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CONSTITUTIONAL LAW IMPLICATIONS FOR A STATE PARTICIPATING IN A PROCESS OF REGIONAL INTEGRATION

GERMAN CONSTITUTION AND „MULTILEVEL CONSTITUTIONALISM“

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German Constitution and „Multilevel Constitutionalism“

Ingolf Pernice ¹

I. Introduction

Regional economic integration organisations are recognised in international law as a new category or type of political actors having the capacity of treaty making and membership in international organisations. Since 1979, the conclusion of the Convention on Long-Range Transboundary Air Pollution (art. 14)², a specific phrase has been included in the final clauses of - mainly - environmental conventions and regimes opening them to the participation of the EC under this new category. This phrase specifies:

„In matters within their competence, such regional economic integration organisations shall, on their own behalf, exercise the rights and fulfil the responsibilities which the present Convention attributes to their member States. In such cases, the member States of these organisations shall not be entitled to exercise such rights individually“.

The example was followed in the Regime on the Protection of the Ozone Layer (1985/87)³, the Framework Convention on Climate Change⁴, and the UN-Convention on Biodiversity⁵. Similar provisions allowed the EC to participate on State level to the Earth Summit on Environment and Development 1992 in Rio⁶, to give it a representation in the Commission for Sustainable Development (CSD)⁷ and even to open the FAO to the par-

¹ I owe the English expression „multilevel constitutionalism“ for the concept of „Verfassungsverbund“ (see infra note 18) to my assistants *Franz C. Mayer* and *Marc-Oliver Pahl* and I wish to thank *Franz C. Mayer* who kindly read through, discussed with me and helped me to complete this report.

² Geneva 13 Nov. 1979, reprinted in *T. Scovazzi/T. Treves* (ed.), *World Treaties for the Protection of the Environment*, 1992, 31.

³ O.J. 1988 L 297/8.

⁴ O.J. 1994 L 33/11.

⁵ O.J. 1993 L 309/1.

⁶ See: *U. Beyerlin*, *Rio-Konferenz 1992: Beginn einer neuen globalen Umweltrechtsordnung?*, 54 *ZaöRV* 124 at 132 et seq. (1994); *G. Corcelle*, *20 ans après Stockholm: La conférence des Nations Unies de Rio de Janeiro sur l'environnement et le développement: point de départ ou aboutissement?*, *RMC* 1993, 107 et seq.

⁷ See *R. Wägenbaur*, *Ein Programm für die Umwelt*, *EuZW* 1993, 241.

ticipation by the EC beside of its Member States⁸. It is the same [*41] rationale, finally, that led to the acceptance of the EC as an „original Member“ of the WTO in 1994⁹. The rationale is that Regional Integration Organisations are **divided power systems**¹⁰ in which the exercise of the sovereign rights of the people is entrusted to the supranational institutions for certain substantive areas, while the remaining competences are kept at the State level. Consequently, Member States may have no competence, insofar, for treaty-making nor for the implementation of international commitments, and it is the supranational organisation, in our case the EC, which is the competent body and that acts on their behalf. Its power corresponds to the transfer of the sovereignty from the people of its Member States and to a lack of international capacity of each such State once the transfer occurs.

How does the national constitution allow these fundamental changes by which the very classical concept of statehood and sovereignty is challenged¹¹? What are, on the other hand, the constitutional law implications of such a transfer of sovereignty which, indeed, turns the „sovereign“ State into a member of a federal system¹²? Before coming to the details on the constitutional law implications for Germany of its participation in the process of European integration, let me first line out three general points which are crucial to understand the subsequent developments:

1. The German Constitution of 1949, the Grundgesetz (GG), includes in its Preamble the firm will of the German people, in giving itself this constitution to serve international peace „acting as an equal member of a United Europe“. Correspondingly, art. 24 I, of the German Constitution (GG) vests the legislature with the power to transfer sovereign rights to supranational institutions. From the very begin-

⁸ See *J. Sack*, Europäische Gemeinschaften Mitglied der FAO, *EuZW* 1992, 2; *J. Sack*, The European Community's Membership in International Organisations, 32 *CMLRev.* 1228 (1995); *J. Schwob*, L'amendement à l'acte constitutif de la FAO visant à permettre l'admission en qualité de membre d'organisation d'intégration économique régionale et la Communauté Economique Européenne, 29 *RTDE* 1 (1993); *R. Frid*, The European Economic Community: A Member of a Specialized Agency of the United Nations, 2 *EJIL* 239 (1993). For the general problems related to this, see: *I. Pernice*, Die EG als Mitglied der Organisationen im System der Vereinten Nationen: Konsequenzen für die Politik von Mitgliedstaaten und Drittstaaten, *EuR* 1991, 273. With regard to the use of voting rights within the FAO see 1996 *ECR* I-1469, at 1506 et seq.; see also 91 *AJIL* 349 (1997).

⁹ Art. XI para. 1 of the Marrakesh Agreement Establishing the World Trade Organization, *EuZW* 1994, 338; Annex to Council Decision 94/800/EC of 22 December 1994, *O.J.* 1994 L 336/1.

¹⁰ For this notion see *G. Bermann*, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 *Columbia Law Review* 331 at 335 (1994), with reference to *E. Stein*, On Divided Power Systems: Adventures in Comparative Law, *Legal Issues of European Integration* 1983/1, 27.

¹¹ For this change in general see: *G. Nicolaysen*, Der Nationalstaat klassischer Prägung hat sich überlebt, in: *O. Due/M. Lutter/J. Schwarze* (eds.), *Festschrift für Ulrich Everling*, 1995, 945; *G. F. Schuppert*, Zur Staatswerdung Europas, *Staatswissenschaft und Staatspraxis* 1994, 35 at 58-60; *D. Thürer*, Der Verfassungsstaat als Glied einer europäischen Gemeinschaft, 50 *VVDStRL* 97 at 122 et seq. (1991): „Gewandelte Staatlichkeit“, and id. at 110: „Einschränkung der verfassungsgebenden Gewalt“; *M. Weller*, The Reality of the Emerging Universal Constitutional Order: Putting the Pieces of the Puzzle together, 10 *Cambridge Review of International Affairs* 40 at 45 (1997): „It is becoming increasingly evident that the sovereign state, exclusively controlled and represented by an internationally unaccountable government, no longer exists. The term ‚state‘ no longer describes a metaphysical entity endowed with supreme internal and external authority. Instead, it is a technical term which modestly represents one of many layers of competence to which individuals have transferred public powers (...)“.

¹² For the qualification of the EC as a federal system see: *I. Pernice*, Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects, in: *I. Pernice* (ed.), *Harmonization of Legislation in Federal Systems*, 1996, 9 at 13.

ning, Germany was, therefore, constituted to be a member of a broader political system. This was the [*42] lesson taken by the German people from the historical failure of the classical concept of nation-state shown by the two world wars.

2. It was very early that the German Constitutional Court recognised the mere fact, that although no explicit textual changes are made in the Constitution, the progress of European integration implies substantial „material“ modifications of the contents of the Constitution¹³, a phenomenon which *Hans Peter Ipsen* has called „constitutional mutation“¹⁴. Those are the implications of art. 24 I GG, which allows the transfer of the sovereignty by simple legislative act, and of the general acceptance of the autonomy and supremacy of community law even over the Constitution¹⁵.
3. Constitutional law in Germany - and this equally applies to the other Member States - cannot, consequently, be read from the text of the „Grundgesetz“ alone anymore, it must be construed in its „context“, formed by the constitution and legislation of the EC or, in future, the EU. Both legal orders, although autonomous regarding their origin, legitimacy and law-making procedures, are interlaced, interrelated and complementary, sometimes even intertwined, both, institutionally and in substance¹⁶. They are, each, elements of a **single constitutional system**, obtaining their [*43] respective legitimacy from the same (European) citizens and giving the authority for legislation and public action applicable to the same people¹⁷.

¹³ BVerfGE 58, 1 at 36, confirmed in the Report of the *Gemeinsame Verfassungskommission (GVK)*, see: Zur Sache 5/93, 41; for more details *U. Hufeld*, Die Verfassungsdurchbrechung, 1997, 114 et seq.

¹⁴ *H.P. Ipsen*, Europäisches Gemeinschaftsrecht, 1972, para 2/20; for the expression „mutiert“: *H.P. Ipsen*, Als Bundesstaat in der Gemeinschaft, in: *Ernst Caemmerer et al.* (eds.): Probleme des europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag. 1966, 248 et seq. particularly at 264; equally *C. Tomuschat*, Die staatsrechtliche Entscheidung für die internationale Offenheit, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VII (1992), sect. 172 para. 72: „Mutation der Staatsverfassung durch Integration“.

For another concept of constitutional change with or without explicit modification of the (written) constitution, focussing on constitutional moments, see *B. Ackerman*, We the people, 1993.

¹⁵ BVerfGE 22, 134 - *Normenkontrolle gegen EWG-Verordnungen*; limits however pronounced in BVerfGE 37, 271 - *Solange I*, and BVerfGE 89, 155 - *Maastricht* (English translation in 33 ILM 388 (1994)). The requirement for express indication of any amendment of the Constitution in art. 79, para. 1, does not apply to the cases of art. 24 or 23 of the Grundgesetz.

¹⁶ *J.A. Frowein*, Die Verfassung der Europäischen Union aus der Sicht der Mitgliedstaaten, EuR 1995, 315 at 318: „Teilverfassung für die ausgegliederten Souveränitätsrechte“; see also *B. de Witte*, International Agreement or European Constitution?, in: *Asser Institute* (ed.): The Treaty on European Union - Suggestions for Revision, 1996, para 38: „the EC Treaty and the Treaty on European Union form a *complementary constitution* for each of the Member States“, and *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 19th ed., 1993, para 106, considers „Verfassung und nationale Rechtsordnung“ to become a „europarechtlich überlagerte(n) Teil-Grundordnung und Teil-Rechtsordnung“. See also: *W.-D. Grussmann*, Grundnorm und Supranationalität - Rechtsstrukturelle Sichtweisen der europäischen Integration, in: *T.v. Danwitz/M. Heintzen/M. Jestaedt/S. Koriath/M. Reinhardt* (eds.), Auf dem Wege zu einer Europäischen Staatlichkeit, 1993, 47 at 63. For the policy aspects of this multi-level description of the community, see *F. Scharpf*, Autonomieschonend und gemeinschaftsverträglich. Zur Logik einer europäischen Mehrebenenpolitik, in: *W. Weidenfeld* (ed.), Reform der Europäischen Union, Gütersloh 1995, 75.

