others* [1990] ECR I-4023; Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569.

[73] The Conclusions of the Presidency of the European Council held in Edinburgh in December 1992 laid down guidelines for the adoption of Community legislation in the light of Article 5(3) EC (European Council of Edinburgh, 11–12 December 1992, Presidency Conclusions, Annex 1 to Part I A, Agence Europe, Special Ed., No 5878BIS , 13/14.12.1992). These formed the basis for the Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty by the Treaty of Amsterdam (Protocol No 30).

[74] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, para 28. Note also that the preamble to a measure need not refer expressly to proportionality: Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235, para 37.

substantiated by qualitative or, wherever possible, quantitative indicators.[75] It will therefore be open to the Court to assess whether the view of the Community legislature that the tests of comparative efficiency and scale have been met in relation to a given measure is correct.[76] The Court however has not applied the principle vigorously. So far, in no case has it annulled a measure on the ground that it contravenes the principle. Where it has annulled measures, it has preferred to do so on grounds of competence or proportionality rather than on grounds of subsidiarity, even though the principle may have influenced the judgment.[77] The cases which illustrate most clearly the judicial approach to subsidiarity are *Netherlands v Parliament and Council* and *BAT.*

In *Netherlands v Parliament and Council*[78] the Dutch Government sought the annulment of Directive 98/44 on the legal protection of biotechnological inventions.[79] The objective of the Directive, which had been adopted under Article 95 EC, was to require Member States to protect through their patent laws biotechnological inventions and, to that end, it determined which inventions involving plants, animals or the human body that could be patented. The Dutch Government argued, inter alia, that the Directive could not be adopted under Article 95 and was in breach of the principle of subsidiarity. It claimed that harmonisation in that area was not warranted, as the laws of the Member States were based on international conventions and were therefore, to a good degree, similar. To the extent that any divergencies of national laws gave rise to uncertainty, reform should be pursued through renegotiation of the applicable international law conventions.

The ECJ placed emphasis on the risk of distortions in competition arising in the future. It reiterated that recourse to Article 95 EC as a legal basis is possible to prevent the emergence of future obstacles to trade, provided that the emergence of such obstacles was likely. It held that, even though the national laws pre-existing the directive were based primarily on the Convention on the Grant of European Patents, the differing interpretations to which these laws were open were liable to give rise to divergencies of practice and case-law prejudicial to the proper operation of the internal market. The Court also safeguarded the internal legislative autonomy of the Community by stating that, in relation to matters affecting the internal market, the Community legislature

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[75] Amsterdam Protocol, op.cit., para 4.

[76] Wyatt takes the view that failure to take into account the guidelines laid down in the Amsterdam Protocol may lead to annulment. See D. F. Wyatt, Subsidiarity and Judicial Review, in D. O'Keeffe (Ed.), Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn, Kluwer, 2000, in 505–519 at 518.

[77] See e.g. C-376/98 *Germany v Parliament and Council (Tobacco case)*, op.cit.

[78] Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079.

[79] OJ 1988 L 213/13.

was free to pursue law reform on the basis of harmonisation directives rather than through renegotiation of international agreements.

On subsidiarity, the ECJ provided only a rudimentary reasoning. It held that the objective pursued by the Directive, namely to ensure smooth operation of the internal market by eliminating differences between national laws on the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. It continued as follows:

> "As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community".[80]

This reasoning is problematic. First, it does not address the issue whether the very objective of harmonising national laws on the protection of biotechnological inventions satisfies the test of subsidiarity. Why should this objective be pursued at Community rather than the national level? The fact that the Community has competence to pursue it under the terms of Article 95 does not necessarily mean that the Directive in issue satisfies the test of subsidiarity. The Court effectively equates the test of subsidiarity with the test of competence, thus removing all independent legal value from the former. Secondly, the Court readily seemed to accept that the fact that the protection of biotechnological inventions had an effect on trade automatically meant that it had an immediate effect on intra-Community trade, thus denying any role for subsidiarity, whose function is precisely this, namely, to provide a threshold for Community action based, inter alia, on whether "the issue under consideration has transnational aspects".[81]

The argument of subsidiarity re-emerged in *British American Tobacco.*[82] The ECJ held that the principle of subsidiarity applies to measures adopted under Article 95, inasmuch as that article does not give to the Community "exclusive competence to regulate economic activity on the internal market but only a certain competence for the purpose of improving the conditions for its establishment and functioning".[83] The Court thus reiterated that regulatory functions lie in principle with the nation-state, as it had first stated in the *Tobacco Advertisement* case.[84]

It then proceeded to assess the contested Directive *vis-à-vis* the test of Article 5(2). It held that the objective of the Directive, which was to eliminate

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[80] Op.cit., para 32.
[81] See the Amsterdam Protocol, op.cit., para 5.
[82] Case C-491/01, op.cit.
[83] Op.cit., para. 179.
[84] Case C-376/98, op.cit.

barriers to trade raised by disparities in national laws whilst ensuring a high level of health protection, could not be sufficiently achieved individually by the Member States. The multifarious development of national laws made harmonisation necessary. In fact, the ECJ did not employ distinct reasoning to deal with the argument of subsidarity. The issue whether Community action was justified had already been resolved by deciding that the Directive could be adopted under Article 95 EC. As regards the intensity of the harmonisation action undertaken, the ECJ assimilated subsidiarity to proportionality and cross-referred to its reasoning in relation to the latter.

The case-law thus suggests that the Court treats subsidiarity as a secondary part of its reasoning. The test of subsidiarity tends to be subsumed under the more general enquiries of legal basis and competence and the assessment of proportionality.[85]

6. Subsidiarity and Proportionality under the EU Constitution: An Assessment of the Protocol

Both subsidiarity and proportionality are expressly provided for in Article I-11 of the EU Constitution which corresponds to Article 5 EC. A novel feature of the Constitution is that it strengthens the role of national Parliaments in monitoring compliance with subsidiarity. This accords with one of the key objectives of the Constitutional Convention which was to increase democracy by enhancing "the contribution of national Parliaments to the legitimacy of the European design".[86] Article I-11(3) of the Constitution corresponds to Article 3(2) of the EC Treaty and with minor textual improvements incorporates the tests of scale and effectiveness. It also contains a new sub-paragraph which confers on national Parliaments responsibility to ensure compliance with the principle. The procedure for doing so is set out in the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution.[87]

The Protocol was based on proposals made by Working Group I, which was set up by the Convention specifically for the purpose of examining subsidiarity.[88]

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[85] See further the Court's reasoning in the *Vitamins case*, op.cit., paras 104–105.

[86] See the Preface to Parts I and II of the draft Treaty establishing a Constitution for Europe as submitted to the President of the European Council meeting in Rome on 18 July 2003, CONV 850/03.

[87] See Protocol 2 of the Treaty establishing a Constitution for Europe.

[88] See Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 23 September 2002.

The Working Group considered that both the application and the monitoring of the principle should be improved, but advised against the establishment of an *ad hoc* body responsible for monitoring its application so as to avoid making the decision-making procedure more cumbersome or lengthier. It also rejected the appointment of an interlocutor within the Commission who would be responsible for ensuring respect for subsidiarity, on the ground that each Commissioner should be responsible for compliance with the principle within the area of his or her competence. The Working Group envisaged instead the exercise of *ex ante* political control and *ex post* judicial control by the national parliaments. This model was endorsed by the Convention and incorporated in the Protocol. Thus, the Protocol establishes an "early warning system" enabling national parliaments to monitor compliance with subsidiarity before legislative measures are adopted. The core elements of this system are consultation, reasoning and voting.

Before proposing legislative acts, the Commission must consult widely. Such consultation must take into account the regional and local dimensions of the actions envisaged.[89] The Commission must forward its proposals for legislative acts and any amended proposals to national parliaments at the same time as it transmits them to the Union legislator. The same obligation applies to the European Parliament as regards its draft legislative acts and amended drafts. It also applies to the Council as regards draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank and the European Investment Bank.[90]

Article 5 of the Protocol subjects draft measures to a thorough cost-benefit analysis. Proposals should contain a detailed statement making it possible to appraise compliance with subsidiarity and proportionality. The statement should include some assessment of the proposal's financial impact and, in the case of a European framework law,[91] of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation.

Under Article 5, the assessment of subsidiarity must be effected, in particular, by reference to two considerations:[92] The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators. Also, proposals

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[89] Protocol, Article 2. See also the Protocol on the Role of National Parliaments in the European Union (Protocol 1) attached to the Constitutional Treaty.

[90] Protocol, Article 4.

[91] European framework laws correspond to Directives under Article I-33 of the Constitutional Treaty.

[92] Notably, Article 5 retains only these two considerations from the guidelines provided for in the Amsterdam Protocol, which is repealed by the Constitution.

must take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and be commensurate with the objective to be achieved.

Political control is exercised collectively by all national Parliaments acting through a novel voting system. Any national Parliament, or any Parliamentary chamber in the case of countries which have a bicameral system, may object to a legislative proposal by submitting a reasoned opinion stating why it considers that the proposal does not comply with subsidiarity.[93] National Parliaments may submit their reasoned opinions within six weeks from the date of transmission. The six week time-limit, however, seems short and may pose a challenge even to the best-organised national assemblies.

Each national parliament has two votes shared out on the basis of the national parliamentary system. In the case of a bicameral parliament, each of the two chambers has one vote.[94] Where reasoned opinions against a proposal represent at least one third of the total number of votes allocated to national Parliaments and their chambers, the Commission is required to review its proposal.[95] After such review, the Commission may decide to maintain, amend or withdraw it, giving reasons for its decision.[96]

Political control is supplemented by reinforced judicial control as provided in Article 8 of the Protocol. This grants the Court jurisdiction to hear actions for judicial review on grounds of infringement of the principle of subsidiarity brought "by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber if it." Such actions can be brought against legislative acts of the Union in accordance with the rules of Article III-365 (currently Article 230 EC). A similar right of action is granted to the Committee of the Regions as regards legislative acts for the adoption of which it must be consulted.

Although the language of Article 8 does not make it clear, it is arguable that the provision requires Member States to make available the right of action to

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[93] Protocol, Article 6. Note that, under Article 6, it is for each national parliament or each chamber to consult, where appropriate, regional Parliaments with legislative powers before deciding to submit a reasoned opinion.

[94] Article 7(2).

[95] Article 7(3). The threshold of one third is lowered to a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provisions of Article III-264 of the Constitution on the area of freedom, security and justice.

[96] Article 7(4). This applies, as appropriate, to a group of Member States, the European Parliament, the Court of Justice, the ECB or the EIB if the draft legislative act originates from them.

national Parliaments and does not simply allow them to do so. The Preasidium notes attached to the Protocol suggest that the national Parliaments are given the right to challenge measures before the ECJ.[97] What is left to the Member States is to determine the arrangements for the exercise of that right, including the question whether it will be granted to each Parliamentary chamber in States with a bicameral system. These arrangements can be made by ordinary law and need not have the status of constitutional rules.[98]

The Protocol does not specify the way by which the national Parliaments may take the decision to object to a Commission proposal or to initiate a judicial challenge against a measure. Thus, it is for each Member State to decide the proportion of votes by which the Parliament needs to act. Many models are here conceivable. A Member State may, for example, require the Parliament to act by majority. In such a case, if the government controls the majority, it is unlikely that the Parliament will vote to submit an objection or initiate litigation if the government itself does not consider it appropriate.[99] At the other extreme, national law may enable, say, a percentage of parliamentarians or a cross-party parliamentary committee to take the initiative. Such arrangements would enhance the power of the national Parliament to question Union legislation, acting independently of the government's interests. National laws may well make the power of the parliament to ask for a judicial challenge subject to the requirement that the parliament must have first decided, by whatever procedures applicable, to submit a reasoned opinion objecting to the proposal.

