

## MULTILEVEL CONSTITUTIONALISM AND THE TREATY OF AMSTERDAM: EUROPEAN CONSTITUTION-MAKING REVISITED?

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### 1. Introduction

According to the conclusions of the Florence European Council of June 1996, the main objectives of the Intergovernmental Conference were to bring the Union closer to its citizens, to strengthen its capacities for external action and to make its institutions more efficient and democratic given the coming enlargement.<sup>1</sup> Thus, comparing this with the scope of the revision clause in Article 48(2) (ex N(2)) TEU after Maastricht, the Conference had undertaken an ambitious venture. The political environment, however, was not found favourable to such substantial aims. Due to the diverging interests of the negotiators, a large volume of complex and confusing provisions, protocols and declarations emerged. This left European integration without the coherence, transparency, effectiveness and democratic legitimacy needed to meet its objectives for the coming century.<sup>2</sup>

Although the result appears to be poor at first sight, Amsterdam was not a complete failure or "non-event".<sup>3</sup> At least three achievements justify qual-

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1. Florence European Council, 21 and 22 June 1996, Presidency Conclusions (SN 300/96 EN), point V (p. 8-10). See also the Conclusions of the European Council of March 1996 at <http://www.europa.eu.int/en/record/turin.html>.

2. For the "patchwork" characterization, see Dehousse, "European institutional architecture after Amsterdam: Parliamentary system or regulatory structure?", 35 CML Rev. (1998), 595 at 596.

3. Similarly, the position of Manin, "The Treaty of Amsterdam", 4 *Columbia Journal of European Law* (1998), 1 at 3 and 25. Further comments (positive): Barents, "Some Observations on the Treaty of Amsterdam", 4 MJ (1997), 332 at 345; critical: Dehousse, "Le Traité d'Amsterdam, Reflet de la Nouvelle Europe", 33 CDE (1997), 265: "résurgence sourde des nationalismes ... dégradation générale des ambitions ... retour en arrière ..."; Favret, "Le Traité d'Amsterdam: Une révision *a minima* de la charte constitutionnelle de l'Union européenne", 33 CDE (1997), 555 at 556: "les résultats de la CIG sont décevants, en dépit de certaines avancées". See also Langrish, "The Treaty of Amsterdam: Selected highlights", 23 EL Rev. (1998), 3 at 18: "results appear rather mixed"; Weiler, "Bread and Circus: The state of the European Union", 4 *Columbia Journal of European Law* (1998), 223 at 224: "an Intergovernmental Conference which, arguably, should never have started". For other commentaries on the Treaty of Amsterdam cf., *inter alia*, Berg and Karpenstein, "Änderungen der rechtlichen Grundlagen der EU durch den Vertrag von Amsterdam", 9 *Europäisches Wirtschafts- und Steuerrecht* (1998), 77; Bothe and

ifying even the Treaty of Amsterdam as, to use the words of Article 1(2) TEU (ex Art. A, as amended by the Treaty of Amsterdam): "a new stage in the process of creating an ever closer union among the peoples of Europe". One achievement is the transfer of legislative powers to the Community in the areas of visas, asylum, immigration and other policies relating to the free movement of persons.<sup>4</sup> The second is the strengthening of the European Parliament regarding the nomination of the president of the Commission and the extension of the co-decision procedure to most areas of legislation. The third is the human rights and democracy mechanism in Articles 6 and 7 TEU (ex Arts. F and F.1, as amended by the Treaty of Amsterdam), which imposes on the EU and its Member States an as-yet unknown constitutional discipline.