¹⁷ Looking for the Rule of Recognition (*H.L.A Hart*, The Concept of Law, 2nd ed., 1994, 100 et seq.) or Grundnorm (*H. Kelsen*, General Theory of Law and State, 1949, 110 et seq.) in this system, a formal view would probably find one at each constitutional level; see also *Grussmann*, Grundnorm, supra note 16, 58-64; *M. Heintzen*, Die Herrschaft über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?, 119 AöR 564 (1994), develops how conflicts between the Constitutional Court and the European Court of Justice and norms of the respective legal orders are to be solved by co-operation. My view, however, is that the principle of primacy of

I have suggested to call this system „**Verfassungsverbund**“¹⁸ (compound of constitutions) - an expression which underlines the constitutional nature of the European process and means in fact: „**multilevel constitutionalism**“. This, I believe, describes the European Union more adequately than the term „compound of states“, used by the Constitutional Court in its judgement on the Treaty of Maastricht¹⁹, and already seems to have found some acceptance among my German colleagues²⁰.

It is a somewhat **monistic perception** of the European and each respective national legal system, based on the assumption that each European citizen regards the European Constitution as his/her constitution applicable to everybody like domestic law, and that a rule of conflict ensures that there is no more than one relevant rule applicable to each individual case. By establishing the principles of autonomy, supremacy, direct and indirect effect of Community law²¹, the Court of Justice confirmed (or maybe, even developed) the constitutional character of the EEC-Treaty²², based on the principle of ist [*44] integration with

Community law is inherent in the multilevel system and breaking up the autonomy of national constitutions insofar as national law conflicting with a community rule in a given case, is not applied. This principle is recognized and given effect by the integration clauses of the national constitutions which continue, nevertheless to have, each, their own and autonomous rule of recognition.

¹⁸ See *I. Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: *R. Bieber/P. Widmer* (eds.), *The European Constitutional Area*, 1995, 225 at 261; more details in: *Die dritte Gewalt im Europäischen Verfassungsverbund*, *EuR* 1996, 27 et seq.

¹⁹ BVerfGE 89, 155 - *Maastricht* („Staatenverbund“).

²⁰ E.g. *P. Häberle*, Gemeineuropäisches Verfassungsrecht, in: *R. Bieber/P. Widmer* (eds.), *The European Constitutional Area*, 1995, 361 at 396; *D. H. Scheuing*, Deutsches Verfassungsrecht und europäische Integration, *EuR Suppl.* 1/97, 7 at 53; *D. H. Scheuing*, Zur Europäisierung des deutschen Verfassungsrechts, in: *K. F. Kreuzer/D. H. Scheuing/U. Sieber* (eds.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union*, 1997, 87 at 105; *R. Bieber*, Die Europäisierung des Verfassungsrechts, *ibid.*, 71 at 93; *M. Heintzen*, Gemeineuropäisches Verfassungsrecht in der Europäischen Union, *EuR* 1997, 1 at 16; *R. Steinberg*, Landesverfassungsgerichtsbarkeit und Bundesrecht, in: *H. Eichel/K. P. Möller* (eds.), *50 Jahre Verfassung des Landes Hessen*, 1997, 356 at 360, with regard to the federal state.

²¹ 1964 ECR 1251 - *Costa/ENEL*; 1963 ECR 1 - *Van Gend & Loos*.

²² See *J.H.H. Weiler*, *The Transformation of Europe*, 100 *Yale Law Journal* 2403 at 2407 et seq. (1991). The German Constitutional Court accepted this approach as early as in BVerfGE 22, 293 at 296. It is in its Opinion 1/76 on the Rhine navigation immobilisation fund, 1976 ECR 741 at 759, that the Court of Justice for the first time used the words „constitution of the Community“; for the later case law see 1986 ECR 1339 - *Les Verts*, and 1991 ECR I-6079 at 6102 - *EEA-Treaty*; see also *H.P. Ipsen*, *Europäisches Gemeinschaftsrecht*, 1972, para 2/33; *G. F. Mancini*, *The Making of a Constitution for Europe*, 26 *CMLRev.* 595 (1989); *I. Pernice*, *Gemeinschaftsverfassung und Grundrechtsschutz - Grundlagen, Bestand, Perspektiven*, *NJW* 1990, 2409 at 2410 et seq.; *G. Nicolaysen*, *Europarecht I*, 1991, 30; *M. Zuleeg*, *Die Verfassung der Europäischen Gemeinschaften in der Rechtsprechung des Europäischen Gerichtshofes*, *BB* 1994, 581 et seq., *id.*, *The European Constitution under Constitutional Constraints: The German Scenario*, *ELRev.* 1997, 19; *J.F. Flauss* (ed.), *Vers un droit constitutionnel européen?, Quel droit constitutionnel européen?, Actes du colloque des 18 et 19 juin 1993*, *RUDH* 11-12 (1995), 357; *C. Grewe/H. Ruiz Fabri*, *Droits constitutionnels européens*, 1995; *E. A. Tomlinson*, *Reception of Community Law in France*, 1 *Columbia Journal of European Law* 183 at 185 (1995); *C. G. Rodrigues Iglesias*, *Zur „Verfassung“ der Europäischen Gemeinschaften*, *EuGRZ* 1996, 125; „*Vertragsschluß als Verfassungsgebung*“; *C. Tomuschat*, *Das Endziel der europäischen Integration Maastricht ad infinitum?*, *DVBl.* 1996, 1074; *P. Badura*, *Staatsziele und Garantien der Wirtschaftsverfassung in Deutschland und Europa*, in: *J. Burmeister* (ed.), *Verfassungsstaatlichkeit. Festschrift für Klaus Stern zum 65. Geburtstag*, 1997, 409 at 411; *J. Gerkrath*, *L'urgence d'un Droit constitutionnel pour l'Europe*, 1997. *Critical: H.H. Rupp*, *Europäische „Verfassung“ und demokratische Legitimation*, *AöR* 120 (1995), 269; *D. Grimm*, *Braucht Europa eine Verfassung?*, *JZ* 1995, 581 et seq., *id.*, *Does Europe Need a Constitution?*, 1 *European Law Journal* 282 (1995), commented by *J.*

national law to one united legal system which is composed, nevertheless of two distinct but intertwined legal orders. The proper functioning and further existence of the Community will depend on the respect of these principles²³. Autonomy means that at each level, national and Community, law is made under quite distinct procedures by quite distinct institutions, that it bases its legitimacy on distinct electorates. In giving legitimacy to the making of European community law, the national electorates constitute themselves to be a new entity: They are the people of the Union to whom its law applies. art. 8 of the EC-Treaty has introduced the notion of European citizenship to underline this common legal status of the peoples of the Member States²⁴ who are, thus, the source of legitimacy for the EC, but also subject to it and its legislation which, again, has become an integral part of each national legal order.

With the option for a United Europe - whatever this may be - the preamble as well as art. 24 and 23 GG open the German constitutional order for integration into a federal European system, the constitution of which consists of a national and the European component for each Member State. Integration means a process aiming at legal unity in substance which a dualistic approach cannot explain. To construe the Community [*45] system as some kind of composite legal order is not really such a revolutionary idea: A number of accepted principles, indeed, are based implicitly on this assumption:

1. The principle of subsidiarity, both, taken up in art. B TEU and 3b ECT on the European level, and included as a necessary structural characteristic of the future European Union in art. 23 I GG, can only work properly within one coherent constitutional system in which the two levels of action are complementary to each other and part of one coherent political and constitutional system.
2. The substantive unity of the two complementary layers of constitution is confirmed by the recognition, in art. F II TEU, of the normative interaction between the two levels, through general principles of Community law, of the fundamental rights and values as laid down in the European Convention on Human Rights and established by the common constitutional traditions of the Member States. That national law, thus, is closely intertwined with Community law has been recognised by the German Constitutional Court as a basis for accepting that the protection of fundamental rights by the Court of Justice meets the requirements of the German Constitution²⁵. In fact, the Maastricht-judgement even uses the term „Rechtsverbund“ - legal com-

Habermas, Remarks on Dieter Grimm's 'Does Europe Need a Constitution?', 1 *European Law Journal* 303 (1995); *C. König*, Anmerkungen zur Grundordnung der Europäischen Union und ihrem fehlendem „Verfassungsbedarf“, *NVwZ* 1996, 549 et seq.; *T. Schilling*, Die Verfassung Europas, *Staatswissenschaft und Staatspraxis* 1996, 387 at 392 et seq. - One must not get carried away with the concept and see constitutions everywhere, though. But I believe that a trend towards constitutionalization beyond the state is undeniable, see also *M. Weller*, The Reality of the Emerging Universal Constitutional Order, 10 *Cambridge Review of International Affairs* 40 at 43 et seq. (1997); *B. Ackerman*, The Rise of World Constitutionalism, 83 *Virginia Law Review* 771 (1997). *B. Fassbender*, UN Security Council Reform and the Right of Veto: A Constitutional Perspective, Dissertation Berlin 1998, upcoming.

²³ Emphasized by *G. Hirsch*, *Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?*, *NJW* 1996, 2457 at 2466

²⁴ For the evolutionary character of the European citizenship which forms a long-term legal juncture between the nationals of the Member States and can be regarded as an expression of the existential common ground and belonging of the people concerned, see *BVerfGE* 89, 155 at 184 - *Maastricht*.

²⁵ *BVerfGE* 73, 339 at 383-385: „normative(r) Verbindung“, and „normative Verklammerung“.

pound - to describe the specific nature of the Community to which the Constitution is open and prepared to form part²⁶.