Granting to national parliaments their own political and judicial means to monitor compliance with subsidiarity may be seen as an indication of respect to representative democracy. The Protocol seeks to promote national Parliaments as centres of political power with a say in the exercise of Community competence independently of their national governments. These newly founded rights may in some cases bring national Parliaments in a collision course with their respective governments. But they also juxtapose the national Parliaments with the European Parliament. Now that the latter is elevated, at least in most areas, to a co-legislator with the Council, an objection on grounds of subsidiarity initiated by a national Parliament is as much a denial of Community competence as a refusal to heed to the supremacy of the European Parliament.[100]

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[97] CONV 724/1/03 REV 1, p. 144.

[98] Ibid.

[99] Unless the government allows the issue to be put in Parliament on a free vote or a sufficient majority of the ruling party considers the issue to be worth a rebellion.

[100] Note that in the *Biotechnological Inventions case* the action was brought at the express request of the Dutch Parliament. See *Netherlands v Parliament and Council*, op.cit., para 4.

These provisions of the Constitution may be seen as enhancing dialogue, democracy and decentralisation. They view Community competence not as a bi-polar exchange between the Union institutions, on the one hand, and the Member States, on the other hand, but as a pluralistic dialogue among various political actors at national and Union level. It is however strange that, whilst the Protocol requires legislative proposals to be justified both with regard to subsidiarity and proportionality, it provides for the early warning system and judicial control only in relation to subsidiarity.

Conclusion

The trend towards the formalisation of Community law, of which the Constitutional Treaty represents the (unfulfilled) culmination, is a sign of maturity of the EU polity. The Constitutional Treaty undoubtedly incorporates some good elements. In view of the result of the French and Dutch referenda, a period of reflection is called for and some serious re-thinking needs to be done. In the meantime, the ECJ continues to exercise its constitutional jurisdiction and grapple with some sensitive issues pertaining to the allocation of competences. Although the *Tobacco Advertisement case* suggested that it is prepared to take a more critical view of Community competence, more recent cases show that its instincts remain integrationist and will grant the institutions ample discretion to build and expand the internal market. The Court does not take subsidiarity seriously.

The Constitutional Treaty enhances the role of national parliaments to ensure compliance with subsidiarity. In doing so, it strengthens democracy, accountability and transparency and contributes to the dispersal of political power. By increasing the number of potential plaintiffs, the Protocol increases the justiciability of subsidiarity and brings the Court of Justice closer to the political game. By transferring to the courtroom what are essentially political issues, it risks the politicisation of the judiciary, not in the sense of making the Court a partisan institution but of involving it more directly in issues of European governance.

Chapter IX

Mind The Gap: The European and National Constitutional Debates – the Truly Missing Link

Joakim Nergelius

1. A Historical Perspective on Today's Constitutional Crisis:

1.1 Introduction and General Background

When talking about a historical perspective on the problems in the current constitutional development of the European Union, at least two different perspectives are available. One is of course a thorough, traditional political and historical analysis, focusing on the steady progress towards deeper integration and "ever closer union" among the Member States, but at the same time analysing and paying all due attention to the problems, pitfalls and obstacles that have also paved the way to this largely undefined final goal – of which the current crisis may turn out to be one of the most severe. The other main alternative, at least from a legal point of view, is of course to analyse the integration by focusing on the relations between the different EU institutions and the interests that they serve, as well as on the importance of those relations for the relation between the EU and the Member States. This approach is perhaps particularly appropriate towards a legal system like the European one, characterised by a federal development at least initially driven much more by law than by political decisions and reaching much quicker, and more far-reaching results, in the legal and economic areas than in the political sphere.

Joakim Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, 139–172.

Though not at all neglecting the significance of the first kind of analysis, the importance of which I actually find underestimated in constitutional thinking, both in law and political science, this article will take the latter approach as its point of departure. Within that line of thinking, the works of Joseph Weiler and not least his extremely important theory of a "Dual Character of Supranationalism" are undoubtedly among the most influential. This model is, as we know, based on the assumption that the ECJ was allowed to develop the EU into a federal-like entity – though not of course a federal state – simply because the Member States and its leaders, as well as the media and to a huge part the academics, did for a long time not pay any attention to the works of an anonymous court in remote Luxemburg. The politicians believed that the existence of a national veto in vital policy issues within the Council of Ministers, as enshrined by the so-called Luxemburg compromise from 1966, would shelter them from any unwished political developments within the EU, failing to realise that legal and economic integration could have political repercussions as well. The media and the academics, in particular political scientists, for a long time simply seemed to find the activities of a court, composed by grey old men and devoted to the seemingly dull task of legal interpretation, unexciting and unglamorous.[1]

All this seems to have been changed by the enactment of the Single European Act (SEA) in the mid 1980's (circa 1985–87), which also marks the start of a new phase in the EU constitutional development, characterised by frequent Treaty changes. Weiler, for example, has been keen to identify this as a formative moment in EU history. According to his theory,[2] with which I generally agree, the period 1957–1985 ("the Foundational Period") was characterised above all by a low degree of political integration but at the same time of a high degree of legal integration, where EC law was given a supranational character due to the deliberate attempts of the Court of Justice to develop the Community in a federal direction.[3] This particular and *dual* character of supranationalism created an equilibrium that was however totally destroyed

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[1] For a comment on this from inside the Court, by a late Judge (and former academic), Judge Mancini also stressed the historical importance for ECJ and the future development of EC law "of being, as it were, out of sight and out of mind by virtue of its location in the fairy-tale Grand Duchy of Luxembourg and the benign neglect of the media". See The Making of a Constitution for Europe, Common Market Law Review 1989 pp. 595–614.

[2] The first version of this theory was presented in 1981, in the article The Community System and the Dual Character of Supranationalism, Yearbook of E.L. pp. 267–307, an article that can be seen as a short version of the unprinted thesis on Supranational Law and the supranational system: Legal structure and the political process in the European Community, Florence 1982. However, the final version of the theory, I would assume, is of course the one presented in the rich article The Transformation of Europe, Yale L. J. 1991 pp. 2403–83.

[3] This view is also confirmed as such by Mancini, op.cit.

by the SEA and by its introduction of majority voting in the Council in particular, a tendency that was of course further reinforced by the subsequent Treaty changes in Maastricht 1991 and Amsterdam 1997 that went even further in the direction towards increased political integration (or towards decisional supranationalism, to use Weiler's words).[4] From this point of view, then, the period 1986–1999 may be seen as the second phase in the period of European integration.[5]

So far, that line of reasoning is by now more or less generally accepted, or at least not very controversial. The next logical question, then, would seem to be if this second period, characterised by frequent Treaty changes, increased powers for the European Parliament and a huge transfer of decision-making powers to the EU level, also in politically sensitive areas like EU citizenship and a common currency, has then been replaced by some other main tendency, which has characterised the integration process in the last five years, i.e. in the 21st century. And if that should be the case, we may also ask if that, latter tendency may have something to do with the current constitutional crisis.

1.2. Explanations Given – and not Given – by the Doctrine

Weiler's theory is interesting, however, also from another point of view. When discussing the growth and success of the European integration in general and EU law in particular, Weiler and other scholars tend to stress the importance of ECJ, as well as its co-operation with national courts within the procedure of preliminary rulings laid down in art. 234 (177) of the EC Treaty. Also the important role of the national courts in this development is much discussed. Undoubtedly, this is a key factor in any serious historical analysis, in particular if we want to understand the simultaneous growth of legal supranationalism and a political process without the same strong federal traits. Another factor, though less observed, that may perhaps also be identified as a key element in explaining the rapid growth of EC law, its increased importance and the general acceptance throughout Europe of its supranational nature, is of course the role in this process of the academics. Many leading experts in the field of EC law, in particular in the formative period in the early 1960's, were rather idealistic. They often had vivid recollections of the Second World

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[4] Weiler describes this former equilibrium, in The Transformation of Europe, p. 2428, in the following words: "On the one hand stood a strong constitutional integrative process that, in radical mutation of the Treaty, linked the order of the Community with that of the Member States in a federal-like relationship. This was balanced by a relentless and equally strong process, also deviating radically from the Treaty, that transferred political and decisionmaking power into a confederal procedure controlled by the Member States acting jointly and severally."

[5] I have dealt with this issue more in detail in the article 'De-legalize it' – On Current Tendencies in EC Constitutional Law, YEL 2002 pp. 443–470.

War and its horrors, which may have made them favourable towards the whole idea of EC law as a new kind of legal system, different from traditional international law and superior to the national laws of the Member States. Mancini, who himself represented this tendency among European law professors with a great interest in EC law, has even pointed to the high frequency of middle-aged academics among the judges and advocate-generals at ECJ as one of the reasons for the Court's success in this respect.[6] Here, Mancini, who was himself deeply involved in this development from both sides, so to speak, seems to be one of the few commentators who has grasped this important aspect of the successful development of EC law within the Member States.

But if praise for the development of EC law and the "new Europe" that it was intended to bring about was for a long time the dominating, or even exclusive tendency in academic EU law circles, the picture is today very different (as Mancini was also very eager to point to).[7] And this more critical evaluation of the EU legal order seems, in many ways, to have started with and have its roots in Weiler's abovementioned article from 1981 on the Dual Character of Supranationalism. From that date, the tendency to criticise certain features of EC law and the jurisprudence of the ECJ rather than praise the general development towards deeper integration has been increasingly dominating in the doctrine. Treaty changes leading to increased political integration and activistic or integration-aiming judgments from the ECJ have both been criticised for their alleged lack of legitimacy.

Generally speaking, this should hardly be surprising since it actually only reflects the general mainstream scientifical way of thinking, throughout the world, which is aimed at criticising and questioning political and societal phenomena, rather than praising them – and rightly so. How dull and meaningless would not social science in general seem if it didn't put mainstream tendencies into questioning, by analysing them with a sharp, critical eye? From this point of view, we may even say that what has actually happened in the last 25 years is that EU law research has become more similar to other fields of social science, at the same time that political science has finally, after all, started to take an interest in EU law and related constitutional issues (also the ones related to the Constitutions of the Member States).[8]

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[6] Op.cit.

[7] See The Case for Statehood, in the late collection of articles Democracy & Constitutionalism in the European Union, Oxford 2000 p. 53 and 55.

[8] Suffice it here to mention the rich works of Sweet Stone, Guarnieri, Majone, Moravcsik, Scharpf and Wallace, among others. For a general survey of some of the doctrinal developments during this time, I would like to refer to Weiler's article Introduction: The Reformation of European Constitutionalism, in his collected essays The Constitution of Europe – "Do the new clothes have an emperor?" and other Essays on European Integration, Cambridge 1999 p. 221 ss.