Amsterdam is indeed the third step in the completion of what was always the heart of the European Community: the common or single market. At

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Lohmann, "Verfahrensfragen der deutschen Zustimmung zum Vertrag von Amsterdam", 58 *Zeitschrift für ausländisches öffentliches Recht und Rechtsvergleichung* (1998), 1; Constantinesco, "Les clauses de 'coopération renforcée'. Le protocole sur l'application des principes de subsidiarité et de proportionnalité", 33 *RTDE* (1997), 751; de Areilza, "Enhanced Cooperations in the Treaty of Amsterdam: some critical remarks", *Harvard Jean Monnet Working Paper* No. 13/1998 (<http://www.harvard.edu/Programs/JeanMonnet/papers/98/98-13.html>); Des Nerviens, "Les relations extérieures", 33 *RTDE* (1997), 801; Ehlermann, "Engere Zusammenarbeit nach dem Amsterdamer Vertrag: Ein neues Verfassungsprinzip?", 32 *EuR* (1997), 362; Hilf, "Amsterdam - Ein Vertrag für die Bürger?" 32 *EuR* (1997), 347; Hilf and Pache, "Der Vertrag von Amsterdam", 51 *NJW* (1998), 705; Jacqué, "La simplification et la consolidation des traités", 33 *RTDE* (1997), 903; Kortenbergh, "La négociation du Traité. Une vue cavalière", 33 *RTDE* (1997), 709; Labayle, "Un espace de liberté, de sécurité et de justice", 33 *RTDE* (1997), 813; Lecheler, "Die Fortentwicklung des Rechts der EU durch den Amsterdam-Vertrag", 38 *Juristische Schulung* (1998), 392; Pechstein, "Amsterdamer Vertrag und Grundgesetz", 51 *Die Öffentliche Verwaltung* (1998), 569; Petite, "The Treaty of Amsterdam", *Harvard Jean Monnet Working Paper* No. 2/98 (<http://www.harvard.edu/Programs/JeanMonnet/papers/98/98-02.html>); Reich, "Le traité d'Amsterdam et le champ d'application de la procédure de codécision", *RMC* (1997), 665; Shaw, "Constitutional Settlements and The Citizen After The Treaty of Amsterdam", *Harvard Jean Monnet Working Paper* No. 7/1998 (<http://www.harvard.edu/Programs/JeanMonnet/papers/98/98-07.html>); Shaw, "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy", 4 *ELJ* (1998), 63; Silvestro and Fernandez-Fernandez, "Le traité d'Amsterdam: une évaluation critique", *RMC* (1997), 662; Streinz, "Der Vertrag von Amsterdam", 9 *EuZW* (1998), 137.

4. According to Langrish, *supra* note 3, at 7 et seq. and 19, it is only the revision of these provisions that comes close to a "fundamental reconstruction". For detailed comments see: Hailbronner, "Amsterdam - Vergemeinschaftung der Sachbereiche Freier Personenverkehr, Asylrecht und Einwanderung sowie Überführung des Schengen-Besitzstands auf EU-Ebene", 33 *EuR* (1998), 583 et seq.

the end of long years of "eurosclerosis", President Delors' White Paper and the Single European Act ("SEA") in 1986 had already given a new impetus to the process of integration. The goal was set by the SEA: "to transform relations as a whole among their States into a European Union". To this end, and in view of completing the internal market, the SEA reintroduced and extended the principle of majority voting, provided for more democratic control of the approximation of the different national laws, and conferred new powers on the Community to design positive policies, such as in the area of the environment. It was left to the Treaty of Maastricht to take a second important step by creating the monetary conditions for a functioning internal market. Given the fact that a monetary union could only function properly within the framework of a Political Union, the development of the Economic and Monetary Union required the parallel creation of the European Union (including the citizenship of the Union<sup>5</sup>) - a framework in which the Political Union could gradually develop. Inspired by old ideas of certain Member States' governments to keep or regain control of European policies,<sup>6</sup> the TEU embedded the existing supranational structure of the Community into a framework of inter-governmental co-ordination. This framework also extended to policy areas not previously covered by Community competences. Here, experience in closer co-operation could be gathered before the established discipline was tightened. The three pillar structure of the Union established in Maastricht was also the result of the then reluctance of the Member States to transfer sensitive areas of sovereignty to the Community: the legislative powers needed to achieve free movement of persons, and the powers for conducting a coherent policy in external relations and security. The Treaty of Amsterdam gave the Community the competence to complete the internal market regarding free movement of persons (see the new Title IV - Arts. 61-69 EC). However, the instruments for the co-ordination of national policies in the areas of foreign and internal security, foreign policies and home affairs - areas forming the core of national "sovereignty" - were merely strengthened.