3. The clause of effectiveness, in art. F III TEU, requiring the Union - which is: the Member States and the Communities taken together under the Treaty of Maastricht and, namely, under the procedure of art. N TEU - to provide itself with the means necessary to attain its objectives and carry through its policies - makes clear that the process of European integration, the dynamics of which are also expressed in art. A II TEU, is an integrated constitutional process²⁷. This process involves and continuously changes both, the European constitution (art. N TEU) and the national constitutions through the procedures of which any amendment of the Treaty is to be accepted and, thus, given democratic legitimacy. It was discussed, at the Constitutional Court in the Maastricht case, whether or not art. F III TEU provides the Union with what is called „Kompetenz-Kompetenz“ and means the power to decide in full autonomy on what the competences and powers of the Union shall be. The answer found by the Court, correctly, was „no“, and that this power which is specific for a sovereign state, still remains with the Member States²⁸. This second statement, however, is incorrect in my [*46] view: At least since the establishment of the European Community Member states are not free any more to decide on what their area of competence shall be. As far as such decision touches Community competences, they would infringe Community law and be unconstitutional. If the concept of Kompetenz-Kompetenz is useful at all, it is given to the Unit which embraces the European Union and its Member States and the procedure for deciding on the distribution of powers between the two constitutional levels is set down in art. N TEU.
4. The unity, in substance, of the national and Community legal orders, finally, is the condition and rationale of the doctrine of „indirect effect“ of community provisions on national law²⁹. Under this doctrine, mainly applied to directives, community provisions, even if not directly applicable, are to be taken into account by national courts when interpreting national legislation³⁰. Its basic idea has been developed by German constitutional doctrine as the principle of „verfassungskonforme Auslegung“ (interpretation in the light of the constitution)³¹ aiming at ensuring as much effectiveness as possible to the constitutional rights and values while, on the other hand, respecting the democratic will of the legislator if the constitutionality of its decision is at stake. Any rule of law must, therefore be interpreted in accordance

²⁶ BVerfGE 89, 155 at 183 - *Maastricht*.

²⁷ See already *J.H.H. Weiler*, The Transformation of Europe, 100 Yale Law Journal 100 2403 at 2413 et seq. (1991), with more references; see also *I.Pernice*, in *H. Dreier* (ed.), Grundgesetz, Kommentar, vol. 2 (1998), art. 23 para. 22.

²⁸ BVerfGE 89, 155 at 194-199 - *Maastricht*.

²⁹ See 1984 ECR 1891 at 1909 - *Von Colson und Kamann*; 1990 ECR I-4135 at 4158 et seq. - *Marleasing*, and others.

³⁰ See *T. C. Hartley*, The Foundations of European Community Law, 3rd ed., 1994, 222; *De Búrca*, Giving Effect to European Community Directives, 55 MLR 2151 (1992); *P. Craig*, Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, 22 E.L.Rev. 519 (1997). For the 'richtlinienkonforme Auslegung', see *H. D. Jarass*, Richtlinienkonforme bzw. EG-rechtskonforme Auslegung nationalen Rechts, EuR 1991, 211; *G. Ress*, Die richtlinienkonforme „Interpretation“ innerstaatlichen Rechts, DÖV 1994, 489; *M. Nettesheim*, Ausbildung und Fortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts, 119 AöR 261 (1994); crit. *U. Di Fabio*, Richtlinienkonformität als ranghöchstes Normauslegungsprinzip?, NJW 1990, 947. For the common law see: *X. Lewis*, A Common Law Fortress Under Attack: Is English Law Being Europeanized?, 2 Columbia Journal of European Law 1 at 15 et seq., 19 et seq. (1995/96).

³¹ *K. Hesse*, Grundzüge, para. 16, para. 79 et seq., with more references.

with the relevant constitutional values and can be declared null and void only if such an interpretation is excluded by the wording or rationale of the legislative act in question. What is interesting in the present context, is that the obligation to construe and interpret national law or statutes in conformity with the constitution is founded on the very principle called „Einheit der Rechtsordnung“³² what may be translated into English by principle of „unity of the legal order“. Accordingly, the doctrine of „indirect effect“ would imply that Community law and national law are considered to be (parts of) one legal system the unity of which is to be ensured by the courts. [*47]

It is obvious that, in a constitutional system like the European Union, where supranational legislation creates rights and obligations for the citizen in the same way as national legislation, European affairs cannot be considered „external“ anymore, and the relationship to the other Member States has to be redefined, more even than that to third countries. The treaties constituting the Union not only create the institutions vested with specific powers, establish their responsibilities as well as the procedures of decisionmaking and control, but also define the respective rights and duties of the citizens, of the Member States and of the European institutions. They are a new kind of „contrat social“ among the peoples of the Member States and ratified in accordance with their respective constitutional requirements³³, by which a new level of government is created as a common instrument to respond to challenges of a supranational or global dimension, where mere (Member-) State action more and more turns out to be ineffective. Formerly foreign affairs, thus, are getting „domestic“, they become „home“-affairs, and what was initially negotiated as an international treaty being the basis and the point of departure of a regional integration process, has now become the constitution of a federal system.

Thus, the constitutional law implications of the participation in this specific, i.e. the European, regional integration process may be quite different from those regarding any other regional integration process. There is no issue of international law anymore here, although a (recently reviving) school of thought so argues³⁴. It is a question of adaptation not only

³² id., para. 81.

³³ See *J.H.H. Weiler*, „...We will do. And Hearken“. Reflections on a Common Constitutional Law for the European Union, in: *R. Bieber/P. Widmer*, *The European Constitutional Area*, 1995, 413 at 439; *I. Pernice*, *The framework revisited: Constitutional, federal and subsidiarity issues*, 2 *Columbia Journal of European Law* 403 at 419 (1996). See also *E. J. Mestmäcker*, *Risse im europäischen Contrat Social*, in: *Hanns Martin Schleyer-Preis 1996 und 1997, Veröffentlichungen der Hanns Martin Schleyer-Stiftung*, vol. 48, 53 at 54; *P. Häberle*, *Gemeineuropäisches Verfassungsrecht*, 31 *Basler Schriften zur Europäischen Integration* 39 (1997).

³⁴ In Germany this view has been promoted in particular by *P. Kirchhof*, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, in: *P. Kirchhof/C.-D. Ehlermann* (eds.), *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *EuR Suppl.* 1/1991, 11; id., *Der deutsche Staat im Prozeß der europäischen Integration*, in: *J. Isensee/P. Kirchhof* (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VII (1992), sect. 183; id., *Rechtsschutz durch Bundesverfassungsgericht und Europäischen Gerichtshof*, in: *D. Merten* (ed.), *Föderalismus und Europäische Gemeinschaften unter besonderer Berücksichtigung von Umwelt und Gesundheit, Kultur und Bildung*, 2nd ed. 1993, 103 et seq.; and conceptualized by Justice Kirchhof as judge-rapporteur in *BVerfGE* 89, 155 - *Maastricht* further explanations afterwards by *P. Kirchhof*, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, in: *P. Hommelhoff/P. Kirchhof* (eds.), *Der Staatenverbund der Europäischen Union*, 1994, 11; see also: *J. Kokott*, *Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht*, 119 *AöR* 207 at 212 et seq. (1994). For a rather purist international law approach, see *Th. Schilling*, *The Autonomy*

of the constitutions but also of the general constitutional culture to the many kinds of necessary interaction between the two levels of government for a society of citizens with multiple, but at least two identities: national and European³⁵. New kinds of problems arise with the ongoing progress of integration, in particular with [*48] regard to the question of effective protection of fundamental rights or of democratic legitimacy and responsiveness of the increasing competences at the supranational level. And in view of the new changes the Treaties will undergo after the Amsterdam summit in June 1997, the question may be put as to what extent the complexity of modified, added and deleted provisions, of protocols and declarations, of procedures, differentiated participation (EMU), special regimes (Schengen) and „flexible“ solutions exceeds the capacity of understanding of the citizens and, thus, makes it impossible to agree on it.

II. Constitutional requirements for the integration process

Unlike other constitutions the German Grundgesetz contained a specific „integration clause“ (art. 24 I) since its adoption in 1949. But it was found incomplete, subsequently, first as far as the protection of some „fundamentals“ of the Constitution, such as the rule of law, fundamental rights and federalism, later also the reach of integration are concerned: it was felt that the European Union is more than an interstate or supranational institution to which only the transfer of powers was allowed³⁶. While the first problem was dealt with by the jurisprudence of the Constitutional Court for many years by the statement, that the transfer of sovereign rights could not possibly mean to break with certain fundamental values and structures constitutive for the German Constitution and its identity³⁷, the second led to the introduction, with a view to the ratification of the Maastricht-Treaty, of the new art. 23 GG with detailed provisions on both questions and, in addition, for the participation of Parliament and the Federal Council in „European matters“ (see 1. infra). The ratification of the Maastricht-Treaty was felt to require other amendments to the Grundgesetz beyond the new art. 23, in particular regarding the voting rights of (foreign) European citizens at the local level (see II. infra) and the institution of the European Central Bank (see III. infra). These express changes raise the question of the criteria for express constitutional adaptations on the one hand, and under which conditions implicit constitutional „mutation“ may be accepted, on the other (see 4. infra).

1. Art. 23 GG: the New Integration Clause for the European Union

Art. 23 GG takes a new step in the process of integration. It contains a number of innovative and quite remarkable provisions which confirm the German commitment to Europe and define more precisely the conditions under which the integration shall progress. [*49]

of the Community Legal Order: An Analysis of Possible Foundations, 37 *Harvard International Law Journal* 389 (1996), commented by *J.H.H. Weiler* in the same issue.

³⁵ On the relationship between the concept of multiple identities, multiple loyalties and European integration, see *J.H.H. Weiler*, Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision, 1 *European Law Journal* 219 at 255 et seq.(1995); id., Der Staat „über alles“, 44 *JöR* 91 at 133 et seq. (1996).

³⁶ See *R. Scholz*, Grundgesetz und europäische Einigung, *NJW* 1992, 2594, and id., Europäische Union und deutscher Bundesstaat, *NVwZ* 1993, 818.