Scientifically, then, there is no reason to complain. Instead, it is a fact that Weiler and others have inspired a critical way of thinking, increasingly influential during the last 25 years, which is much more interesting, richer, thought-provoking and also much deeper, intellectually speaking, than the general, unreflected enthusiasm which prevailed during the first 25 years, from the mid 1950's to the early 1980's (a period that may be seen as the childhood of EU law).

But still, it is one of the aims of this article to somewhat question also this by now mainstream critical line of thinking in EU law and some of its main assumptions. Above all, in light of the current constitutional crisis, it will be asked if this "Weilerian" critical approach is not too focused on the task of criticising, even in a somewhat de-constructivist manner, and thus unable to offer constructive solutions to the main institutional and constitutional problems and challenges that the EU and now increasingly the world as a whole seems to be facing. It may perhaps sound naïve and idealistic, but shouldn't serious EU constitutional thinking try to come up with some good solutions for once, in the same way that e.g. economists have always tried to suggest remedies for economic crisis (albeit with a varied degree of success)? Once again, those really big issues will not be solved here. That is definitely not my intention. But maybe it is time to start discussing them and to take them seriously.

2. A Case for Statehood or Multi-level Constitutionalism? Or both?

One of the issues that truly needs to be discussed then, has to do with the development of the EU in a clearly federal direction and which legal and constitutional consequences this should entail. When discussing that issue, it is also logical to reflect upon the general development of constitutional law as a topic that both European integration and globalisation in general have brought and will in the future bring about even more.

A somewhat heated discussion on whether the development and process of constitutionalising the EU treaties that had been going on since the early 1960's, mainly due to the work of the ECJ as discussed above, would as its logical and even desirable consequence have a kind of "statehood" as an end result was in 1998 initiated by Mancini, who received a harsh reply from Weiler.[9] Mancini's idea can be summarised as claiming that the constitutionalisation that had by then taken place would a. lead to a kind of statehood as a logical

[9] Mancini's article Europe: The Case for Statehood was originally published in European Law Journal 1998 pp. 29–42; Weiler's response, Europe: The Case against the Case for Statehood is found in the same volume, pp. 43–62. Mancini's article is reprinted in Democracy & Constitutionalism in the European Union pp. 51–66.

consequence and b. in fact required this in order to secure democracy and legitimacy. The steps in a federal direction taken so far were in other words not enough and not even satisfactory from legal and constitutional points of view.

These conclusions may seem exaggerated, but the arguments for and against statehood at that time of European integration (i.e. at the very end of what I would call its second phase, stretching from the mid 1980's to 1999 and characterised above all by new and hitherto unprecedented levels of political integration) still need to be analysed in some detail. If we then first look at Mancini's arguments, he starts by pointing out the effect of the constitutionalisation of the EU treaties and how this makes them different from ordinary treaties in international law. His conclusion is that to argue, today, that the EU is an international organisation would be "like trying to push the toothpaste back into the tube".[10]

This point is hardly controversial; indeed, even Weiler, who disagrees sharply with Mancini's conclusions, has talked about constitutionalism as the "DOS or Windows of the European Community", which "captures, more than anything else, what is special about the process of European integration".[11] What is perhaps more controversial, however, is Mancini's connection between federalism and democracy. The federalisation of EU has made it more democratic, he argues, but not democratic enough. In order to achieve full democracy, statehood in the form of a federal state is necessary.[12] Against this background, much criticism is invoked both against political and intellectual, academic elites who suddenly, at that time (and even more so today) seem(ed) to be much more critical against further and deeper integration than twenty or thirty years before. This criticism is directed against the reasonings of the German Constitutional Court in its well-known *Maastricht* judgment from 1993[13] and some of its prominent representatives like Dieter Grimm,[14] as well as against Weiler, who despises that same judgment and its argumentation precisely because of its ethnical, and, in fact, 'statal' implications.[15]

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[10] Op.cit. in Democracy & Constitutionalism, p. 53.

[11] The Reformation of European Constitutionalism p. 221.

[12] Op.cit. p. 65 s.

[13] Entscheidungen des Bundesverfassungsgerichts (BVerfGE 89, 155).

[14] It is tempting here to quote his opinion of Grimm and like-minded German scholars, having dealt with what he conceives of as the ideological roots of their argumentation (op.cit. p. 58): "When dealing with some of the premises of German public law, one is at times reminded of the Cheshire cat: the body, beginning with the end of the tail, has vanished, but the grin remains."

[15] This harsh criticism from Weiler is to be found e.g. in the article " . . . We Will Do, And Hearken" (Ex. XXIV:7) – Reflections on a Common Constitutional Law for the European Union, in R. Bieber/P. Widmer (ed.), L'espace constitutionnel européen, Zürich 1995 pp. 413–468.

Although those two lines of thinking may seem entirely contradictory, he claims that they stem from a common root, namely "the inability to conceive of statehood in any terms other than *nation* statehood, or, in a nutshell, to divorce the state from the nation".[16] Mancini agreed that despite the constitutionalisation process, Europe has not yet reached "a sense of shared identity and collective self", but he was still very critical in particular against the inability of so many current scholars, German and others, to conceive such a future development as possible. An example of the kind of argument that he dislikes is clearly stated in the opinion of Grimm that since democracy can only be achieved within a national framework, "converting the European Union into a federal state is not a desirable goal".[17]

Against this whole line of reasoning, Weiler is, hardly surprising, extremely critical. While agreeing that Mancini points to interesting questions, he denies sharply that his own opposition to European statehood depends on an inability to conceive of European statehood as something else than a Nation-State. Above all, he insists that Mancini's suggestions would not, at least not in itself, reduce the non-democratic nature of the EU. Instead, he argues that some of the problems related to e.g. lack of transparency in the public administration may be solved within the current constitutional framework (and are, furthermore, not necessarily remedied by giving the EU "statehood").[18] However, he also displays a belief in "the possibility of peoples, *demoi*, existing and thriving without having their own State", as well as a genuine distrust of the concept of statehood as such. "The dangers are inherent in Statehood and that is why the Community has such a civilisatory potential".[19] In an open and personal reflection, he goes on to state that his opposition to European statehood is not rooted in a "*per se* dislike for the State (or the nation)", but rather in the potential for 'boundary abuses' that State power may unleash. He continues, with great rhetoric force:

> "My fundamental appraisal of the Community is that it is a political structure and process which, at one and the same time, both 'saves the States of Europe' and also constrains them. It is a remarkable and unprecedented political arrangement and I would hate to see it replaced by a State . . . I also find unappealing the notion of a European State for the same reason I find unappealing the notion of a European nation conceived in the thicker organic sense. The very existence of a Europe of individuals with individual identities, a Europe of nations with the boundaries created by distinct national identities and a Europe

[16] Op.cit. p. 55.
[17] As stated by Grimm in Does Europe need a Constitution, ELJ 1995 p. 282 – 302, at p. 296.
[18] Op.cit. p. 54 ss.
[19] Op.cit pp. 58, 59 s.

> of States with the differently distinct Statal boundaries, which forces one both to acknowledge differences and to reach across in the deeply committed way which membership of the Community entails is what makes the European postwar experiement so special and, arguably, worth preserving even if it does not have quite the power and quite the constitutional clarity as a State would."[20]

Somewhat more puzzling, perhaps, is his view on how this reasoning for or against statehood relates to democracy. As opposed to Mancini, he denies that democracy is an end in itself. Instead, he says, though indispensable, it is but a means to the end, which is to try to live a life of decency, to honour our creation in the image of God, or the secular equivalent.[21] Still, when claiming that Mancini had got it all wrong, he concludes his article by saying that we should "forget about a European State and start thinking seriously, really seriously, about, say, democracy".

My own view on this still vital and thought-provoking discussion is that Mancini made a clear point when showing the inability of certain critics of further EU integration and, possibly, statehood as a final product of that process, to think in new terms and, for instance, imagine that full and true democracy may sometime in the future exist outside the traditional realm of the Nation-state; that traditional point of view is, as we know, evident not least in the views put forward by the German Constitutional Court in the Maastricht judgment. At the same time, Mancini himself, as Weiler indicates, seems to lack imagination when he is unable to grasp that such a democratic development may actually take place within the EU *without* giving it statehood and turning it into a state in the traditional sense. In the same way that some of the objects of his criticism connect democracy and nation-state, Mancini himself connects EU democracy with EU statehood, in a way which seems exaggerated and surprisingly pessimistic.

But what has all this got to do with the future development of the doctrine of constitutional law? A lot, it would seem. First of all, the question whether the term constitution may in fact be used also for different international organisations, not only for states of the traditional kind, is hardly new; it was raised e.g. by Alf Ross after the Second World War, pointing to the United Nations.[22] With the constitutionalisation of the EU, it is of course natural that the question would occur again in relation to the union where, as we have seen, it is now generally acknowledged that such a thing as a constitutional order does exist[23]

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[20] Op.cit. p. 62.

[21] Op.cit. p. 60.

[22] See Ross, Constitution of the United Nations – Analysis of Structure and Functions, Copenhagen 1950.

[23] The ECJ has described the EC Treaty as the "basic constitutional charter" of the EU or the EC on a number of occasions, e.g. in Opinion 1/91 on the EEA Agreement, ECR 1991 I p. 6079.

(the existence of which may be seen as confirmed by the very suggestion of an EU constitution, whether it will ever enter into force or not). Recently, the issue has also been dealt with by Rainer Arnold, who analyses it in the light both of the Draft EU constitution and the previous constitutionalisation process.[24] As Arnold points out, state related constitutional law is normally expected to fulfil two major functions, namely to organise the state and to regulate the relationship between the state and the individual, in particular by protecting fundamental rights. Since these kind of issues have been shifted to supranational organisations in Europe when matters formerly decided by the state are now increasingly decided "on a Europe-wide basis", the functions of a constitution are now also to be found at the supranational level. "The substance to which the state constitution was related has to a great extent now been supranationalised, the needs for constitutional regulation are the same on both the state and the Community level, and the functions a state constitution fulfils coincide with those to be fulfilled by EC/EU primary law".[25] Thus, there is no real reason not to acknowledge, also from a theoretical point of view, that constitutional law is now, at least in Europe, a topic that can hardly be studied *only* from the perspective of national constitutions (whether one at a time or through a traditional comparative approach). Instead, national constitutional law and EU law are increasingly influencing each other and developing in a relation of mutual interdependence, as shown by recent jurisprudence from Germany, Italy, Denmark, UK and other countries. The traditional doctrine according to which constitutional law is a topic that deals with the constitution of one or more independent states, which is based on the idea of a sovereign state,[26] is definitely under attack – regardless of whether the EU will ever be given formal statehood or not (a possibility that does in fact seem quite unlikely).

At the same time, it should be realised that when acknowledging this new level of EU constitutional law as a new set of constitutional norms, or a new "bloc de constitutionnalité" in order to use the French expression, a number of new and somewhat complicated issues will merit attention. One such issue

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[24] See his article The Different Levels of Constitutional Law in Europe and Their Interdependence, in J. Nergelius/P. Policastro/K. Urata, Challenges of Multi-Level Constitutionalism, Krakow 2004 p. 101 ss.