Thus, further necessary steps towards a Political Union, in particular towards a common foreign and security policy, are yet to be taken, even if common policies on visas, asylum and immigration - very much like commercial policy - already include important elements of foreign policy. Here,

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5. See Preuss, "The relevance of the concept of citizenship for the political and constitutional development of the EU", in Preuss and Requejo (Eds.), *European Citizenship, Multiculturalism, and the State* (1998), at p. 11.

6. For the historical background of the division between the supranational structure of the Community and the intergovernmental structure of the Union since the Fouchet plans, see Everling, "Folgerungen aus dem Amsterdamer Vertrag für die Einheit der Europäischen Union und Gemeinschaften - Zusammenfassende Bewertung der Tagungsbeiträge", in von Bogdandy and Ehlermann (Eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam*, (EuR Beiheft 2/1998), p. 185, at 187.

as in home affairs (e.g. police and judicial co-operation in criminal matters), the Treaty of Amsterdam already moves towards a closer control of what Member States do. However, no power for legislation with direct effect for the citizen is given to the Union, and no mandatory legal review by the Court of Justice is provided.<sup>7</sup> The step from intergovernmental co-operation to the "supranational method" still has to be made. The completion of a coherent Union system of public authority - able to act in the common interest of its citizens throughout the Member States - is left to further revision(s) of the Treaties, should the peoples of Europe so wish.

The process described is closely linked to two things: on the one hand, a continuous strengthening of the democratic control and legitimacy of Community legislation and, on the other, provisions which define more clearly the areas and intensity of action to be taken at the supranational level, given the goal of preserving the national identity and a certain autonomy of the Member States. Both elements seem to be essential constitutional conditions under which powers may be conferred on the supranational level.

To evaluate the merits and possible mistakes of the Treaty of Amsterdam with a view towards future revisions, a more distant perspective will be taken hereafter. This perspective views the Member States' constitutions and the treaties constituting the European Union, despite their formal distinction as a unity in substance and as a coherent institutional system, within which competence for action, public authority or, as one may also say, the power to exercise sovereign rights is divided among two or more levels.<sup>8</sup> With the conclusion of the Treaties and each revision, such power has been moved from the national to the European level. The question is who, in fact, is at the origin of these acts by which public authority is conferred on, or even constituted

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7. Art. 34(2) lit (b) TEU (ex Art. K.6, as amended by the Treaty of Amsterdam) expressly excludes any direct effect of the "framework decisions" taken by the Council, Art. 35 TEU (ex Art. K.7, as amended by the Treaty of Amsterdam) gives the Court jurisdiction on measures taken in the third pillar with regard to the Member States which declare their acceptance to such jurisdiction. Individuals have no *locus standi*.

8. For the concept of divided sovereignty, see Pernice, "The framework revisited: Constitutional, federal and subsidiarity issues", in 2nd Frankfurt-Columbia Symposium on Comparative Law, *Harmonization of Laws in Federal Systems: A Comparative Perspective*, 2 *Columbia Journal of European Law* (1996), 403 at 418, with more references. The idea of divided sovereignty stems from the description of the American federal system, the notion can be traced back to Tocqueville, *De la démocratie en Amérique* (1835), chapter VIII ("partager la souveraineté") and to Hamilton/Madison/Jay, *The Federalist Papers* (1787/88), e.g. Hamilton, *Federalist No. 32*, ("division of the sovereign powers"). See also O'Keeffe, "Sovereignty of Parliament in the Constitution of Europe: Foundations of Legitimacy in the Divided Power Systems of the European Union", in Koepfer and Pernice (Eds.), *Entwicklungsperspektiven der europäischen Verfassung im Lichte des Vertrages von Amsterdam*, forthcoming 1999, see also *Walter Hallstein-Institut, Symposium 1998*, <http://www.rewi.hu-berlin.de/WHI/deutsch/index.htm> "The Role of Parliament in the Constitution of the European Union: The ERA of Case-by-Case Legitimacy", in *Walter Hallstein-Institut, Symposium 1998*, <http://www.rewi.hu-berlin.de/WHI/deutsch/index.htm>, looking for "multiple sources" of legitimacy in the EC "multi-level system of governance".

at, the supranational level. If, in the case of Austria, the accession to the Union was regarded as a fundamental revision of the national constitution,<sup>9</sup> in what sense, then, can the creation of the European Union by the Treaty of Maastricht and its further development by the Treaty of Amsterdam be understood as a continuation of the progressive constitution of an ever closer union among the peoples of Europe?