³⁷ *BVerfGE* 37, 271 at 279.

a) European Integration as a Legal Obligation

First, art. 23 GG borrows the idea of the Preamble of the Grundgesetz and translates it into a concrete obligation with legally binding effect: It is with the aim of achieving a United Europe that Germany participates in the development of the European Union. Although the Treaty of Maastricht is not mentioned expressly, the textual and historical context make it clear that another European Union cannot be developed. Should any German authority go against integration, e.g. by acting towards resiliation of the Treaties or leaving the Union, the Constitutional Court could declare this unconstitutional. Admittedly, this case does not seem to be of practical relevance. Still, the Constitutional Court, expressly stated in the Maastricht decision that an *actus contrarius* to the foundation of the Union is possible according to the rules of international law, and that Germany even should recon-

sider its participation in the EMU in case the principle of stability was disregarded³⁸. It seems to me, that the Court simply forgot to take into account the provisions of the new art. 23 GG.

b) Homogeneity of Constitutional Structures and Basic Values

Unlike most of the other Member States' constitutions³⁹, art. 23 I GG contains the fundamental structural requirements for the European Union, to the development of which the German authorities are held to contribute: It has to be designed in conformity with democratic, social and federal principles, the rule of law and must ensure the protection of fundamental rights at a level similar to the level provided by the Grundgesetz. This clause somehow reflects the basic features of the German Constitution and, thus, tends to ensure a structural homogeneity or - to avoid misconceptions of the Carl Schmitt-type⁴⁰ - **structural accordance** or harmony of the two constitutional levels⁴¹. [*50]

³⁸ BVerfGE 89, 155 at 204 - *Maastricht*; crit.: *I. Pernice*, Das Ende der währungspolitischen Souveränität Deutschlands und das Maastricht-Urteil des Bundesverfassungsgerichts, in: *O. Due/M. Lutter/J. Schwarze* (eds.), Festschrift für Ulrich Everling, 1996, 1057 at 1066 et seq.

³⁹ See, however chapter 10, art. 5 of the Swedish constitution, which requires the respect of the human rights, art. 29, para. 3 of the Greek constitution, which in addition requires that the foundations of the democratic order are not questioned, art. 7, para. 4 of the Portuguese constitution requires the respect for the principle of subsidiarity and the achievement of the economic and social cohesion. Other requirements are equal rights with the other States (art. 11 of the Italian, art. 28, para. 3 of the Greek, art. 88-2 and 88-3 of the French constitutions), reciprocity (art. 7, para. 4 of the Portuguese and art. 28, para. 3 of the Greek constitutions) and voluntary acts (art. 88-1 French constitution).

⁴⁰ See *C. Schmitt*, Verfassungslehre, 1928, 251, referred to in BVerfGE 89, 155 at 186, where it quotes, however wrongly, *H. Heller*; this spiritual, social and political homogeneity continues to be regarded as precondition for a workable democracy by (former Justice at the BVerfG) *E.W. Böckenförde*, Demokratie als Verfassungsprinzip, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts, vol. I (1987), sect. 22 para. 46. See, however, the criticism of *B.-O. Bryde*, Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie, Staatswissenschaft und Staatspraxis 1994, 305 at 311, and *I. Pernice*, Carl Schmitt, Rudolf Smend und die europäische Integration, 120 AöR 100 at 103 et seq. (1995). The concept of homogeneity, as used here, regards constitutional principles and structures only and is much closer to *P. Lerche*, Förderalismus als nationales und internationales Ordnungsprinzip, 21 VVDStRL 66 at 85 (1964).

⁴¹ For the principles see *H. P. Ipsen*, Über Verfassungs-Homogenität in der Europäischen Gemeinschaft, in: *H. Maurer* (ed.), Das akzeptierte Grundgesetz, Festschrift für Günter Dürig, 1990, 169.

The rather general language of art. 23 GG allows for flexibility on how these „principles“ are put into practice, step by step in the constitutional process, from one intergovernmental conference to the other⁴². It is interesting to see that these „**upstream**“ requirements, however, model more in detail than other constitutions the future European federal system in accordance to the western democratic constitutional tradition. Given the existing structures and constitutional principles of the EU also have a retroactive effect on the national constitutions: Though, Member States still feel to be the „masters of the treaties“⁴³, they are even not, any more, the masters of their own constitutions. Indeed, if the legitimacy of EC legislation and action is primarily transmitted to it by the national institutions, if the implementation and judicial review of European law are basically a matter for national authorities -, the principles of democracy individual liberty and the rule of law, if taken seriously at the European level, in turn must have a „**downstream**“ effect back to the national level, in that the condition of their proper functioning at the European level is that they are also recognised and applied in all the Member States. Art. F I TEU states that the national identity of the Member States is respected, but very clearly on the qualifying condition that their governmental systems are based on democratic principles⁴⁴. Taking up what was already a political precondition for membership and accession since the Copenhagen Summit 1973⁴⁵, this provision will be given teeth and more precise terms by the Treaty of Amsterdam which, in case of a serious and persistent breach of the „principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law“ opens the possibility to „suspend certain of the rights deriving from the application of this Treaty to the Member State in question“ (art. 6 and 7 TEU, consolidated version).

[*51]

Such principles at the national and European level are mutually effective; they function as a construction plan for the EU and as a supranational safeguard of continuous democratic stability in the Member States⁴⁶. More importantly, they may even act in favour of a slow progress towards some harmonisation of the national constitutions⁴⁷, a minimum „homogeneity“ of which is the condition for the functioning of the European „Verfassungsverbund“.

⁴² See art. N TEU, and the last step, so far, still in the making: the Treaty of Amsterdam, 2 October 1997.

⁴³ BVerfGE 89, 155, at 190; the opposite view has been taken already by *U. Everling*, Sind die Mitgliedstaaten der Europäischen Gemeinschaften noch Herren der Verträge?, in: Festschrift für Herrmann Mosler, 1983, 173, and id., Zur Stellung der Mitgliedstaaten der Europäischen Union als „Herren der Verträge“, in: Festschrift für Rudolf Bernhardt, 1995, 1161 et seq.; *J.A. Frowein*, Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit, 54 ZaöRV 1 at 10 (1994). For a more recent, thorough, analysis of the conflict between the Constitutional Court and the European Court of Justice see *M. Heintzen*, Die "Herrschaft" über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?, 119 AöR 564 (1994).

⁴⁴ See also *M. Hilf*, in: *E. Grabitz/M. Hilf* (eds.), Kommentar zur Europäischen Union, ed. May 1995 (loseleaf), art. F para. 12.

⁴⁵ Declarations of the European Council on the European Identity, December 14, 1973, Europa Archiv 1974, D 50, and on Democracy, Bulletin of the EC 3/1978, 6. These principles were of particular importance for the accession of Greece to the EC, see the position of the Commission on the Greek application of 23 Mai 1979, O.J. 1979 L 290/54, as well as the conclusions of the European Parliament of 18 January 1979, O.J. 1979 C 39/47. For comments with conclusions valid until the treaty of Amsterdam see: *J.A. Frowein*, Die rechtliche Bedeutung des Verfassungsprinzip des parlamentarischen Demokratie für den europäischen Integrationsprozeß, EuR 1983, 301 at 309 et seq.

⁴⁶ See *Pernice*, supra note 18, 261 et seq.

⁴⁷ See for more details *Pernice*, supra note 12, 28 et seq.

c) Procedure and Limitations for the Development of the European Union

The procedural requirements for the establishment of the European Union and further transfers of competence to it introduced by art. 23 I GG reflects the constitutional nature of the integration process. These acts as well as any similar provision, by which the contents of the Grundgesetz is modified or completed, are subject to the procedures for and limitations to any constitutional amendments as provided for in art. 79 I and III GG. Thus, not only the majority of two thirds is required both, in Parliament and in the chamber of the Länder, the Federal Council, but the „clause of eternity“ in art. 79 III GG applies to the acts of integration as to any constitutional amendment: They shall not touch neither the federal structure of Germany nor the principles of human dignity, the rule of law, democracy and of the social and republican order. Some authors even include here the principle of (sovereign) statehood⁴⁸. But they tend to overlook that the state conceived by the Grundgesetz is not the state of the 19th century⁴⁹ and that the aim of membership to a United Europe as referred to in the preamble of the Constitution as well as the actual integration of Germany in the European Union both imply a division of sovereignty which - having its foundation with the people of the Member States and the European citizens respectively - is exercised for some areas of action by national authorities and for the others in common by the European institutions⁵⁰. If it is accepted that even the German Länder are states⁵¹ the [*52] guarantee of statehood doesn't seem meaningful, anyway⁵². Nevertheless, the German Constitutional Court states in its Maastricht decision that the transfer of powers to the European level finds its limits in the principle of democracy: Democratic voting rights at the national level - and the EC still gets its legitimacy primarily from here - would become meaningless if no substantial powers would remain with the national government⁵³. It is unclear, however, where these limits are and if they would still be valid if Community legislation benefited from direct legitimacy through, say, the European Parliament. In any event, one fundamental requirement was made very clear by the Court: Further growth of European competences and powers is conditioned by a substantial enhancement of democratic legitimacy, transparency and public control of decisionmaking⁵⁴. With the provisions on transparency and on the European Parliament as well as with the modification of art. 158 II ECT the Treaty of Amsterdam addresses the problem but still, even taken into account the legitimacy of the governments represented in the Council and

⁴⁸ See e.g. *P. Kirchhof*, Der deutsche Staat im Prozeß der europäischen Integration, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VII (1992), sect. 183 paras. 58-62.

⁴⁹ See supra note 11, and *I. Pernice*, Deutschland in der Europäischen Union, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VIII (1995), sect. 191 para. 43.

⁵⁰ See already *A. Hamilton/J. Madison/J. Jay*, The Federalist Papers (1787/88), no. 46 "The federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes". See also, with more references: *Pernice*, in: Dreier, supra note 27, art. 23 para. 21.

⁵¹ This is the standing jurisprudence of the Constitutional Court: BVerfGE 1, 14 at 34; 34, 342 at 360 et seq.; 64, 301 at 317; see also *P. Badura*, Die Kunst der föderalen Form, in: *P. Badura/R. Scholz* (eds.), Wege und Verfahren des Verfassungslebens, Festschrift für Peter Lerche zum 65. Geburtstag, 1993, 369 at 371 et seq.; *Jarass/Pieroth*, Grundgesetz für die Bundesrepublik Deutschland, 4th ed. 1997, art. 20 para. 10.