[25] Op.cit. p. 103 s.

[26] For an excellent, updated view of this traditional view of sovereignty from a French perspective, see M. Troper, The Influence of Judicial Review of Statutes on Substantive Law, in Challenges of Multi-Level Constitutionalism pp. 327–342, p. 339 ss. A number of interesting approaches to this traditional concept in its "moment of transition" are also to be found in Neil Walker (ed.), Sovereignty in Transition, Oxford 2003.

is of course which EU norms that may in fact be characterised or qualified as constitutional, a matter that will be dealt with below in section 3.3. Other issues have to do with which constitutional norms that should be given priority in cases of conflict, the EU norms or the national ones (or maybe the European Convention of Human Rights)?[27] But at the same time, there is no reason to deny or hide the fact that issues of this kind are already today dealt with by a number of courts throughout Europe. (In fact, conflicts on issues of this kind, not least between the ECJ and the German Constitutional Court – in relation e.g. to bananas – are very well-known.) And having that in mind, there seems to be no reason for the doctrine not to discuss them and, in fact, to take them really seriously. Those issues do also concern values, like democracy, rule of law and human rights, and the fact that those should be acknowledged and guaranteed not only at the national but also at the supranational level.[28] On this point, I definitely agree with Mancini, though I do not think that he drew the correct conclusions from those factors.

3. The Problems with the EU Constitution

3.1. Its Troublesome Background . . .

When the proposal for a new Draft Constitution from the so-called European Convention, who had worked with the proposal for almost one and a half year, was finally presented on 18 July 2003, this was perhaps not the end of a very long journey, since it took another year before the text was given its current, final form and it will still not be ratified for another few years, if ever. But it was definitely the result of a development towards further European integration, now finally manifested also in formal constitutional terms, that had started almost four decades before. At the same time, however, the content of the Draft Constitutional Treaty (DCT) shows some distinctive institutional features that are in fact more significant of the third and latest, if not last period of European integration, which in my view dates from the spring of 1999 until today.

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[27] A number of issues of this kind are discussed by Policastro in his Preface to Challenges of Multi-Level Constitutionalism, in particular p. 23 s, 29 s and 32 s. Of the vast doctrine on this topic, an interesting perspective from an Austrian perspective is provided by Theo Öhlinger, Unity of the Legal System or Legal Pluralism: The *Stufenbau* Doctrine in Present-Day Europe, in A. Jyränki (ed.), National Constitutions in the Era of Integration, London 1999 pp. 163–173, while a very interesting theoretical perspective is offered by Jaakko Husa, Nordic Reflections on Constitutional Law – A Comparative Nordic Perspective, Frankfurt a. M. 2002 p. 83 ss.

[28] For further arguments along those lines, see the contribution of Policastro in this volume.

As I have tried to show at some length and with quite a few examples in an article from 2002,[29] the period from 1999 to 2002 can be seen as characterised above all by a reaction within the EU against some of the main constitutional features of the "second phase", i.e. 1986–1999, such as an increased scope of majority voting in the European Council and a strengthened role of the EU Parliament, acting as a co-legislator with the entering into force of the Amsterdam Treaty on 1 May 1999 and even taking initiatives that forced the Commission to resign that same spring (March 1999). The circumstances surrounding this resignation and the appointment of a new Commission later that year, as well as e.g. the way to deal with the sanctions against Austria in 2000, all point to a situation where the Member States, or rather some of them like UK, France, Spain and Sweden, in fact wanted to show the rest of Europe and the surrounding world that they were, so to speak, still in charge of the agenda and had not lost the initiative to the Parliament. And in that light, it is in fact interesting to see the DCT as a continuation, or maybe even the logical consequence and final result of that tendency in EU constitutional law.

The Convention itself was a rather unusual gathering, meeting regularly – at least monthly – in well-attended sessions in the EU Parliament in Brussels, consisting of more than hundred members representing not only the existing and future Member States but also the different EU institutions, working totally in public and much involved, not least through the internet, in a dialogue with the so-called civil society. The very idea of a Convention preparing the work of the Constitution was here used for the second time in a short period; originally, as we know, it was used for elaborating the Charter of Fundamental Rights, apparently in a way that inspired a follow-up. And obviously, the model as such is considered to be successful, since the DCT now states, in article IV 442–443, that every intergovernmental conference (IGC) in the future will be preceded by a convention, modelled upon the one that has now been conducted, which is to be convened by the President of the European Council.[30]

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[29] 'De-legalize it', op.cit.

[30] As we know, in a special declaration from the Nice summit in December 2000, Sweden and Belgium were asked, in their roles as presidents of the EU in 2001, to try to stimulate continued and deepened debate on the need for constitutional reforms before enlargement, with the aim to increase the public interest and strengthen the popular legitimacy of the union. While this was hardly a Swedish area of priority, Belgium in the fall of 2001 found time to establish a way forward (besides dealing with the aftermath of the events of September 11, 2001). Those efforts resulted in the so-called *Laeken declaration*, from the summit with the European Council that was held in the castle with that name outside Brussels in december 2001. Here, the summoning of a convention in order to discuss "the future of Europe", as well as its organisation, was mentioned for the first time. This decision from the European

3.2 . . . Not to Mention Its Contents

3.2.1. *Introductory Remarks*

In the debates that have so far taken place in the EU on the *pros and cons* of the Draft EU constitution, notably in France, Netherlands and other countries where it has been subject to referendum but also in some other states, as well as in the EU law and political science doctrines and in the general political debate, various issues have been subject to critical attention. For instance, in the French debate before the referendum in May 2005, it was striking how much attention that was paid to part III of the constitutional text, that actually mainly codifies existing, material EU law (which is to a huge part even included in the existing treaties). In other parts of Europe, the idea to codify the supremacy principle, in a not very easily grasped way (art. I-6), has upset national feelings. Also reforms in the legislative process, including the so-called *passerelle*, have been controversial.

Many other aspects of the text may also be subject to critical remarks. I would here like to point to some main problems with its suggestions in important fields.[31] Above all, I think attention could be focused on two institutional key issues, namely the relations between the Council of Ministers, the Commission and the European Council, as well as the issue of QMV (qualified majority voting) in the two Councils. Also the division of competences between the EU and the Member States, in particular the scope of the supremacy of EU law before national law, merits attention. At least in the public debate on the DCT that has so far taken place, those issues seem to have been slightly underestimated. By analysing them further, it will hopefully be clear why the DCT is, in many ways, to be seen as the "peak" or end product in the journey towards increased informal decisional intergovernmentalism or simply "networking between governments" that has taken place at least since 1999.

Concerning the structure of the DCT, only a few words need to be said here. As we know, it is divided into four parts: While the first part deals with the

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Council also declared that the aim of the convention should be to elaborate a single European Constitution or basic treaty that could replace the four existing treaties. Some particularly important tasks for the work were also identified, namely to establish a better division of competences, between the union and its Member States as well as between the institutions of the EU, a further simplification of the legal acts and instruments of the Union, as well as increasing democracy, transparency and efficiency, while at the same time bringing EU "closer to its citizens".

[31] For a full survey, see the article The European Constitution – Intergovernmental Dominance Replacing Institutional Balance? A few critical Remarks on some institutional Aspects of the new EU Constitution, available at http://cels.law.cam.ac.uk/publications/articles_on_the_european_constitution.php.

definition and objectives of the Union, part II contains the Charter of Fundamental Rights and part III deals with the policies and functioning of the union. Part IV, finally, contains General and Final provisions, which are important not least from a formal point of view.[32] Above all, however, the very fact that all the rules on those various topics will possibly be contained in one single document is of great importance; this would of course also mean the end of the hitherto existing *pillar structure*. (Within the DCT, the different articles are numbered in a traditional manner, but with the part of the Treaty to which they belong as a prefix; the result is then I-25, II-235, IV-447 etc.) Most of the important institutional rules are to be found in part I, with details on the different institutions also in part III. Formally, however, the different parts of the text will have the same status.[33]

3.2.2. *Relations between the Core Institutions: The Commission, Council of Ministers and the European Council*

From a structural point of view, the most important change brought about by DCT is probably the very clear strengthening and reinforcement of the European Council, i.e. the Heads of State and Government (HSG), not the Council of Ministers.[34] This Council has of course so far been politically very important, as may be seen not least from the huge media attention that its regular meetings tend to gather, but it has held very few formal or legal functions and not even been recognized as a formal EU institution. Now, this will change totally, all of a sudden, should the DCT become a reality.

Thus, the European Council will now be seen as a part of the institutional framework of the EU, together with the Parliament, Council of Ministers, Commission and Court (art. I-19). According to art. I-20, the Council will

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[32] The DCT also contains a preamble, with a reference to the cultural, religious and humanist inheritance of Europe, without however mentioning God or Christianity as a specific religion, which certain groups had wished for. It may also be noted that the well-known expression in the current preamble referring to "an ever closer union between the peoples of Europe" as the aim of European integration is now replaced by a formulation about "the peoples of Europe . . . united ever more closely".

[33] This means, then, that an idea launched among others by the Portuguese presidency of the EU in the first half of 2000, aiming at dividing the treaties between a constitutional and a material part, has been followed structurally but not formally.

[34] Currently, under the existing treaties the European Council has few specified tasks; the most noteworthy is probably that it shall, according to article 4 TEU, provide the Union with the necessary impetus for its development and define general political guidelines. Of course, the Council of Ministers may also be composed of the HSG, meeting for a specific purpose in that Council instead of in the European Council; see Alan Dashwood, The Constitution of the European Union after Nice: law-making procedures, European Law Review 2001 pp. 215–238.

decide on the future composition of the Parliament, after the elections of 2009. A special President of the European Council shall be elected for two and a half years, with a possible extension (art. I-22). This new President shall, among other things, represent the EU externally within the common foreign and security policy (CFSP).[35] At the same time, however, the European Council shall also, by qualified majority and a consent from the president of the Commission, among the commissioners appoint a special "foreign minister", whose task shall be to supervise CFSP.

The perspective is even more blurred if we consider that the Council of Ministers will also be subject to important changes, meaning, not least, a division or distinction between its actions as legislator, in foreign affairs or so-called "general affairs" (art. I-24).[36] Thus, it seems like the Council of Ministers will now lose some of its institutional stability, while the European Council will on the other hand suddenly gain a totally new kind of stability that it has never before owned; this is all the more so since the latter Council may now decide in which other constellations the former one will be able to meet. Also the fact that the new "foreign minister" described above will act as president of the Council of Ministers when it deals with foreign affairs, although he is formally a member of the Commission, contributes to the indeed very blurred picture; until now, the Commission and the Council of Ministers have never before been linked or intertwined in this way. On the contrary, the need to keep them apart, for the simple fact that they represent different interests, has always been stressed in the EU law doctrine, as well as in general political and constitutional discussions.[37]

All those somewhat strange new ideas and innovations merit a further analysis (although they cannot all be dealt with here). For instance, a clear problem connected with this institutional architecture, where both the President of the European Council and the "Foreign Minister", as well as the President of the Commission are supposed to take part in the regular meetings within the European Council, seems to be the risk for personal and political conflicts

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[35] This is the person, then, who is in the debate often referred to as the new "EU President".