Answers to these questions proposed below are based on a concept call "multi-level constitutionalism". This concept treats European integration as a dynamic process of constitution-making instead of a sequence of international treaties which establish and develop of international cooperation.<sup>10</sup> The question "Does Europe need a Constitution" is not relevant, because Europe already has a "multilevel constitution": a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties (*Verfassungsverbund*).<sup>11</sup> The European Union is a divided power system,<sup>12</sup> in which each level of government - regional (or *Länder*), national (State) and supranational (European) - reflects one of two or more possible political identities of the citizens concerned. And each of these identities corresponds to a different level of society. The Treaty of Amsterdam, seen in the light of multilevel constitutionalism, is one further step towards a progressive "constitution" of legitimate institutions and powers at the European level, which are complementary to the national constitutions and designed to meet the challenges of an evolving global society. Seen in this way, Amsterdam may turn out to be much more of a success than it appears at first sight.

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9. Pernthaler, "Europäische Integration und nationales Verfassungsrecht in Österreich", in Battis, Tsatsos and Stephanou (Eds.), *Europäische Integration und nationales Verfassungsrecht* (1995), p. 437 at 444: "Gesamtänderung der Bundesverfassung". Cf. Art. 44 III of the Austrian constitution, for more details on the concept of "Gesamtänderung", see Seidl-Hohenveldern, "Constitutional Problems Involved in Austria's Accession to the EU", 32 CML Rev. (1995), 727 at 729; Adamovich et al., *Österreichisches Staatsrecht Vol. I* (1997), p. 246.

10. See, for more details, Pernice, "Constitutional law implications for a State participating in a process of regional integration. German Constitution and 'Multilevel Constitutionalism'", in Riedel (Ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law* (1998), 40-65, and "Die Dritte Gewalt im europäischen Verfassungsverbund", 31 EuR (1996), 27.

11. Grimm, "Does Europe Need a Constitution?", 1 ELJ (1995), 282, commented on by Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" , 1 ELJ (1995), 303. See also Reich, "A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law", 3 ELJ (1997), 131 at 132.

12. For the expression see Stein, "On Divided Power Systems: Adventures in Comparative Law", (1983) LIEI, 27; Bermann, "Taking subsidiarity seriously: Federalism in the European Community and the United States", 94 *Columbia Law Review* (1994), 331 at 335.

## 2. European integration in the light of "multilevel constitutionalism"

European Integration is the consequence of the historical experience of two world wars. The 19th century system of nation-States has failed to bring about what classical theories hold to be the objectives of the State:<sup>13</sup> to ensure security, peace and welfare for the people. Some "sovereign" States - as was shown in extremis by the "Third Reich" and is demonstrated by totalitarian regimes world-wide - have tended to prove that the State cannot always guarantee (and often is itself a challenge to) the freedom and human rights of the people. Europeans wanted new structures and assurances for the safeguard of peace and human rights. European integration is the most successful concept to meet this desire.<sup>14</sup> European integration aims at a closer union among the peoples step by step: from a common market to a Political Union. And it is a challenge to the concept - or the myth - of the sovereign State and constitution in the classical sense. In the past, States and their (often monarchic) public authority were taken as a given fact; they were progressively "subject" to a constitution which safeguarded individual rights and to parliamentary participation in and control of the exercise of the power held by the State. Today, it has become clear that it is only the constitution by which legitimate public authority can be established and entrusted to specific organs created for that specific purpose. Hermann Heller has explained very clearly that the State is an instrument of self-organization of society.<sup>15</sup> As Peter Häberle has shown, there can be no pre-existing State, and no more State authority than created and organized by the constitution.<sup>16</sup> But public authority does not need to be given solely to one level of political organization; different layers of political organization may be vested with different complementary powers and responsibilities, in accordance with the layers of society and the principle of subsidiarity.<sup>17</sup> Accordingly, national institutions do not need to be vested with absolute (or even a complete set) of legislative, governmental and judicial powers covering all areas of possible action. Rather,

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13. Walter Hallstein, as quoted by Steinberger, "Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Okt. 1993", in *Festschrift für Rudolf Bernhardt* (1995), p. 1313 at 1326.