⁵² BVerfGE 89, 155 - *Maastricht*, therefore avoids the question.

⁵³ BVerfGE 89, 155 at 186 - *Maastricht*.

⁵⁴ BVerfGE 89, 155 at 213 - *Maastricht*.

the participation of national legislatures in preparing their position⁵⁵ it is difficult to claim that democratic principles are fully effective in the European Constitution⁵⁶.

In accordance with the very limited application of direct democracy under the German Constitution, there is no referendum or public poll available for the ratification of treaties constituting or developing the European Union. Some authors claimed that the adoption of the Treaty of Maastricht was an act of constitution-making going beyond the limits of art. 79 III GG and therefore could only be ratified after a referendum⁵⁷. Even a referendum, however, could not validly override the Constitution's mandatory guarantees⁵⁸. But it is clear that involving the people directly and actively in the construction of Europe would bring Europe closer to them and imply that politicians understand and explain to the people the advantages of each new amendment to the Treaties. I would be in favour, therefore, to a modification of art. N TEU⁵⁹. Also in Germany the introduction of a referendum for Europe would need, first, an amendment to the Grundgesetz which should also provide for the procedures to be followed.

d) Internal Preparation of the German position in European affairs

The broadest part of the new art. 23 GG is devoted to the information on European affairs and the respective participation of Parliament (paras. II and III) and the Federal Council (paras. II, IV-VII) in defining the German position at the Council. Former provisions of interinstitutional agreements or contained in the Act of Ratification of the Single European Act⁶⁰ are now included into the constitution and extended more in detail by legislation⁶¹. It basically gives Parliament and the Federal Council the right to be informed and heard by the government in all matters related to the European Union. The [*53] position taken by the Federal Council is quasi-binding for the German minister in the Council of Ministers if the legislation in question is within the area of competence of the Länder. In case the competence of the Länder is exclusive, one of their ministers shall represent Germany at the

⁵⁵ See art. 23, para. 3 and 4 GG; for a comparative overview : *Pernice*, in: Dreier, supra note 27, art. 23 para. 13.

⁵⁶ For a critical approach, see also *J. H. H. Weiler/U. R. Haltern/F. C. Mayer*, European Democracy and Its Critique, 18 WestEuropean Politics 4 (1995).

⁵⁷ *D. Murswiek*, Maastricht und der Pouvoir Constituant, 32 Der Staat 161 (1993); *H.H. Rupp*, Muß das Volk über dem Vertrag von Maastricht entscheiden?, NJW 1993, 38 et seq.; *J. Wolf*, Die Revision des Grundgesetzes durch Maastricht, Ein Anwendungsfall des Art. 146 GG, JZ 1993, 594; *W. Blomeyer/K. A. Schachtschneider*, Die Europäische Union als Rechtsgemeinschaft, Berlin 1995; the point was also submitted to the Constitutional Court in the Maastricht-case, see BVerfGE 89, 155 at 170, 180 - *Maastricht*.

⁵⁸ BVerfGE 89, 155 at 180 - *Maastricht*.

⁵⁹ For the consequences as to an amended procedure under art. N TEU see *I. Pernice*, supra note 34, paras 72 et seq. Similar thoughts are expressed in the speech of Commissioner *M. Oreja*, La révision institutionnelle de l'Union Européenne, in: Académie de droit international, The Hague, 29 July 1997, 29, unpublished provisional text.

⁶⁰ BGBl. 1987 II, 1102. See for more details and references on the vast discussion *R. Scholz* in: *T. Maunz/G. Dürig*, Grundgesetz Kommentar, ed. 1996 (loseleaf), art. 23 para. 92 with fn. 5.

⁶¹ Law on the cooperation of the Federal government and the Federal chamber on matters of the European Union, 12 March 1993 (BGBl. I 311), and Law on the cooperation of the Federal government and the Länder on matters of the European Union, 12 March 1993 (BGBl. I 313).

Council (para. VI). It is the constitutional responsibility of the federal government, in any event, to preserve the interests of the Federal Republic as a whole.

2. Art. 28 GG: Participation of European citizens in Municipal Elections

According to the pre-Maastricht jurisprudence of the Constitutional Court democratic elections are an act of popular sovereignty (art. 20 II GG) the exercise of which is reserved to the German people in the narrow sense of „German citizens“⁶². Any attempt to give foreign citizens a right of vote even just for municipal elections was therefore declared unconstitutional⁶³. With a view to the ongoing attempts to introduce a voting right for citizens of other Member States of the EC the Court made clear, nevertheless, that insofar an amendment to the Grundgesetz was not excluded⁶⁴. There was no problem, consequently, to prepare the Constitution to the introduction, by art. 8b I ECT, for the right for European citizens to participate in municipal elections⁶⁵.

3. Art. 88 GG: The European Central Bank and Monetary Stability

Within the chapter on the execution of the federal legislation and the organisation of the federal administration, art. 88 GG initially only provided for the establishment of a Federal Bank acting as bank of issue, details of its structure and function being set out in [*54] detail in the Law on the Federal Bank. Although this bank will continue to exist after the transition to the European Monetary Union, it was felt necessary to amend art. 88 GG in order specifically to allow the transfer of the monetary sovereignty to a European Central Bank, „which is independent and bound to the primary objective to ensure price stability“⁶⁶. The case is striking in that it constitutes a sort of specific though incomplete integration clause for the monetary policy with specific requirements not only for the structure, but even for the policy of the institution in view⁶⁷. As for the structure and, in particular, the independence of the Central Bank, art. 88 GG even seems to contradict the requirements in art. 23 I GG, namely the democratic principles. The Constitutional Court admitted that the principle of democracy is at stake, but nevertheless accepted this „modification“ of the principle here in view of the need to ensure monetary stability⁶⁸. The question remains what other „modification“ of the principle of democracy might be accepted under this rationale and on what specific grounds: Can there be other exceptions? With regard to the structural requirements for the European Union set out in art. 23 I GG the example shows, at least, that they cannot be construed very narrowly.

⁶² BVerfGE 83, 37 at 50 et seq. - *Ausländerwahlrecht*. For a critical analysis of the link between ‘demos’ and citizenship in Germany, *Weiler*, *Demos*, supra note 35, 250 et seq., and *id.*, *Staat*, supra note 35, 127 et seq.

⁶³ BVerfGE 83, 37 at 53 et seq.; for valid criticism see *Bryde*, *Volksdemokratie* supra note 40, 306 et seq.; *U. Fastenrath*, *Die Struktur der erweiterten Union*, *EuR Suppl.* 1/1994, 101 at 116 et seq.

⁶⁴ BVerfGE 83, 37 at 59 - *Ausländerwahlrecht*.

⁶⁵ See the report of the Gemeinsame Verfassungskommission (GVK), *Zur Sache 5/93 50*.

⁶⁶ *id.*, 51.

⁶⁷ In this sense see the evaluation in BVerfGE 89, 155 at 204 et seq. - *Maastricht*.

⁶⁸ *id.*, 207 et seq.; comments: *I. Pernice*, *Das Ende der währungspolitischen Souveränität Deutschlands und das Maastricht-Urteil des BVerfG*, in: *O. Due/M. Lutter/J. Schwarze* (eds.), *Festschrift für Ulrich Everling*, 1995, 1057 at 1068.

4. Constitutional „Mutation“ and Criteria for Express Amendments

Given the general integration clause in art. 23 GG regarding the European Union, the question whether there was a need for amending art. 88 GG has to be answered ‘No’. The fact that the federal government establishes a federal bank acting as bank of issue does not exclude that this Bank is integrated into a European System of Central Banks - in contrary: the system is based on its existence as much as on the existence of an (independent) Central bank in each other Member State. Likewise, the amendment of art. 28 I GG did not seem mandatory, as the former wording simply required that the people have a representation in the municipalities elected by a general, equal, direct, free and secret vote. That the participation of European citizens having their residence in the given municipality violates the democratic principle is at least not obvious. Anyway, a „modified“ construction of the word people (Volk) would easily have allowed to accommodate voting rights for foreigners with the text of art. 28 I GG, without an explicit amendment. Constitutional „mutation“ would easily have explained the changed meaning of the provision, the real thrust resulting from the combined reading of the Grundgesetz and the relevant provisions of the EC-Treaty.

There are plenty of other examples where, due to European law, a mutation of the contents of the constitution without any explicit change of the wording can be illustrated⁶⁹.
[*55]

1. Art. 1 III GG confirms the immediate legally binding force of the fundamental rights listed in art. 2-19 GG for the legislator, the executive authorities and the Judiciary. Wherever German authorities implement Community legislation (directives, regulations) they *have* to respect the Community fundamental rights as developed by the Court of Justice on the basis of the general principles of law⁷⁰. They cannot set aside a Community rule simply, though, because it, or its application is in conflict with a fundamental right *of the German constitution*⁷¹. Consequently, the rule that all German authorities are bound to respect the fundamental rights of the Grundgesetz does not apply for an increasing area of action anymore: German authorities are, insofar, under European „command“, they act as European authori-

⁶⁹ This influence of Community law has, for the first time, been attempted to be taken into account systematically in the commentary to the Grundgesetz by *H. Dreier* (ed.), Grundgesetz, Kommentar, vol. 1 (1996), and vol. 2 (1998, forthcoming).

⁷⁰ See art. F, para. 2 TEU (art. 6 of the Consolidated Version, Conf. 4005/97 add. 1, hereafter called CV); for an overview see *I. Pernice*, in: *E. Grabitz/M. Hilf* (eds.), Kommentar zur Europäischen Union, ed. May 1995 (loseleaf), art. 164 para. 42 et seq.; see also *F. Mancini/ V. Di Bucci*, Le développement des droits fondamentaux en tant que partie du droit communautaire, 1 Recueil des Cours de l'Académie de Droit Européen 27 (1990); *G. C. Rodríguez Iglesias*, The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities, 1 Columbia Journal of European Law 169 (1995); for a more critical assessment of the ECJ in that respect, see *C. Jason/ A. O'Neill*, The European Court of Justice: Taking rights seriously?, 29 CMLRev 669 (1992).