[36] It may be noted that according to art. I-24 sect. 6, the meetings of the Council of Ministers will be open to the public when it acts as a legislator. This will thus mean that the Council will have two kinds of meetings; one open and legislative and one behind closed doors, which will deal with other issues than the legislative ones.

[37] For instance, it has always been clear that the current spokesman for foreign affairs Javier Solana does only represent the Council of Ministers. The future problems for the foreign minister in relation to a division of loyalty and similar matters have been observed in article I-28 sect. 4 in fine, where it is stated that the new "foreign minister" should not always have to be bound by the statute and procedural rules of the Commission. However, this remark does not seem to be sufficient in order to eliminate those problems.

between no less than three main political personalities, their staff, cabinets etc. It can hardly be said that the DCT establishes a clear division of competences between them. Who shall do what, who will have the last word, who will be favourised by the media? The risk for conflicts here seems to have been underestimated, to put it mildly.

As said above, this strengthened role of the European Council may be seen as a continuation of a tendency towards a new kind of informal decisional intergovernmentalism or simply "networking between governments" that has increased in the work of the EU at least since 1999.[38] It may of course also be seen as a mere codification of the current situation within the EU.[39] However, it can hardly be said to reflect any real clarity in institutional terms, nor any clear idea or vision in terms of separation of powers between the institutions. In fact, the DCT can even be accused of upsetting the hitherto reasonably well-functioning balance between them, the so-called "Community Method". Having this in mind, it is, from a constitutional point of view, somewhat difficult to embrace the DCT with any great enthusiasm.

3.2.3. *Qualified Majority Voting in the Council(s)*

The rules in DCT concerning QMV are common for the European Council and the Council of Ministers, as follows from article I-25. Qualified majority is here defined as at least 55% of the Members of the Council, comprising at least fifteen of them and representing states comprising at least 65% of the population of the Union.[40] A blocking minority must include at least four Council Members, failing which the qualified majority shall be deemed attained. Thus, three out of the four largest Member States, France, Germany, Italy and UK may not on their own block a proposal, though they may otherwise be large enough to do so. Given that the co-decision procedure, which entails QMV, will continue to be the main legislative procedure (cfr articles I-34 and III-396), as it has been since the Amsterdam Treaty entered into force in 1999, those rules are of course extremely important. The main novelty in this respect, then, is undoubtedly that those rules will now apply to the European Council, a traditional castle of unanimity, at all. If anything, seen

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[38] See Nergelius, "De-legalize it" p. 462 ("In fact, the European Council may even be described as the real winner in the institutional battle for power that has taken place since 1999") and 468.

[39] This is for instance the opinion advocated by Dashwood, at a CELS/SCELS Workshop in Cambridge, that took place on 20 September 2004.

[40] However, should the proposal not originate from the Commission, the qualified majority shall be defined as at least 72% of the members of the Council, representing states comprising at least 65% of the population of the Union.

in a historical perspective, this fact will strengthen or replicate once again, though at another level, Weiler's these of a strong change in the integration process, due to the effect of the introduction of QMV in the Council of Ministers, two decades ago. Apart from that, the fact that it will be much easier than today to establish a blocking minority is of course also significant.

However, the rules are after all not quite as simple as described above. According to protocol 34 – which is, as the other protocols, an integral part of the DCT (art. IV-442) – the voting rules agreed upon in the Nice Treaty in 2000 shall continue to apply until 31 October 2009.[41] This means that acts shall be adopted if there are at least 232 out of 321 votes in favour of them, representing a majority of the members.[42] Nevertheless, any member of the Council(s) may request that, whenever an act is adopted by QMV, a check is made in order to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the EU. Should that not be the case, the act shall not be adopted.[43]

From a theoretical point of view, it is often argued that the importance of QMV is overestimated, since voting anyway actually rarely takes place in the Council(s), where the states tend to strive for consensus. On the other hand, it seems to be clear, as shown not least by Weiler, that the (re)introduction of QMV in the Council of Ministers in the mid-1980's, as an element in the launching of the Internal Market and the Single European Act, totally changed the atmosphere and the working conditions within the Council, where discussions and negotiations subsequently took place "in the shadow of the vote" instead of, as it used to be, "in the shadow of the veto".[44] Given that the areas where QMV is applied are today many more than some twenty years ago, it can be underlined that the importance of the rules on QMV should definitely not be underestimated.[45]

In this respect, it shall also be noted that future discussions within the Council(s) will take place not between twelve or fifteen but twenty-five or

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[41] A slight modification is here proposed, however, due to the fact that Bulgaria and Romania do not seem likely to conclude their membership negotiations in the next few years, as envisaged in Nice.

[42] Or 2/3 of the members if the proposal does not come from the Commission.

[43] A detailed analysis of how those new rules will affect different areas of decision-making was presented by Alan Dashwood/Angus Johnston, The Institutions of the Enlarged EU under the regime of the Constitutional Treaty, CELS/SCELS Workshop, Cambridge, 20 September 2004, notably in the Appendix. The article is published in CMLR 2004 pp. 1481–1518.

[44] See in particular The Transformation of Europe, Yale Law Journal 1991 pp. 2403–83 (supra 2).

[45] According to art. I-23, sect. 3, QMV is the main rule and shall apply unless DCT provides otherwise.

more Member States, which is of course a huge difference. Not least the widened possibilities for Member States to form blocking minorities is problematic from this point of view, since the interests and opinions of the Member States will probably be more divergent in the future than they have been until now. Thus, the new rules will probably not make decision-making in the Council(s) easier, which seems to be yet another hidden problem in the DCT. Furthermore, the rules are not likely to fulfil the simplification of the treaties that the Laeken declaration wished for.[46]

3.2.4. *Some Remarks on the Division of Competences between the EU and the Member States*

The rules on the competences of the Union and the division of competences between EU and the Member States are to be found in title III of part I of DCT, in particular articles I-11 – I-14, while the principles of proportionality and subsidiarity are regulated, as before, in a special protocol (no. 2). An important change in that respect concerns the introduction of a so-called early warning system, according to which the national parliaments will be able, within six weeks from the date when the Commission did submit a legislative proposal to other institutions, to address those institutions with a written statement, declaring their concern that the subsidiarity principle has not been duly respected. If such a statement has been made from one third of the national parliaments, the institution(s) concerned may ask the Commission to reconsider its proposal. If no change in the proposal should then occur, the parliaments may bring an action before the Court of Justice, arguing that the principle of subsidiarity has been violated – a fact that, besides of its other possible implications, seems likely to bring an end to the restraint that has until now characterised the jurisprudence of ECJ in this area.[47]

Apart from that, the different areas and not least categories of competence (above all so-called exclusive and shared competence) are regulated clearer than before in articles I-12-14. However, it must be noted that the DCT will not contain any clear catalogue of competences, describing in a clear way which competences that belong to the EU or to the Member States, of the kind that we know from traditional federal states like USA or Germany. Obviously, a number of Member States prefer the current, somewhat unclear and "floating" system, where they may in fact only exercise limited competences,

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[46] It may also be noted here that the complicated, though seldomly used rules on enhanced or closer co-operation will remain in force more or less unchanged; see art. I-44 as well as III-416–423.

[47] For further analysis, see the contribution of Tridimas to this volume.

before the EU has acted, and of course only within the area of shared competence, instead of such a clear federal structure, although the latter model does actually give much stricter guarantees and greater protection for the competences of the different states – as shown once again by examples from USA and Germany. As far as the "blurred" character of the DCT is concerned, once again and in another area than the one mentioned above, it should also be noted that a special "flexibility clause", corresponding to the current rule on so-called residual powers in art. 308 of the EC Treaty, is suggested in art. I-18. According to this rule, the Council of Ministers, acting unanimously on a proposal from the Commission and with the consent of the Parliament, can adopt appropriate measures whenever action by the EU should prove necessary (and within the framework of policies defined as such in Part III of DCT). Such a rule may of course be necessary in emergency situations when a true need to act quickly will arise, but from a strictly principled point of view, it is contradictory to other articles in the Constitution aiming at defining, regulating and limiting the competences of the EU (like art. I-11 or the current articles 3 and 5 of the EC Treaty).

Still, an issue that seems to be even more interesting to analyse from a constitutional point of view, and which has so far gathered less attention in the doctrine, has to do with the relationship between existing EU law and national law. In other words, will the DCT affect the rules on supremacy of EU law over national law(s) (or national constitutions, for that matter)?

Article I-6 in this respect quite simply states 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". As can be seen here, this formulation does not in itself offer any solution or answer to the issue that has so far been most vividly discussed in the doctrine, namely whether EU law should also, in case of conflict, be superior to the constitutions of the Member States, an issue of immense importance where, as we know, the ECJ and constitutional or high courts in a number of Member States have for a long time held different opinions, the ECJ championing the view that the supremacy applies without exceptions for any kind of national law[48] and powerful courts notably in Germany, Italy and Denmark arguing in the opposite direction.[49] However, and this is somewhat surprising, the Member

[48] This has been its opinion ever since the early case Costa v. Enel, 6/64, ECR 1964 p. 1141. See also e.g. Simmenthal, 106/77, ECR 1978 p. 629 and Commission v. Luxemburg, C-473/93, ECR 1996 I p. 3207.

[49] See in particular the following cases: Germany; "Solange I", BVerfGE 37, 271, "Solange II", BVerfGE 73, 339 and the Maastricht or Brunner case, BVerfGE 89, 155. Italy; Frontini, Corte Costituzionale 183/1973, 1974 Giur.Cost. 330. Denmark; Maastricht case, U 1998.800 H (Supreme Court).

States did sign a special declaration (no. 1), according to which art. I-6 only reflects existing case-law of the Court of Justice and the Court of First Instance. Given only the very brief description of the highly controversial topic presented here, it seems clear that this is a huge simplification. In fact, what the Member States have done here, for no obvious reason, is no less than preferring the opinion of ECJ in this contested area before the opinions of some of their own highest courts. Although the legal status of declarations is generally somewhat unclear, this declaration reflects a surprising position from the Member States; one may even wonder if they fully understood the legal significance of the position expressed in the declaration when they agreed upon it. Maybe they did, and just tried to address some of the "new" constitutional issues with conflicting constitutional norms at different levels, European and national, discussed above towards the end of section 2, but for some reason that does not seem entirely probable. In any case, it seems most likely that the ECJ will not hesitate to use the declaration as a source of interpretation or background material when a new case occurs that involves the highly sensitive issue of the extent of the principle of supremacy of EU law.

3.2.5. *Analysis and Concluding Remarks Concerning DCT*

The issues discussed here cover only a very limited, though extremely important, part of the new constitution, which contains a total of 448 articles, 36 protocols and 50 declarations. Whether the DCT enters into force or not, they will continue to be of great importance for the EU, since they concern the most crucial issues in relation to the division of powers between EU and the Member States as well as between the EU institutions, which represent different values and interests. Thus, those issues are also very much related to the question how democracy is best fulfilled and exercised within the EU and thus to the discussion above in section 2.