14. See also Klein, "Die Erweiterung des Grundrechtsschutzes auf die universelle Ebene - Auswirkungen auf den Grundrechtsschutz in Europa", in Kreuzer et al. (Eds.), *Europäischer Grundrechtsschutz* (1998), p. 39 at 42: the protection of human rights has been taken away from the exclusive competence of the States - a basic change in the concept of national sovereignty.

15. For the theoretical foundations, see Heller, *Allgemeine Staatslehre* (1934), p. 228 et seq.

16. Häberle, "Die Europäische Verfassungsstaatlichkeit", 78 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1995), 298 at 300.

17. For a comparative analysis of this principle, see Häberle, "Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre", 119 *AöR* (1994), 169; see also Bermann, *supra* note 12, at 331.

people may reserve certain powers to national institutions and provide for other responsibilities to be entrusted to institutions at a subnational or at a supranational level constituted by the relevant citizenry.

Multilevel constitutionalism<sup>18</sup> is based on the assumptions that the *contrat social*, the concept developed by Rousseau, does not necessarily lead to one unitary State, and that the notion of constitution is not necessarily bound to a rigid concept of the State.<sup>19</sup> This new conception creates room for a pluri- or multilevel organization of public authority and responsibilities. Federal States are a classic example that a society can be organized in a two-level State structure, in which limited public authority is entrusted to bodies called "states", both on the national and subnational level; powers are divided between two levels of government according to their respective constitutions.<sup>20</sup> They are an example not only of the possibility of such division but also of the variety of ways in which the relationship between the two levels of original and basically autonomous public authority can be organized. However, multilevel constitutionalism does not necessarily imply statehood at each level. The essential feature of a two- or multilevel constitutional (federal) system is that the legitimacy of the various levels of government is not derived from one another. Rather, each level of government has "original" legitimacy, insofar as it is democratically founded on the general will of the people affected by its policies, on the one hand, and has direct jurisdiction over the people (citizenry) from which its legitimacy is derived, on the other. Multilevel constitutionalism bridges the apparent conflict between European constitutionalism and the constitutionalism of the Member States.<sup>21</sup>

The European Union comprises the Community and the Member States, the latter having established a system of close intergovernmental co-operation in areas not covered by Community competences.<sup>22</sup> It is not a federal State, but can be regarded and evolves as a federal system in the aforementioned way.

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18. The concept was developed first in Pernice, *supra* note 10, at 43 et seq.

19. For the opposite view: Randelzhofer, "Souveränität und Rechtsstaat: Anforderungen an eine Europäische Verfassung", in Noske (Ed.), *Der Rechtsstaat am Ende?* (1995), p. 123 at 124 et seq., although he does admit the use of the term "constitution" for the EU in a specific sense (*ibid.*, p. 129 et seq.). Koenig, "Ist die Europäische Union verfassungsfähig?", 51 DÖV (1998), 268, even denies the possibility that the Union can have a constitution.

20. For the theoretical basis see Hamilton/Madison/Jay, *The Federalist Papers* (1787/88), *Federalist 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".

21. For another approach to overcome this conflict, see Weiler, "Epilogue. The European Courts of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism", in Slaughter et al. (Eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (1998), p. 365 at 366.

22. In this sense Vignes, "Contribution to the Table Ronde sur l'Etat et l'Union", in Labouz (Ed.), *Les accords de Maastricht et la constitution de l'Union européenne* (1992), p. 203; Constantinesco, "Les noms de l'Europe (Des Communautés européennes à l'Union européenne)" in Flauss and Wachsmann (Eds.), *Le Droit des Organisations Internationales. Recueil à la mémoire de Jaques Schwob* (1997), p. 309 at 329.