⁷¹ Clearly stated in 1971 ECR 1125 at 1135, para. 3 - *Internationale Handelsgesellschaft*. See also BVerfG EuR 1989, 270 at 273: As far as Community law leaves a discretion to the national authorities, they are fully bound by the provisions of the Grundgesetz. The review of Community acts, however, is reserved to the Court of Justice. Nevertheless, the Constitutional Court reserves itself the right to review Community acts in case of an evident and general departure from the inalienable standards of protection provided by the GG, *ibid.*, and BVerfGE 73, 339 at 366 et seq. *Solange II*; 89, 155 at 174-176 - *Maastricht*. For more details see *Dreier*, *supra* note 69, art. 1 III, points 9-13; *Pernice*, *ibid.*, art. 23, paras. 26-31.

ties and are with regard to the German legislation and constitution almost⁷² *de legibus soluti*⁷³.

2. Art. 2 I GG grants the general freedom of action to everybody, provided the rights of others or the constitutional order are not violated. It is generally accepted that the phrase „constitutional order“ is an expression for the entire legislation which is in line with and valid under the Grundgesetz⁷⁴. But in view of art. 23 and 24 GG it must comprise not only the multitude of German laws but also the entire Community legislation⁷⁵. Thus, wherever a limitation of fundamental rights by (valid) legislation is reserved [*56] in the provisions of the Grundgesetz, such reservation extends to Community legislation, the validity of which is to be accepted by the national authorities unless the Court of Justice decided otherwise (art. 177 ECT)⁷⁶.

3. Likewise, the notion of „constitutional order“ in art. 20 III GG, which binds the legislator, as well as the obligation of the executive and the judiciary to act in respect of the statutes and the law have to be given an extended meaning including (supreme) Community law. This extended reading of art. 20 III GG is necessary with a view to the integration clauses in art. 23 and 24 GG in order to make it clear to the national authorities that they do, in fact, act as European civil servants, a normal consequence of the federal structure of the European Constitutional System.
4. Consequently, in applying the general guarantee of equality before the laws in art. 3 I GG one has to take into account the European dimension: Differentiated treatment may be justified, on the one hand, by valid acts and interests of the Community. On the other hand a justification under national law may have to be considered invalid if it is contrary to a rule of Community law (e.g. art. 6, 119 ECT), with the consequence that the different treatment in such a case would have to be considered as arbitrary discrimination and void.
5. The guarantees of some of the fundamental rights under the German Constitution are limited to German citizens only. While every person is granted the general freedom of action, equal treatment, freedoms of religion, thought, expression and communication as well as the freedoms of arts and science, the freedom to assemble, to associate, the free movement of people and the professional freedoms are guaranteed exclusively to Germans.

Art. 19 III GG extends the protection of the fundamental rights, if applicable, to legal persons under German law, thus generally excluding e.g. foreign business corporations.

⁷² For the exception of general and evident violations of inalienable fundamental rights see the position of the Constitutional Court described by *A. Gerber*, Deutschland, in: *B. Cottier* (ed.), Conséquences institutionnelles de l'appartenance aux Communautés européennes, 1991, 77 at 87 et seq., and supra note 71.

⁷³ Their double loyalty towards fundamental rights (doppelte Grundrechtsloyalität), is nevertheless limited to the protection of the inalienable rights standards, see: *I. Pernice*, Gemeinschaftsverfassung und Grundrechtsschutz - Grundlagen, Bestand und Perspektiven, NJW 1990, 2409 at 2417.

⁷⁴ BVerfGE 6, 32 at 37 - *Elfes*; this is the constant jurisprudence, see *Dreier*, supra note 69, art. 2 I, para. 38; *Jarass/Pieroth*, supra note 51, art. 2 I, para. 14.

⁷⁵ See also *Dreier*, supra note 69, art. 2 I, para. 42.

⁷⁶ 1987 ECR 4199 - *Foto Frost*.

Art. 33 II GG, finally, reserves the equal right of access to the civil service to Germans only. It is clear that such restrictions are discriminating within the terms of art. 6, 48, 52 or 59 ECT⁷⁷, even if the legislation in some of the areas concerned provides for equal treatment⁷⁸. In doctrine, different ways have been explored to achieve a construction which brings the dispo-[*57]sitions mentioned in accordance with Community law⁷⁹. None of the solutions suggested seem satisfactory to me, though. The rights concerned are of great economical and political relevance. In view of economic activities, such adaptation by interpretation, however, is insufficient in that it does not give legal certainty to the subjects of such rights⁸⁰. As to the political rights, textual adaptation is needed in the same way at least in order to give the rights of the European citizen under art. 8b ECT full and equal application⁸¹.

6. Art. 32 GG deals with foreign relations and attributes them generally to the area field of federal competences. The Länder need the consent of the Federal Government if they want to conclude treaties with foreign countries. It has become more and more evident, however, that policies towards the Community cannot be qualified foreign affairs any more⁸² and, therefore, are subject to specific rules in the new art. 23 GG. But beyond this: given the exclusive competence of the Community in the area of commercial policies and in the growing areas covered by Community legislation⁸³ on the one hand, and the integration of the foreign policies for the remaining areas into the CFSP-scheme under art. J TEU, on the other hand, both being matters of the European Union within the meaning of art. 23 GG, except for the relations to neighbouring states and some bilateral agreements, there remains almost no area to which art. 32 GG could reasonably apply⁸⁴. Similar conclusions seem to apply, by the way, to art. 24 I and II GG, opening the Constitution for supranational integration outside the European Union and for the accession of

⁷⁷ This does not seem to be accepted, however, by *H. Krüger*, in: Sachs (ed.), Grundgesetz Kommentar, 1996, art. 19 note 52; *W. Riefner*, Grundrechtsträger, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. V (1992), sect. 116, para. 59.

⁷⁸ E.g. for the freedom to assemble the Versammlungsgesetz of 15 November 1978 (BGBl. I, 1790), in sect. 1; for the freedom to associate the Vereinsgesetz of 5 August 1964 (BGBl. I, 593) in sect. 1.

⁷⁹ See *K. Drathen*, Deutschengrundrechte im Lichte des Gemeinschaftsrechts, 1994, ##. One way seems to be to interpret these art. „in conformity“ with Community law so to achieve equal treatment, see: *M. Nettesheim*, Auslegung und Fortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts, 109 AöR 261 at 284 et seq. (1994); *R. Breuer*, Freiheit des Berufs, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VI (1989), sect. 147 Rn. 76 et seq., but the text does not admit it. Most authors, therefore, defend to apply article 2, para. 1 GG in conformity with the European needs so to achieve a result which is equivalent in each case with the specific right in question, see *H. Bauer/W. Kahl*, Europäische Unionsbürger als Träger von Deutschen-Grundrechten?, JZ 1995, 1077 at 1078, 1081 et seq.; *H. Dreier*, supra note 69, Vorb., paras. 36, 75, as to legal persons see however *id.*, art. 19 III, para. 14: interpretation in conformity or disapplication of the restrictive word „German“; in favour of the latter construction also *I. Pernice*, in: *Dreier*, supra note 69, art. 11, para. 18.

⁸⁰ *id.*, art. 11, para. 18.

⁸¹ A special case is art. 21, para. 1 GG, where the freedom to create political parties is granted, but sect. 2, para 1 of the Law on political parties (Parteiengesetz of 31 January 1994, BGBl. I, 149) excludes political associations from the (privileged) status of a political party, if a majority of their members or in the presidency are foreigners. This is contrary not only to the spirit of art. 138a ECT, but also to the specific non-discrimination clause of art. 8b ECT and needs rapid adaptation.

⁸² See supra note 33, and, with more references : *Pernice*, in: *Dreier*, supra note 27, art. 23 para.. 97.

⁸³ See 1971 ECR 263 at 275, para. 19) - *AETR*; 1976 ECR 1279 at 1311 et seq. - *Kramer*; 1977 ECR 741 at 755 et seq. - *Rhine navigation*; 1994 ECR I-5267 at 5399, 5411, para. 77, 5416 et seq. - *WTO*.

⁸⁴ See *I. Pernice*, in: *Dreier*, supra note 69, art. 32 para. 13.

Germany to restrictions of sovereignty due to the membership in alliances for security and defence. [*58]

7. Important changes have also taken place in a number of provisions on the distribution of legislative and executive powers between the federal and the state level (art. 70-75, 87f GG). Where competences for legislation have passed to the European level, these provisions remain significant in view of the participation of the Länder in forming the German position at the Council (art. 23 IV-VI GG) and for the question of who is responsible for the implementation only. The case of customs seems to be the most striking example: If art. 73 n° 5 GG confers the exclusive competence for legislation in the area of customs, free movement of goods, commercial agreements etc. to the federal level, this does not mean any more that it will be empowered to legislate and to make its own policies. It just means that for all policies and legislation in that area it is the federal government who makes up its position and represents Germany at the Council, the Länder just being kept up to date, and that it is for the federal level to act if legislation for the implementation of Community measures is needed and to ensure application of such measures (art. 87 I GG).

8. This is not the place to continue in detail the enumeration of provisions of the Constitutions which have changed, due to the integration of Germany into the European Union, their contents or their field of application. Other examples are the role of the parliament (art. 38 et seq.), the Federal council (art. 50 et seq.) and the Federal Government, including the chancellor (art. 62 et seq.). They are elected and responsible not only for classical national politics but also for effective participation in framing the European policies, and the electorate in making its choice will more and more view the results of that and the respective contribution of the national government to it. Far-reaching implications also can be seen for the role of the legislator which is, as far as the transposition of Community directives is concerned rather rubber-stamping the ideas from Brussels and acting as an administrative rather than a political body⁸⁵. Let me refer, finally to the provisions of „financial constitution“ by which the distribution of the tax income in the Federal Republic is fixed and financial autonomy is granted to the Federal Government as much as to the Länder (art. 104a-115 GG)⁸⁶. It is clear that this autonomy is now limited at all levels by the provisions of the European Monetary Union (art. 104c ECT)⁸⁷, and it appears outdated to attribute the financial responsibility to each level according to the respective political [*59] responsibilities (art. 104a GG), if more and more decisions and tasks come from Brussels⁸⁸.