In that respect, a lot could be actually be said in defence of the current balancing of powers between the EU institutions and between the Union and the Member States. How is this, after all, well-functioning balance likely to be affected by the DCT, should it enter into force?

One tendency that is clear in the DCT is the emergence of the European Council as a not only influential, even crucial, but rather dominant body, with decision-making powers in a number of areas (also in relation to other institutions), a permanent president, right of initiative in many areas and new formal responsibilities, e.g. in the field of CFSP. In my view, there is no doubt that this change marks an even clearer direction in EU constitutional law towards what is above called – for lack of better words – informal decisional intergovernmentalism. Thus, there is no real doubt that the DCT may be a challenge towards what is traditionally called, not least within the EU institutions, "the

Community Method". This has, as we know, always been characterised by a balance between supranational elements (e.g. the right to initiative of the Commission) and intergovernmentalism within the legislative process exercised by the Council of Ministers, which has in recent years been balanced by the increased powers of the Parliament, a supranational body that does however also directly represent the citizens.

This balance is unlikely to be kept with DCT, which instead centralises a huge part of the different powers (whether of initiative, decision-making or implementation and carrying out of rules) to the intergovernmental European Council, a body that has so far never been an official EU institution, that has no staff, premises or secretariat of its own and in which the transparency looks likely to be limited. This is undoubtedly a clear step towards giving the Member States and their governments the political but also a huge part of the legislative initiative within the EU.

Other important problematic aspects of DCT related to the issues described above have to do with lack of clarification and lack of efficiency in the decision-making, due to the increased possibilities to form blocking minorities.[50] From a traditional EU law point of view, using the well-known concepts of intergovernmentalism and supranationalism (without making any attempt to define them further), it is thus clear to me that the DCT must be seen as an expression of intergovernmentalism, at least as far as the relations described above between some of the core EU institutions are concerned. Other commentators may see it differently,[51] and it is clear, for instance, that the Parliament will increase its powers in some areas (while the ECJ and the ECB will remain powerful institutions). But this partly new kind of intergovernmentalism, which has so far not merited much attention in the EU doctrine, is still the dominant institutional trend of the proposed constitution.

Furthermore, it is a troubling kind of intergovernmentalism, and a slightly different one than the one we are used to, that is now emerging. If the two

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[50] Also the generally somewhat weakened position of the Commission could be mentioned here, but this topic will not be dealt with partly because the DCT in its final form has brought about less changes in the role of the Commission than the Convention intended in its proposal from June 2003. It seems likely that this was one of the areas where some of the small Member States influenced the elaboration of the DCT, while some of the big Member States, like France and UK (with some help from Sweden and Spain) were probably more in favour of the strengthened position of the European Council.

[51] Interestingly enough, the main "founding father" himself, Valery Giscard d'Estaing, argued, in an article aiming above all at convincing French voters to say yes to the Constitution in the forthcoming referendum, that the DCT could be seen from both ways, as expressing supranationalism as well as intergovernmentalism, but that it was good for exactly that reason (i.e. that it contains both elements); see Les deux "projets" européens, Le Figaro 29 January 2005.

Councils are seen as the intergovernmental bodies of the EU, it is clear that they will together be stronger in terms of decision-making power than before, but this new strength belongs entirely to the European Council. In fact, the Council of Ministers, with its already quite limited secretariat, could probably find life under DCT rather difficult, having to work in new forms, with new constellations (which are different depending on the issue dealt with) and at the same time probably having to share its resources with a formally speaking totally new institution – the European Council, to which it is now also formally losing influence and competence.

3.3. And What about Its Future?

3.3.1. *General Remarks*

Since the referendas on the EU Constitution were held in France and Netherlands in the end of May and early June 2005, there has been a great uncertainty in the air throughout Europe, as to the future fate of the Constitution. Does it in fact have any future at all? It is not entirely clear that it will survive those two severe blows, given that according to the current rules on treaty ratification within the EU (article 48 of the EU Treaty), any amendments to the Treaties have to be ratified by all the 25 Member States in accordance with their different constitutional requirements. The existence of a Declaration No 30 of the Constitution, according to which it could in fact enter into force (or that question at least be subject to discussions within the European Council), should 20 Member States have ratified it by October 2006 could theoretically alter this[52], but for reasons explained below this development does simply not seem very likely to occur.[53]

The general feeling of unease and uncertainty in relation to the continued integration process, including the eventual entry into force of the Constitution, was then undoubtedly reinforced by the bitter rows between different Member States, notably United Kingdom and France, at the European Council summit in Brussels 16–17 June 2005. Though nothing specific was in fact said there about the fate of the Constitution (except that it was now time for "reflection", whatever that means), the very fact that the Luxemburg presidency, as well as President Chirac and Prime Minister Blair (just before taking over the EU

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[52] See also, in this respect, article IV-443 sect. 4.

[53] For a full account, see my article And now for something completely different: It's the EU Constitution – and its formal stuff, in Europarättslig tidskrift (Swedish Journal on European Law) 2005 pp. 421–433, on which the comments below are based. Another interesting comment, though in Swedish, is by Bruno de Witte, Ratificeringen av EU:s nya fördrag – vad händer om den misslyckas?, SIEPS 2004:8, Stockholm 2004.

presidency), described the situation as a grave state of crisis is of course alarming and did not increase the "constitutional optimism", so to speak.[54] Therefore, it is now highly appropriate to ask what will really happen with the Constitution.

Those Member States that have, in the light of the rejections of the constitution in France and Netherlands, postponed their ratification procedures or even annulled previously announced referendas (UK, Sweden, Denmark, Poland, Ireland) may hardly be criticised for their actions. Not only the current rules on ratification, which do of course apply now, but also the rules suggested by the Constitution itself (IV-443 and 447) do as we know presuppose a unanimous ratification of all Member States before a Treaty amendment shall enter into force. In the wake of a negative result in two of the founding Member States, the reaction of those states could hardly be described as exaggerated. Also the Declaration from the European Council of 17 June, although it expects the Constitution finally to enter into force, foresees a period of reflection, after which the Council intends to address the issue again in the spring of 2006.

14 states have by now ratified the Constitution.[55] A factor to be taken into account here is, as mentioned above, that art. IV-443 sect. 4 and Declaration 30 to the Constitution (which is formally speaking not legally binding but could probably be invoked by some Member States, should the circumstances be adequate) foresee that a discussion on its possible entry into force should take place within the European Council, if 20 Member States should have ratified it by the end of October 2006. However, it seems obvious that a number of those Member States who have now declared that they will postpone the ratification will have severe difficulties in meeting that time-limit; this goes for UK, where a referendum has once been announced and ratification without referendum is thus politically unlikely, as well as Sweden, where parliamentary elections will be held in September 2006, a date before which no political party will be inclined to touch the "hot potato". In Denmark and Ireland, opinion polls seemed to be favourable to accepting the Constitution, at least until the French and Dutch referendas were held, but will the leading politicians now be able to gather new steam and motivation in order to run tough campaigns? Given some knowledge on the problems that those countries have had with previous ratifications, this does not seem entirely likely. And what about Poland and the Czech Republic, where national sentiments seem to have gained grounds within the opinion for quite some time?

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[54] For a slightly more optimistic account of the situation, see Blair's speech in the European Parliament 23 June, available at http://newsvote.bbc.co.uk.

[55] Those are: Belgium, Spain, Germany, Lithuania, Slovenia, Luxemburg, Hungary, Cyprus, Greece, Italy, Latvia, Malta, Austria and Slovakia.

I therefore believe that the option of using Declaration 30 as an alternative to a traditional, common or joint ratification by all the Member States is out of the question.[56] This probably also means that it will not be possible to give France or Netherlands (and maybe some more state) a second chance to vote on the Constitution, maybe after some exception or special status within a given field could have been achieved. This way of solving the problem, which was as we know used – though not in identical forms – for Denmark concerning the Maastricht Treaty and Ireland in relation to Nice, presupposes that all the other Member States decide to go ahead with their ratification and that this process will not run into any main difficulties; given what was just said about the current situation in for instance UK and Denmark, this does actually seem very unlikely.

Thus, it seems logical that ideas on different solutions concerning the Constitution's future are now so many. The most radical solution, of course, would be for the EU simply to abolish the Constitution and formally declare it dead (and then engage in vague projects like "reflection" and "dialogue", maybe even without specifying what they really mean or are intended to lead to). However, both for political and legal reasons this does not, at least not for the moment, seem very likely. First of all, a lot of work of the representatives of all Member States as well as the main EU institutions has been invested in the Constitution and it seems unlikely that the Member States will simply throw this away. Also, the loss of political prestige connected with such a move would still be huge, as far as I can see. Last but not least, though such a decision may seem to be a simple solution, it somehow disregards the need for new rules in a number of fields (e.g. new decision rules in the Council(s) or new competences in the field of Common Foreign and Security Policy, CFSP) that the Constitution intends to bring about. This need is somewhat urgent and the Constitution meets it at least partially (in some areas, that is). It shall also be noted, once again, that the Declaration of the European Council in Brussels in June 2005, issued at a moment of great, even historical disagreement between the Member States, does not at all envisage this alternative. Thus, simply to think of a future development within the EU where the Constitution is just dead and ignored, as though it had never existed, is also quite unlikely.

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[56] An argument that is likely to (re)occur in the debate is that as many Member States as possible should continue with the ratification, despite the uncertainty as to the final destiny of the Constitution, simply because they are legally obliged to do so (or even given the need of an "opinion poll" in as many Member States as possible). However, in the light of the uncertainty concerning the final fate of the Constitution and being aware of the huge amount of political energy that needs to be invested in such a ratification in a number of the remaining Member States, this argument is in my view not justified.

Let us therefore consider some other options. One such alternative, popular with many commentators since quite some time – though it seems to be more attractive for economists or political scientists and other commentators, eager to come up with new solutions, than for lawyers, who tend to worry about the impact it will have on the, until now, rather uniform application of EU law – is to enhance the extent to which so-called *closer cooperation* will be used. However, apart from the fact that the general enthusiasm for this kind of cooperation is normally not shared by lawyers – and despite that the Monetary Union or the Schengen Agreement may on the other hand be seen as quite successful new models of closer cooperation – there is today a further argument against taking new steps in that direction. Traditionally, the vision of this kind of cooperation is that a few core Member States, who may be perceived or see themselves as a kind of elitist *avant-garde* in this respect, will develop this cooperation on their own; typically, such a group could consist of Germany, France, the Benelux countries, Spain and maybe some newer, eager Member States like Austria or Finland. Then, if the project turns out well, other states will wish to join later, which the current rules allow them to do. Today, however, it is hard to foresee France and Germany taking the lead in any kind of more advanced, bold, untested or even risky projects, given the domestic problems in both countries. The fact that Netherlands, with its strong economy and long, unbroken history of European commitment rejected the Constitution also puts the position of that country as a possible EU forerunner in question. Thus, closer cooperation does in my view not seem to be the solution for the foreseeable future.

Yet another option is of course to try to have the Constitution modified and slightly renegotiated, and then submitted to ratification once again in a few years time or something like that. There are both pros and cons involved in such an operation, as will be dealt with below, but the difficulties are not neglectable. Let me just point to a few of them.