Five elements will be elaborated further to show in detail the foundations and implications of this concept. The very fact that the Union is formally based on international treaties neither excludes considering its foundations as constitutional nor compels one to adopt a dualist approach as to the relation between Community and national law (see 2.1). Indeed, the "integration clauses" of the national constitutions support the monistic view of a divided exercise of the peoples sovereignty at different levels of action within an integrated legal system (see 2.2). The concept of Union citizenship: translates the common belongingness<sup>23</sup> of the peoples of the Member States to the Union in accordance with the Treaties - which may be regarded as a European social contract;<sup>24</sup> constitutes their common legal status in the Union; and gives legitimacy to European institutions and their actions (see 2.3). Accordingly, although formally separate and belonging to the different levels of government, the institutions of the Community and those of the Member States are closely interlinked, dependent on and related to each other. Not only do the national administrations and jurisdictions, when applying Community law, act as Community institutions, but they participate in and are, in fact, constituent elements of the legislative and constitution-making process of the Community (see 2.4). There is a substantive as well as a functional division of power inherent in the Treaty system. This double division not only ensures, according to the principle of subsidiarity, the effective formation and application of the law close to the citizen, but also safeguards individual rights and the stability of the national constitutional systems. This safeguard is now expressed by the explicit provisions for the minimum constitutional requirements in Articles 6 and 7 TEU (ex Art. F and F.1) as amended by the Treaty of Amsterdam (see 2.5). Hence in the multilevel constitutional system described, the constitutional autonomy of the Member States is subject to and constrained by a European constitutional discipline. By integration into the European Union, the Member States have lost their "competence-competence" in that due to the constraints following from the Treaties and the reciprocal restraints resulting from the national integration clauses for the constitution-making power of the Union, and in particular from Articles 6 (ex F) and 49 TEU (ex O), as amended by the Treaty of Amsterdam, for the national constitutions full

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23. This notion is used by Weiler, "The State 'über alles'", in Due et al. (Eds.), *Festschrift für Ulrich Everling* (1995), p. 1651 at 1678.

24. See also Weiler, "'...We will do. And Hearken'. Reflections on a Common Constitutional Law for the European Union", in Bieber and Widmer (Eds.), *The European Constitutional Area* (1995), p. 413 at 439; Pernice, *supra* note 8, at 419; Mestmäcker, "Risse im europäischen Contrat Social", in *Hanns Martin Schleyer-Preis 1996 und 1997, 48 Veröffentlichungen der Hanns Martin Schleyer-Stiftung*, p. 53 at 54.



freedom to determine what the tasks and powers of public authority are can be found, if at all, for a Member State only in the context of the EU.

### 2.1. *International Treaties or constitutional foundation of the Union?*

The European Community was established by the Treaty of Rome, which is an international treaty just like the SEA, the Maastricht, and the Amsterdam Treaties. This international origin suggests a dualistic concept: the co-existence of two distinct legal orders applicable to the individual. Consequently, the "internationalist" view,<sup>25</sup> held inter alia by the German Constitutional Court, treats Community Law as any other rule of international law: the application of Community law within the national legal order is founded and depends on a national act which is subject to repeal. This view even subjects the legislation and other actions of the Community at least potentially to national constitutional control.<sup>26</sup>

The European Court of Justice both accepts the international character of the Community's founding treaties and also seems to take a dualist view by underlining the autonomy of European law and its specific character.<sup>27</sup> It does, however, stress that the Treaties establish "institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens". "Sovereign" powers and legislation do not need national acts to be transposed into national law. Through the limitation of their sovereign rights,

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25. For this view, see Kirchhof, "Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht", in Kirchhof and Ehlermann (Eds.), *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, (EuR Beiheft 1/1991), p.11 at 14: "Die Gemeinschaft hat ihre Rechtsgrundlage in einem völkerrechtlichen Gesamtakt"; see also Kokott, "Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht", 119 AöR (1994), 207 at 212; rather purist: Schilling, "The autonomy of the Community legal order: An analysis of possible foundations" 37 Harv. Int'l L.J. (1996), 389; crit.: Weiler and Haltern, "The Autonomy of the Community Legal Order - Through the looking glass", 37 Harv. Int'l L.J. (1996), 411.