With these examples in mind, let me try a preliminary answer to the question in which cases constitutional mutation will not be sufficient and, therefore, textual modification is required. The necessity of adaptation exists, at least, in all cases where individual rights granted by Community law provisions are not fully clear and effective without a formal

⁸⁵ To sanction failures of this by damages (see 1991 ECR I-5357 - *Francovich*; and 1996 ECR I-1029 - *Brasserie du Pêcheur*), therefore, seems not really to conflict with its political authority.

⁸⁶ See also the new provision for the local governments in art. 28, para. 2, 3rd sentence GG.

⁸⁷ For the „federal“ problems due to the EMU see *K. Stern*, Die Konvergenzkriterien des Vertrags von Maastricht und ihre Umsetzung in der bundesstaatlichen Finanzverfassung, in : *O. Due/M. Lutter/J. Schwarze* (eds.), Die Konvergenzkriterien des Vertrags von Maastricht und ihre Umsetzung in der bundesstaatlichen Finanzverfassung, in: *Festschrift für Ulrich Everling*, 1995, 1469. The question becomes even more difficult with the stricter discipline provided for in the Stability-pact of 1997.

⁸⁸ See already my remarks in the debate on: *Grundsätze der Finanzverfassung des vereinten Deutschlands*, 52 VVDStRL 181 et seq. (1993).

amendment of the constitution. This obligation follows from Community law and may be enforced under art. 169 ECT. According to the *Francovich* jurisprudence of the Court⁸⁹ even damages may be due in case of an infringement. This applies, in particular, with regard to Community fundamental rights. In other area fields, the normative unity of the European constitutional order may suffice to produce adequate results, and it is rather a question of clarity and simplicity for each constitution to adapt its text from time to time to the changes it has undergone as a consequence of the development of the Treaties constituting the European Union.

III. Internal regime of international law and supranational law application

The German Constitution adopts a dualistic approach with regard to public international law. As demonstrated above, the approach to supranational law is somewhat different, although it is admitted that the founding treaties of the European Community, though concluded as international law treaties, are founding an autonomous legal system⁹⁰.

1. International law: A Dualistic Approach

Under the German Grundgesetz, any rule of international law, to become part of the internal legal order, needs a national act of implementation. A distinction is made between general customary and principles of international law, on the one hand, and treaties on the other. With regard to the general rules of international law, it is through art. 25 GG that they are incorporated, as such, into national law. In the hierarchy of norms, those general principles are considered to be situated above legislation and below the constitution⁹¹. Courts can submit doubts on the existence or contents of such general rules to the Constitutional Court under art. 100 II GG. [*60]

International treaties, on the other hand, if related to one of the areas of federal legislative competence, are given internal legal effect by simple federal statute (art. 59 II GG). There is some dispute about the legal quality such international law acquires within the internal legal system. The traditional is that it is transformed into national law. According to the actually prevailing doctrine, the legislator implements its obligation by incorporating the international treaties in internal law as such⁹², thus they keep their character as international law and must be interpreted according to the rules of international law. Though transformed or incorporated by a simple legislative act, such a provision of conventional

⁸⁹ 1991 ECR I-5357 - *Francovich*; see also 1996 ECR I-1029 - *Brasserie du Pêcheur*

⁹⁰ BVerfGE 89, 155 at 187, 200 - *Maastricht*. But see also BVerfGE 22, 293 at 296 - *EG-Verordnung*, where the Court denies that Community law had the character of international law.

⁹¹ This is the jurisprudence of the Constitutional Court, see BVerfGE 16, 276; 18, 441; 23, 288, and the dominant doctrinal view. There are compelling (historical and dogmatic) reasons, however, to argue that the rules of *ius cogens* range above the constitutional level, see *I. Pernice* in: *Dreier*, supra note 69, art. 25, para. 24. For a parallel development in Hungaria see the Hungarian Constitutional Court decision n° 53/1993 (X.13), AB-3, 524 et seq., quoted in 3 East-European Constitutional Review 10 (1993-1994), and Swizerland see: BBl. 1994 III 1486, 1493 et seq.; comments: *D. Thürer*, Bundesverfassung und Völkerrecht, in: *J. F. Aubert et al.* (eds.); Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874 (1995), para. 16; *S. Breitenmoser*, Rechtsstaatlichkeit in der Schweiz, in: *Rainer Hofmann et al.* (ed.), Rechtsstaatlichkeit in Europa, 41 at 74.

⁹² *R. Bernhardt*, Verfassungsrecht und völkerrechtliche Verträge, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts, vol. VII (1992), sect. 174 paras. 28/29, with more references.

international law is exposed to overruling by subsequent legislation according to the *lex posterior*-rule⁹³.

2. *Supranational law: a New „Monism“*

As it follows from the introduction above, the regime for supranational law in Germany is quite different. art. 23 and 24 I GG give a special „constitutional“ meaning to international treaties, in the framework of which sovereign rights are conferred to a supranational body. In a judgement of 1967 the Constitutional Court recognised that Community law is neither international law nor national law of the Member States. The Treaty of Rome created a new public authority which is autonomous and independent from the authorities of the Member States; its legislation needs no ratification nor confirmation and cannot be invalidated by the Member States. The EC-Treaty was qualified the constitution of this Community⁹⁴. This decision is of fundamental importance and in complete conformity with the jurisprudence of the Court of Justice to which it refers⁹⁵. It has never been revoked explicitly. It was confirmed by a judgement of 1971, where the Constitutional Court drew the consequence of the primacy of Community law for the judges who, according to a general rule, are obliged each time before applying an act of legislation to verify if it is compatible with superior rules of law: As opposed to a conflict with a norm of the Constitution, however, where the Constitutional Court only is competent to annul an act of parliament, in case of a conflict with Community law each judge is empowered and held to disapply - disapply only, not to declare void - the national rule and thus, to give priority to the rule of Community law⁹⁶.

While confirming that the EC-Treaty has to be considered the constitution of the Community the Constitutional Court has, nevertheless, broken with the clear concept on [*61] the supremacy of Community law in the famous *Solange*-case of 1974⁹⁷. To ensure an effective protection of the fundamental rights of the German citizen, it held itself competent to declare a rule of Community law inapplicable in Germany if it is incompatible with a fundamental right guaranteed under the Grundgesetz, ‘as long as’ (*solange*) there was no equivalent protection of fundamental rights contained in the legal system of the Community⁹⁸. The approach and the formula have been reversed in the second *Solange*-judgement in 1986: Given the effective and reliable protection of fundamental rights developed by the case law of the Court of Justice on the basis of the general principles of Community law in the years after *Solange I*⁹⁹, the Constitutional Court decided to give way to the supremacy-rule¹⁰⁰ and not to admit any individual case any more with the claim of the violation of German fundamental rights by Community law, again, „as long as“ (*solange*) the protec-

⁹³ See *O. Rojahn*, in: *I. v. Münch/P. Kunig* (ed.), *Grundgesetz-Kommentar*, 4th ed., vol. 2, art. 59 para. 37 with further references.

⁹⁴ BVerfGE 22, 293 at 296 - *EG-Verordnung*.

⁹⁵ *Ibid.*, reference is made to 1964 ECR 1251 at 1279 - *Costa/ENEL*.

⁹⁶ BVerfGE 31, 145 at 174 et seq. - *Milchpulver*.

⁹⁷ BVerfGE 37, 271 - *Solange I*, referring to the constitution of a community of states at 277 et seq., 282.

⁹⁸ *Ibid.*, 280 et seq.

⁹⁹ *G. C. Rodríguez Iglesias* admits that the ECJ received a „decisive stimulus“ from, inter alia, the *Solange I*-decision; see *The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities*, 1 *Columbia Journal of European Law* 169 at 181 (1995).

¹⁰⁰ It was generally confirmed in BVerfGE 75, 223 at 245 - *Umsatzsteuer-Richtlinie*

tion is not evidently and generally fallen short of this level¹⁰¹. The famous *Maastricht*-judgement of the Constitutional Court, though establishing a quite doubtful „principle of co-operation“¹⁰², cannot, nevertheless, be interpreted to adopt, again, a different view on the fundamental rights issue. The Court just reiterates that it will continue to ensure the unalienable standards of human rights protection, but also limit its role to it¹⁰³.

The more striking part of the judgement is the competence the Constitutional Court takes to review if the EC-institutions have exceeded the competences attributed to them by the Treaty and acted, therefore, *ultra vires*, in which case the act in question would - and could, for reasons of constitutional law - not have binding force nor be applied in Germany¹⁰⁴. The Court argues that the Community can only act validly within the limits of what it has been given competence for. It ignores, however, that the exclusive competence to judge on the question of the limits of competences has been attributed to the Court of Justice of the Community (art. 164, 173, 177 and, *e contrario*: art. 183 ECT) - in view of ensuring the unity and equal application of Community law and, thus, the proper functioning of the system¹⁰⁵. It also ignores the fact that this exclusive competence of the Court of Justice to give a final view on the validity of Community acts had [*62] already been recognised by the same Senate of that Constitutional Court in an earlier case¹⁰⁶.

Strong criticism from German authors as well as from abroad¹⁰⁷, may have induced the Constitutional Court to make clear statements in later caselaw to confirm that it is still attached to the guiding principles of Community law: supremacy and immediate application. It has rejected as inadmissible a reference of the Federal Civil Court in a case of gender discrimination by a law on the protection of women prohibiting woman's work at night. It has been alleged that this prohibition was contrary to art. 3 II GG on discrimination among men and women. The Court ruled that the question was not relevant in the given case because the legislation at stake was already incompatible with Community law and, therefore, inapplicable by German courts¹⁰⁸. This confirmed what the Constitutional Court had already stated in 1971: Even parliamentary legislation has to be disapplied by German courts if it is in conflict with Community law¹⁰⁹. As a result, notwithstanding the more theoretical reservations made by the Constitutional Court the practice of the German courts can be regarded having adopted a monistic approach: Community law is applied as part of internal law, and the Court of Justice is respected, as I will explain below, as an integral part of the system of judicial protection in Germany.