First of all, the problem mentioned above with all the work already devoted to the drafting of the Constitution would be present also in that situation. And what must be added, then, are the new problems that a renegotiation will bring about; the Constitution is a compromise between 25 Member States and some EU institutions, agreed upon with great difficulty. It is not even sure that an agreement could be reached if the text was to be renegotiated, which means that the Member States, aware of this danger, will be reluctant to decide on something like that.[57] And, furthermore, how could we know that yet another

[57] It may of course also be argued that this option disregards the situation of the 13 Member States who have already ratified the Constitution. In fact, however, no alternative will be entirely positive for them or attentive to their needs, which is one of the great problems or "traps" of the current situation.

ratification procedure, under the current rules, would actually be easier next time than it has been now? Given that it is not even easy to know exactly which parts of the Constitution that the voters in France and Netherlands were voting against, this task seems immensely difficult.

From a political point of view, another alternative does therefore look more likely. This is of course to let some time pass and then give the Member States the opportunity to agree, unanimously, on different parts of the Constitution (i.e. the most important and urgent ones, as discussed above). Then, step by step, major parts of the Constitution may enter into force in, let's say 2007–2008, by traditional international agreements; other parts, like the popular initiative by one million citizens that will force the Commission to take an initiative (art. I-47) may be subject to new inter-institutional agreements and different kind of "soft law-arrangements". Whether this is good or not remains to be seen – from a legal point of view I am definitely inclined to say that it is not – but given the current uncertain situation, this seems to be the most likely solution.

Are there, then, any new, fresh ideas on which to approach the complex situation? Well, one way to start could of course be to analyse what the use of the term constitution in this respect – if it is to be kept – does actually entail. Already in the beginning of 2000, the then Portuguese EU presidency launched an idea that is in my view entirely convincing, namely to divide the Treaties into one constitutional part, consisting of rules on the EU institutions, the relationship between EU and the Member States, subsidiarity, human rights and some other typically constitutional issues, and one part with material rules of the kind described here above, on competition law, fishing policy, internal market and other topics. The idea was of course, then, that only the first kind of rules should be subject to the harsh criteria for amendment and ratification stipulated in art. 48 TEU, while the second group of rules could be altered by majority decision in the Council (which would probably under DCT be the European Council, given the strong position that the Constitution gives this, formally new institution). Now, it is interesting to note that articles IV 444 – 445 actually foresee a simplified revision procedure concerning Title III of Part III, relating to the internal policies and action of the Union. Those two articles have hitherto mainly been observed in the debate concerning the so-called "*passerelle*" in art. IV-444 sect. 2, according to which the European Council may adopt European laws or framework laws in accordance with the ordinary legislative procedure instead of the special one, as otherwise required.[58] Still, they could also be seen as an interesting step in the right direction in

[58] Concerning the legal impact of framework decisions, see once again the Judgment in the Pupino case C-105/03, June 2005.

terms of dividing the Constitution into different parts, where some are more constitutional than others, so to speak.[59]

But the problem, undoubtedly, is that those provisions are not far-reaching enough. If the EU leaders really want the new "Constitution" to be discussed, through referendas or when it is passed through national parliament(s) or otherwise, they should ask themselves if it is really a good idea to include in it a huge part – by far the longest section, with a total of no less than 322 articles – that may by and large simply not be described as constitutional, should we analyse the content of its rules. Therefore, this must be one of the main areas of reform, as illustrated by the slightly confused French debate, should the Constitution ever come to be modified or subject to re-negotiation. A further advantage with dividing between a constitutional and non-constitutional part of the text, where the rather un-constitutional Part III would no longer be part of the constitutional package, would of course also be to eliminate the risk of discussions on the Constitution turning into debates between left and right or between "capitalism and neo-liberalism" on the one hand and social regulations on the other, like in the French campaign in 2005. Constitutional discussions should focus on the rules, the framework of the political game, not on the material content of politics.

3.3.2. *Ways to Proceed*

In the DCT, we can probably all find things we like or disagree with among its 448 articles, 36 protocols and 50 declarations. What is more interesting at this stage is to analyse the possibilities for an eventual entry into force of the Constitution, or parts of it. Strictly speaking, from a formal point of view, the only rules that we really need to bother with in this situation are of course articles IV-443 and 447 (as well as Declaration No. 30), which deal with the ratification process and entry into force of the text. But once again, things may prove to be slightly more complicated than they seem to be at first glance.

As stated above and by a great number of other commentators throughout Europe in the last year, the political situation is now very unstable and it is therefore extremely hard to predict what will actually happen with the Constitution. Certain alternatives that tend to occur in the debate – like a strong emphasis on closer cooperation, for example – are less likely to come true. There seems to be an obvious, politically possible solution, namely to let

[59] A number of other, theoretically possible options are suggested by de Witte, op.cit. Among those are a denouncing of the current EU and the construction of a new Union for the states who ratify the DCT (which de Witte actually rejects, for the simple and good reason that it will not be possible under the current rules to change the nature of the EU in that way) and a premature application of the DCT, pending its entering into force – which is however also complicated.

time pass and then decide to make certain important parts of the Constitution binding through inter-governmental decisions, without formally altering or amending the current treaties; after a number of such operations, the Constitution may even formally be declared to be a dead letter. And should this actually come true, I have mentioned here a few parts of the Constitution that I consider indispensable. (That would then probably not include the division of the Treaties into two parts, one constitutional and one "ordinary" – a move which would make future constitutional amendments much easier – since that is a reform which seems to be too huge and important to be decided in this simplified way.)

But if we may think a bit free here, and even be slightly idealistic, there may actually be room also for a more radical idea, should the political leaders in Europe want to do something new and radical about the current dead-end situation. As mentioned above, they have now talked at almost every European Council summit for a number of years about the need to bring Europe closer to its citizens. Also the Commission and the Parliament talk a lot about this. The referendas in France and Netherlands have shown, just like previous referendas in e.g. Ireland and Sweden, how difficult it is to separate European from national affairs in national referendum campaigns, where voters tend to punish and protest against national politicians they dislike. The alternative to let parts of the Constitution enter into force through intergovernmental decisions may prove tricky and even lead to protests against lack of transparency and democracy – who knows? In such a situation, a bolder move from the politicians may actually be an attractive solution, also to themselves.

It is then that the idea to organise one single European referendum, held at the same time in all 25 Member States, may prove to be the way out of the current trap. The newly launched (September 2005) Duff/Voggenhuber report from the European Parliament actually proposes such a thing, but only in relation to future, amended versions of the DCT, not the current one.[60] Apart from that, the draft opinion on this report of the Committee on Foreign Affairs proposes a "European Citizens First-initiative", aimed at giving the views of the citizens priority in all future matters of legislation, as well as other political debates and proposing regular European-wide debates on certain themes.[61] And the Commission in its so-called "Plan D" for Democracy and Dialogue[62]

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[60] PE 362870v 01–00, Committee on Constitutional Affairs.

[61] See the Parliament report (Committee on Foreign Affairs) on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union (COM – 2005/2146(INI)), written by Elmar Brok.

[62] Communication Strategy of 20 July 2005, IP/05/595, adapted as (COM (2005) 494), 13 October 2005, originally called Listen, Communicate, Go local – New Commission Approach to dialogue and communication with European citizens, but with the final title "The Commissions's Contribution to the period of reflection and beyond: Plan D for Democracy, Dialogue, and Debate".

(also from 2005) is very focused on communication, both in the way of not only talking to the citizens but also listen to them and in terms of improving the way in which the Commission and other EU institutions do communicate with the EU citizens. But as we see, none of those proposals do actually address the current crisis and the way to deal with the DCT.

For obvious reasons, due not least to constitutional provisions in a number of Member States, such a European-wide referendum as suggested here can not be legally binding, but should instead be seen as a kind of giant opinion poll. (It could obviously at the same time serve as somewhat a happening, with votes coming in from 25 different capitals, almost in the manner of the Eurovision Song Contest.) It is also clear that it would not preclude subsequent national referendas in countries where this may be necessary for constitutional or other reasons, such as Denmark. But nevertheless, the result in such a referendum may in a way be decisive. Should the text be voted against by a majority of European voters, it is of course obviously dead and there is no need to continue the ratification process. But should a clear majority of the European citizens, of say 55% or more support it, the pressure for the EU as a whole to let it enter into force would be huge.[63] This would then also create some space for solving problems of individual countries who would still reject it, in the way that has previously been obtained for Denmark and Ireland (an alternative that, as said above, does not seem to exist for France and Netherlands today).

Furthermore, if campaigns for and against the Constitution are held simultaneously in 25 different countries, it seems very unlikely that national issues of different kinds would influence the outcome of the result in individual states, except perhaps on the fringe of the debates. This could then also serve as a test on whether such a thing as a European public arena, often wished for by many commentators, does actually exist. Undoubtedly, it would bring EU issues closer to the citizens than has so far ever been the case.

But, from a legal point of view, even in this, somewhat utopian situation, one further question remains to be answered: Should it in this new situation be the current constitutional text, that the voters in two crucial Member States have already rejected, that is subject to a pan-european vote, or should it be a modified version? That remains of course to be seen and there is no

[63] In the Brok report (supra n. 60), the suggestion here is that it may only enter into force if it is approved by a majority both of the citizens and the Member States. This is of course a possible minimum requirement, but it seems totally unrealistic to propose such a ratification rule as a substitute for the current rules of ratification in the constitutions of the different Member States.

point in arguing for or against the different options at this early stage; that would be premature, to say the least. It may however be mentioned that regardless of whether a modification of some kind will take place or not, no alternative will actually be quite satisfying or rewarding for the 13 Member States who have ratified the Constitution, who seem to be in a no-win situation. Their position is therefore not an argument as such against a re-negotiation.[64] Such a move, albeit limited, could also make it easier to justify the decision to hold one single referendum in all Member States. It seems somewhat more confused to organise this on a text that has already been subject to referendum in four Member States (with four others waiting) and rejected by two of them.

And if those assumptions are taken for granted, the next question is of course which questions or parts of the DCT that ought to be renegotiated before a possible second referendum might take place. Above, I have indicated my own preferences in that regard or rather, the parts of the DCT that I find particularly ill-equipped to meet the future needs and challenges of the EU. This does of course not automatically mean that they would also be subject to a smooth re-negotiation; on the contrary, some of them may be expected to be particularly tricky to deal with that way. But should the DCT actually be subject to re-negotiation (which is after all an easier thing than to write a totally new constitution or treaty), it would seem strange if they were not at all included in those future discussions.

4. Mind the Gap! On the Problem of Bringing about a True Debate on Europe in Europe

What the discussion above has shown more than anything else, perhaps, is that the future not only of the DCT, but rather the future direction of the European integration in general for that matter, is indeed a European issue, that concerns all European states and academics, journalists and politicians as well as "ordinary citizens". Though it may sound pompous, this question is important, maybe even decisive, for the political future of Europe, its role in the future world and its prospects for bringing peace and prosperity both within its frontiers and to other parts of the world. Seen in that light, the bitter row between UK and notably France at the European Council summit in Brussels in June 2005 was not only a

[64] De Witte, op.cit., even suggests that in such a situation, they would not have to ratify the new, re-negotiated Treaty at all. This would in my view depend of how big the changes suggested therein would be. I am not entirely convinced of his line of reasoning on this point (which is otherwise normally the case).

standard example of political quashing between old rivals or foes, but rather an almost existential battle on the future direction of European integration, on which areas to give priority and how Europe ought to view itself in today's world.