26. Case BVerfGE 73, 339 (367, 375) *Solange II*; case BVerfGE 89, 155 (174, 190) *Maastricht*. For the opposite view: Zuleeg, "The European constitution under constitutional constraints: The German scenario", 22 EL Rev. (1997), 19. See also the 1962 statement in a House of Lords Committee of the Lord Chancellor on the legal implications of British membership in the EC, Public Record Office LCO 19/108, quoted by Chalmers, *European Union Law*, vol. I, *Law and EU Government* (1998), at 273. More moderate: the Danish Supreme Court, Carlsen et al./Rasmussen, Judgment of 6 April 1998 No. I 361/1977, UfR 1998, 800, para 9.6 (for an English version cf. <http://www.um.dk/udenrigspolitik/europa/domeng/>); for comments on this decision, cf. Ring and Olsen-Ring, "Souveränitätsübertragung nach dänischem Verfassungsrecht", 9 EuZW (1998), 589; Thomas, "Das Maastricht-Urteil des dänischen Obersten Gerichtshofes vom 6.4.1998", 58 ZaöRV (1998), 879; Hofmann, "Der Oberste Gerichtshof Dänemarks und die europäische Integration", 26 EuGRZ (1999), 1; Hoegh, "The Danish Maastricht Judgment", 24 EL Rev. (1999), 80.

27. Case 6/64, *Costa v. ENEL*, [1964] ECR 585; prepared already by case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

the Court explains, the Member States have created "a new legal order of international law" by which, "independently of the legislation of Member States", rights are conferred upon individuals, "which become part of their legal heritage".<sup>28</sup>

Do these words support the assumption that the Court of Justice has adopted a dualist/internationalist view? Although the Court admits that the EEC Treaty "has created its own legal system", it contrasts the EEC Treaty with "ordinary international treaties" and stresses that it is a legal system which "became an integral part of the legal systems of the Member States and which their courts are bound to apply".<sup>29</sup> Can the "legal heritage" of individuals be dual? Can a national court possibly solve an individual case by giving effect to two conflicting norms at once? The mere fact that a rule of conflict - giving primacy to Community law - is recognized as part of Community law<sup>30</sup> points to a negative answer. Both Community law and national law must be understood as part of one body of law applicable to Member States and individuals in the European Community. The result seems to be a monist approach,<sup>31</sup> and not only with regard to the European citizen: Article 300(7) EC (ex Art. 228, as amended by the Treaty of Amsterdam) seems to confirm this result regarding international treaties concluded by the Community, in that they are binding on both the Community institutions and the Member States. And in implementing them, as the Court states in *Kupferberg*, the Member States meet a legal obligation with respect to both the Community and the third country in question.<sup>32</sup> Thus, in relation to third States - just as with regard to the citizens - the Community, as a contracting party, and its Member States appear as one unit. Its agreements are an integral part of Community law and may have direct effect and be invoked, as part of the national legal systems, before national Courts against conflicting national legislation.<sup>33</sup>

As to the recognition of the international character of the EC Treaty, the position of the Court was clarified in the context of the Agreement on the European Economic Area. While the Court specifies that the Treaty has been

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28. Case 26/62, *Van Gend en Loos*, cited *supra* note 27.

29. Case 6/64, *Costa v. ENEL*, cited *supra* note 27.

30. Case 26/62, *Van Gend en Loos*, cited *supra* note 27.

31. This is called "European Monism" by Kumm, "Who is the final arbiter of constitutionality in Europe?", 36 CML Rev., 000 at 000. Nevertheless the CFI recently stressed the international character of the Treaties in view of a non-contractual liability alleged to result from the SEA in case T-113/96, *Dubois*, [1998] ECR II-000, noted in 33 EuR (1998), 350.