¹⁰¹ BVerfGE 73, 339 at 378-387 - *Solange II*.

¹⁰² BVerfGE 89, 155 at 174 et seq. - *Maastricht*.

¹⁰³ See also *D. Grimm*, The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision, 3 Columbia Journal of European Law 229 at 235 (1997), where Grimm, judge at the Constitutional Court - though not at the senate that decided Maastricht -, states in consequence that „constitutional complaints and references to the German Constitutional Court by lower courts alleging a violation of fundamental rights by the Community in an individual case are, for the moment, inadmissible“.

¹⁰⁴ BVerfGE 89, 155 at 187 et seq., 209 et seq. - *Maastricht*

¹⁰⁵ See also the clear statements of *G. Hirsch*, Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation, NJW 1996, 2457.

¹⁰⁶ BVerfGE 75, 223 at 234: „abschließende Entscheidungsbefugnis“.

¹⁰⁷ See for an overview *Grimm*, supra note 103, 237 fn 28.

¹⁰⁸ BVerfGE 85, 191 at 203 et seq. - *Nachtarbeit*.

¹⁰⁹ See supra note 104.

So far, there is no jurisprudence, however, on what the public administration has to do in such a case. But the same strong arguments plead in favour of a competence for the administration to disapply legislation which is incompatible with Community law¹¹⁰. The responsible civil servant would, otherwise, not only act in contradiction to his obligation under art. 20 III GG, but also consciously do what the next court would have to declare illegal, and he would incur the risk or quasi-certainty of being held liable for damages. [*63]

IV. Judicial review

The Constitutional Court not only recognises the substantive cohesion of the Community legal system and the national constitutions forming together one legal system - „Rechtsverbund“¹¹¹, but also conceives the European Court of Justice as an integral part of the national judicial system: The individual right of access to justice and the constitutional guarantee of being heard by a neutrally predetermined judge (art. 101 I GG) is applied to the European Court of Justice, and a judgement may be declared unconstitutional if a national court omits arbitrarily to refer a case to the Court of Justice under art. 177 ECT¹¹². The Constitutional Court developed this view in a case where the Federal Court of Finances had not accepted the direct effect of the Sixth Directive on indirect taxation, contrary to what had been stated by the European Court of Justice in the given case¹¹³. It adopted the view that giving direct effect to that directive exceeded the competences of the Court and was not, therefore, binding for German judges. To divert from the ruling of the Court of Justice, however, without a new reference under art. 177 ECT, was held to be arbitrary by the Constitutional Court, and, therefore, a violation of art. 101 I of the German Grundgesetz¹¹⁴.

Yet, there is no jurisprudence on the question how, in the - rather theoretical - case of an evident and general failure of the Community to safeguard the undeniable standards of human rights protection or of an action *ultra vires*, the question could be brought to the Constitutional Court. Constitutional complaints under art. 93 I n° 4a GG can only be based

¹¹⁰ See *M. Zuleeg*, Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich, 1969, 215; *D. H. Scheuing*, Rechtsprobleme bei der Durchsetzung des Gemeinschaftsrechts in der Bundesrepublik Deutschland, EuR 1985, 229 at 252 et seq.; *I. Pernice*, Auswirkungen des europäischen Binnenmarktes auf das Umweltrecht - Gemeinschafts(verfassungs-)rechtliche Grundlagen, NVwZ 1990, 201 at 202; *S. Kadelbach*, Der Einfluß des EG-Rechts auf das nationale Allgemeine Verwaltungsrecht, in *T.v. Danwitz/M. Heintzen/M. Jestaedt/S. Korioth/M. Reinhardt* (eds.), Auf dem Weg zu einer Europäischen Staatlichkeit, 1993, 131 at 135; *J. Pietzker*, Zur Nichtanwendung europarechtswidriger Gesetze seitens der Verwaltung, in: *O. Due/M. Lutter/J. Schwarze* (eds.), Festschrift für Ulrich Everling, 1995, 1095 et seq. on the discussion *ibid.*, 1098 fn. 8; *G. Ress/J. Ukrow*, Die Deutsche Verwaltung in der Europäischen Union, in: *K. König/H. Siedentopf* (eds.), Öffentliche Verwaltung in Deutschland, 1996, 731 at 734 et seq.; *H. D. Jarass*, Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten, 121 AöR 198 (1996); *R. Streinz*, Der Vollzug des Europäischen Gemeinschaftsrechts durch deutsche Staatsorgane, in: *J. Isensee/P. Kirchhof* (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VII (1992), sect. 182 para. 64.

¹¹¹ BVerfGE 89, 155 at 183 - *Maastricht*; see already BVerfGE 73, 339 at 383 et seq., 385 - *Solange II*: „normative Verklammerung des Gemeinschaftsrechts mit den Verfassungen der Mitgliedstaaten“.

¹¹² BVerfGE 73, 339 at 366 et seq. - *Solange II*.

¹¹³ See 1984 ECR 1075 at 1085 - *Kloppenburg*.

¹¹⁴ BVerfGE 75, 223 at 233 -245 - *Umsatzsteuer-Richtlinie*.

on a violation of the applicant's fundamental rights. In case of an alleged violation by Community law, the specific requirements for admissibility, however, are that it would have to be shown that the Community institutions have generally misconceived the meaning or limits of a given guarantee¹¹⁵. As to the question of competence, there seems to be no way to allege an equivalent violation of fundamental rights. The only way to deal with alleged acts *ultra vires* seems for a judge, first, refer the question to the Court of Justice under art. 177 ECT. If the answer is not satisfactory, the case may then be referred to the Constitutional Court under art. 100 I GG¹¹⁶. This [*64] Court would be wise to interpret the conditions for admissibility of such references narrowly or, better: revisit its own jurisprudence and accept that the decisions of the European Court of Justice are final. It would, in any event and to avoid arbitrariness and a breach of EC law, have to refer under art. 177 ECT to the Court of Justice - what it has never done, so far - and explain all its considerations for why the limits of competence are exceeded in a way intolerable under the German Constitution. Should the European Court of Justice confirm its view on the validity of the act in question, the Constitutional Court would have to accept this view, and it would be up to the political institutions to find a solution which does not create a precedent putting the Community at risk.

V. Conclusions

With the process of European integration under the Treaty on the European Union and according to the preamble and the „integration clause“ (art. 23) of its Grundgesetz, Germany, like the other Member States, undergoes a progressive constitutional mutation leading to the consolidation of a **Multilevel Constitutional System (Verfassungsverbund)** which is merging together the Member States' and the Communities legal orders. There is some hesitation, periodically, to accept the unconditional supremacy of European law over even the national Constitution, namely with a view to effective protection of fundamental rights and of the democratic legitimacy of European legislation. But this is to be taken as warning signal to the institutions and, more importantly, to the national governments and Intergovernmental Conferences, to adapt the structures, law and practices of the European Union to what the peoples legitimate expectations of a democratic system of governance in

¹¹⁵ See also *Grimm*, supra note 115, 235, stating that those conditions are not met actually, and a „decisive step backwards“ would have to be shown.

¹¹⁶ This is what happened in the Banana case. There, a Lower Administrative Court (Verwaltungsgericht) referred a question to the German Constitutional Court under art. 100, para. 1 GG, VG Frankfurt, EuZW 1997, 182. The Banana litigation is not strictly speaking an issue of lack of competence, though, it is about a community act violating public international law. On the Banana litigation, see *N. Reich*, Judge-made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, 7 EJIL 103 (1996); *D. Bellantuono*, Il mercato comune delle banane ovvero l'Europa di „repubbliche di banane à la carte“, 6 Il foro italiano 248 (1997). I will not enter into the details of this never-ending story, for further details see 1994 ECJ I-4973 - *Germany v. Commission*, German Constitutional Court EuZW 1995, 126; Higher Administrative Court Kassel EuZW 1995, 222; German Constitutional Court, EuZW 1995, 412; Financial Court Hamburg 1995, 413; 1995 ECR I-3799 - *Atlanta*; 1995 ECR I-3761 - *Atlanta*; 1995 ECR 4533 - *Chiquita*; Federal Court of Finances EuZW 1996, 126; 1996 ECR I-6065 - *T. Port*; 1996 ECR II-1741 - *Comafrika*; 1996 ECR II-1707 - *Atlanta*; 1997 ECR I-645 - *Belgium, Germany v. Commission*; 1997 ECR I-687 - *Belgium v. Commission; Terres Rouges Consultant T-47/95*, Activities-Rep. No.11/97; Conclusions of A. G. Elmer, *T. Port C-364/95 and C-365/95*, Activities-Rep. No. 19/97.

Europe are. The judgement of the German Constitutional Court in the Maastricht-case, like a bundle of cases actually pending before it concerning the protection of fundamental rights in the Banana-case, but recently also the transition to the EMU¹¹⁷, are the evidence of an ongoing uneasiness with the present procedures of integration and the results they produce. The president of the Constitutional Court, in her speech at a 1996 symposium on the constitutional future of the European Union said that, in Germany, the Constitutional Court's Maastricht judgement somehow substituted a referendum. This provocative statement is a challenge to the political institutions and will hopefully generate some deeper reflection on how not only the decisions of the Union (art. A II TEU) but its „constitutional“ process could be brought closer to the European citizen. It is not by international diplomacy (only) a process of regional integration can be directed and treated. In democratic societies, the [*65] evolution of multilevel constitutionalism is a matter of the people's sovereignty. The features, aims and steps of the European constitution must become the subject of a europeanwide political discourse and more clearly become the expression of a europeanwide social contract. Each level of government must be responsive to the people for which it is acting, and the system must be open, finally to international cooperation, integration and constitutionalism in response to the challenges of globalisation.

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¹¹⁷ See: Verfassungsbeschwerde gegen EU-Währungsunion, FAZ Nr. 3 (5 Jan. 1998), 11, 13; for more details see also *K.A. Schachtschneider* (ed.), Die Euro-Klage, 1998.

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