Still, those huge political issues cannot be dealt with here. They are after all not included in the topic of this book, nor of this particular article. But may it after all be the case that the discussion that has taken place in many countries on the DCT, as well as its future fate, will actually also tell us something about those greater future issues?

What I find particularly disturbing in the current situation is the lack, not only of a truly European debate, with a European "demos", political parties etc, so often wished for by sociologists, political scientists and other commentators, but also an acknowledgement of the fact that the issue of the ratification and possible future entry into force of the EU constitution is a truly European issue, which concerns all EU Member States now and in the future, rather than a national one. But instead of consensus on this rather fundamental point, we tend to get debates on the ratification of the DCT as well as other future issues, like enlargement and globalisation, that are getting ever more nationally oriented, which is rather contradictory and in fact quite discouraging for the future. And as far as the legal context is concerned, not only does the current art. 48 require unanimous ratification of new or amended treaties. It is also a fact that this rather awkward way of dealing with modernisation of the Treaties will, as we have seen, not be changed as such, should the DCT after all enter into force!

According to art. IV-443, however, a simple majority of the European Council will in the future be able to convene a new Convention for constitutional changes or amendments, like the one working in 2002–03, provided that this is proposed by a Member State, the Parliament or the Commission.[65] And according to sect. 3 of the same article, a conference of representatives of the governments of the Member States – a traditional IGC in other words – shall then be convened in order to decide "by common accord" on the amendments to be made, which will then enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. As we can see, this means no change at all of the current rules, which is after all quite surprising given the huge problems with the ratification in different Member States that have characterised every Treaty change ever since Maastricht in the early 1990's.

In this perspective, the above-mentioned possibility for the European Council to hold discussions on what to be done in a situation where at least 20 Member States have ratified the amendments (art. IV-443 sect. 4 and Declaration No. 30)

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[65] It could be noted that the Council may in that situation also, by simple majority, decide not to convene a Convention; in that case, however, the Parliament must give its consent and instead, a conference of representatives of the national governments shall be held; see art. IV-443 sect. 2.

is by no means radical enough. As any reader realises, it is necessary that the current ratification procedure has to follow the existing and applicable rule, i.e. art. 48 of the TEU. This is also indicated by art. IV-447. But it is actually highly surprising that the Member States were not able to agree on some smarter and easier solution for the future, in particular when we know how many new ideas in this field that were discussed during the work of the EU constitutional convention (that did however formally never present any new suggestion). One explanation of this rather regrettable state of affairs is of course that the Member States wish to remain in the role of "Masters of the Treaties" for yet some time. Still, it is hard to see why they officially agree on a situation where, technically and theoretically, a state like Malta may be able to block an agreement that the other 24 Member States have agreed upon. When concepts like QMV or double majority (of both Member States and citizens) have now made their way into the ordinary legislative process, it is somehow difficult to imagine that they should forever be banned from the constitutional, treaty-making arena.

The Brok opinion on the Duff-Voggenhubber report seems to acknowledge this problem and, as mentioned above, suggests as a remedy a quick re-modelling of the DCT, once it has entered into force, after which it should be subject to a European-wide referendum.[66] But will it really be possible to push through a ratification of the DCT in the traditional way, now that it has been rejected by two leading Member States? And would the European voters and citizens then be ready for a new referendum a few years later? Is it even possible to explain to the voters – and would the politicians really want to try – why the DCT, which has been subject to so heated and stirred controversies, ought to be quickly re-changed?[67] And why would a re-negotiation be easier once the DCT has entered into force than before that has happened?

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[66] The report itself (PE 362870 v 01–00, final version / 6 December 2005, A6-0414/2005) is actually very focused on dialogue, in the same way as the Commission in its Plan D, see also the White Paper on European Communication Policy, 1 February 2006, 1P/06/103, but wants the DCT as such to be abolished and officially declared dead. After that, it wants the dialogue to start and a first draft of a new constitution to be presented towards the end of 2006. Then a convention is supposed to work with that text in 2007–2008, after which a pan-european referendum is supposed to take place on the 7 June 2009, together with the elections to the EU parliament. This time-table is obviously more similar to the one that I would personally advocate, although I am not quite sure of the effects of declaring the DCT dead.

[67] A further, more technical argument against the kind of reasoning conducted by this opinion is that it presupposes that the next, revised version of the DCT should be subject to a referendum, while the DCT itself, that it wishes to see enter into force as soon as possible, does actually not foresee such a procedure for treaty changes. This seems to be quite unlogical. The Parliament in its resolution on the period of reflection stresses dialogue and an entering into force of the Constitution in 2009 above all, without going into specific details on how this is going to be achieved.

It seems that this opinion underestimates some important problems in this and other respects. In fact, a re-negotiation of the current DCT, followed by a European-wide referendum in 2009 or before as suggested in the Duff-Voggenhuber report is in many ways easier to justify, as mentioned above. Regardless of how it is brought about, it seems to be clear that the EU will find it harder to adapt to the new global situation and find its new role in the world unless having at least some of the new rules in the DCT materialised and at its disposal. But for this to come true, pushing forward the current DCT at any cost, against the will of states who have voted no or postponed ratification, does quite simply not seem to be a very good idea.

Above all, however, the true need that such a European-wide referendum could fulfil, in 2009 or before, seems to lie in the nature of the very debate on the integration process. The present ratification process with all its problems seems to illustrate one major gap in the whole current EU situation, both from legal, constitutional and political points of view. From a general European point of view, it is clear enough that the question whether the new EU Constitution will ever enter into force or not is truly a European issue, which concerns the whole of the Union and all its Member States and citizens. But still the current rules on Treaty ratifications, as well as the ones suggested by the DCT, make it possible for every individual Member State to prevent the entry into force of new treaties or ordinary treaty amendments. And furthermore, the debates that we now see at national levels at the moment of ratification, by referendum or in other ways, seem to emphasise national issues and truly national perspectives on EU issues more than ever. This is the case both for badly informed debates, led by chauvinistic parts of the media like in the UK or Poland, as well as more well-informed debates e.g. in France, where issues like the so-called "Polish plumber" or even the possible future accession of Turkey were important in the campaign in 2005, although they had absolutely nothing to do with the content of the DCT and were thus not subject to vote. In Netherlands, globalisation as such was discussed, but mainly against the background of political violence and an aggressive murder in 2004, which highlighted the alleged problems with immigration and the role of the Muslim community in particular. And as we saw in France, even when the discussion did actually touch upon the content of the DCT, it did so in relation mainly to rules that were not even new.

So how can this deplorable state of affairs be explained? How did this true gap in the current European debate not only on the future institutional structure of the EU but indeed on the future of Europe as a whole occur? And how can it be cured?

One reason for its existence is undoubtedly that the dominating part of the media is still, to a surprisingly high degree, national. This, of course, leads to a focus on national issues and, not least, *national perspectives* also on European

issues in the political debate. Apart from that, I think it is clear that one of the main reasons for the current situation in this respect is the inability of European and EU politicians, at all levels, to speak and act in the name of Europe and even to address a European audience. This is true for national politicians in Spain, Sweden, Denmark or Germany (or the new Member States), as well as for representatives of the EU Commission or Parliament. The so-called "Havel factor", much discussed by political scientists a few years ago when trying to find criteria for politicians for whom the European voters may have a great confidence, although they are not their national representatives, does today not seem to apply for any European politician, although persons like Tony Blair or Daniel Cohn-Bendit would of course like to be seen as candidates.[68]

There are many possible reasons for this particular problem, ranging from the fact that since politicians are above all elected by national voters, they find it natural only to address national audiences (and, correspondingly, difficult to imagine any other spectators or listeners). Factors like fear of being accused for intervening in the matters of other states, lack of language skills, current short-sightedness and lack of strategic visions or moral convictions[69] may be added to the list, just like the current tendency of many politicians throughout Europe to blame various political problems on the EU. But nevertheless, apart from the growing historical distance from the Second World War, there seems to be no obvious reason why today's leading EU politicians should be less European-minded and, in fact, more provincial in their world-view than their predecessors were fifty years ago. On the contrary, globalisation ought to give them a more international approach. And then, to conclude, any initiative that would reduce this gap, which is potentially probably more detrimental to the future EU democracy than most other challenges, should be welcome. The citizens are told that the EU is here to manage and solve European affairs, common to everyone, and at the same time the politicians involved seem to think more about national affairs than ever (while the representatives of the Commission and Parliament are too distant or simply lack enough popular appeal); no wonder that the average EU citizen is confused. If a European-wide referendum could make the European public more generally interested in EU issues and thus reduce the gap also between a few informed specialists and "the man on the street" – and I actually think it would be more successful in

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[68] The Communication Strategy from the Commission does not address this particular question at all.

[69] Obvious examples of this latter kind of politicians are the French President Jacques Chirac or the Swedish Prime Minister Göran Persson, who are both very pro-European one day in order then to be nationalistic Eurosceptics a few days later. In the case of Chirac, it even seems clear that he called the referendum on the DCT in order not least to strengthen his domestic political position – a plan that failed, to put it mildly.

that respect than the Commission will be with its Plan D – remains to be seen, but even this possibility is a further argument in favour of organising it.

Conclusions

The only thing that seems to be certain in the current integration process is that nothing is certain, to paraphrase a classical philosophical reflection. "Panta rei", in other words. But still, even when considering this somewhat troublesome uncertainty, it is fair to ask who would really want to have the old constitutional structure of the EU, from the first phase in 1957–85, back? Not only because it is actually impossible to turn the clock back but also for many other reasons, I would definitely not want anything like that to occur.

First of all, it may be remembered that when Weiler complained in the early 1990's about the new state of affairs, and all the important values that had disappeared when majority voting was introduced in the Council (together with some other institutional reforms), he was actually lamenting a constitutional structure where decisions in the Council were regularly made unanimously, i.e. "in the shadow of the veto", and where the ECJ was far more activistic than today. But who would really wish that situation back now? Who would, seriously speaking, consider that kind of "constitutional equilibrium" well-adapted for an EU with 25 Member States? Who would consider it a suitable democratic model for the further enlarged EU of 25 or more Member States?

And furthermore, when analysing the effects of the "second phase" from 1986–1999 in legal and constitutional terms, we find things like EU citizenship, now also discovered by the ECJ,[70] stronger protection of human rights and the Monetary Union as consequences of the increased political integration and the frequent treaty reforms which marked that period. Though reminding us of some kind of "statehood" as they may be, who would honestly, on a balanced scale, find their total effects negative? On the contrary, I would rather say that they speak in favour of further integration along those lines – without ever arguing for statehood as such. Thus, future EU political and constitutional discussions could try to learn something from that period, instead of trying to do things differently.

[70] See above all the judgment Baumbast, C-413/99, ECR 2002 I p. 7091.

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