32. Case C-104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR I-3641 at 3662, para 13.

33. *Kupferberg*, cited *supra* note 32, at 3665, paras 22-27; for the conditions of direct effect see Case C-469/93, *Amministrazione delle finanze dello Stato v. Chiquita Italia SpA*, [1995] ECR I-4533 at 4565, paras. 24-37, for provisions of the Lomé Convention as opposed to the GATT.

concluded "in the form of an international agreement", it goes on to say that it "nonetheless constitutes the constitutional charter of a Community based on the rule of law".<sup>34</sup> In its advice on accession to the European Convention on Human Rights it qualifies such an act as being of "constitutional dimension", which requires an amendment to the Treaty.<sup>35</sup> As early as 1967, even the German Constitutional Court called the EEC Treaty "in a certain sense the Constitution of Europe".<sup>36</sup> It has been proposed to name this approach constitutionalist, as opposed to the internationalist concept adopted by some of the national courts and in some literature on European law.<sup>37</sup>

What is at stake, finally, is the relationship between sets of norms coming from two different sources, at different levels of government. In principle, preeminence of Community law is generally accepted; in fact, reservations are made in some Member States, at least regarding basic principles of national identity or sovereignty, fundamental rights and freedoms, and the limits of the powers conferred to the Community.<sup>38</sup> The possibility that "constitutional" control by national courts might threaten the supremacy of Community law and its uniform application or, more precisely, the question of who - national courts or, at the supranational level, the Court of Justice - will have the final say in a given case has given food for extensive doctrinal discussion.<sup>39</sup> The answer depends on the very foundation of the existence, validity and applicability of European law. If it is derived from national constitutions, it seems to be difficult to deny control by the Member States of what they accept as binding law internally in each case. If it is considered "original" or autonomous,<sup>40</sup> there seems to be no legal criterion for deciding the question of precedence

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34. Opinion 1/91, *European Economic Area*, [1991] ECR I-6079. For more references see Pernice *supra* note 10, at 43 note 22.

35. Opinion 2/94, *ECHR*, [1996] ECR I-1759 at 1788 et seq.

36. Case BVerfGE 22, 293 (296).

37. With an excellent overview of the discussion: Chalmers, *supra* note 26, at 271-335. See also the analysis of Weiler, *supra* note 21, at 378 et seq.

38. See e.g. case BVerfGE 89, 155 *Maastricht*. For a comprehensive overview, see de Berranger, *Constitutions nationales et construction communautaire* (1995), p. 251-340; Rothley, "Europa alla tedesca. Das Bundesverfassungsgericht, das Grundgesetz, die Gemeinschaft", in FIDE (Ed.), *National constitutional law vis-à-vis European integration* (1996), p. 22 at 36-42.

39. See, most recently, Kumm, *supra* note 31; Kaufmann, "Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäischen Staatenverbund", 36 *Der Staat* (1997), 521; Schilling, "Zum Verhältnis von Gemeinschafts- und nationalem Recht", 39 *Zeitschrift für Rechtsvergleichung* (1998), 149.

40. This is the view of the Court of Justice in *Costa/ENEL*, *supra* note 27, stressing the "special and original nature" of the Treaty as "an independent source of law". This view is taken as almost undisputed by von Bogdandy, "Europäische Union als einheitlicher Verband", in EuR Beiheft 2/1998, p. 165 at 173; see also the references at Pernice, "Art. 23", note 20, in Dreier (Ed.), *Grundgesetz Kommentar* (1998). The opposite view was adopted by the Constitutional Court in the *Maastricht* judgment, case BVerfGE 89, 155 *Maastricht*, and Kirchhof, "Der deutsche Staat im Prozeß der europäischen Integration", in Isensee and Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VIII (1992), § 183 note 66 and seq.

over national law in a given case of conflict. Using the terms of Hans Kelsen's legal theory, each system would have its own basic norm (Grundnorm) and no rule in one system could be a criterion for the validity of acts of the other.<sup>41</sup> Thus, the concepts offered for a solution are either political,<sup>42</sup> institutional<sup>43</sup> or "pluralistic" (in fact, "dualistic"). The final say, then, though limited by the recognition of European integration in the national constitution, would be in the hands of those who have to implement European law: national and national courts.<sup>44</sup> Any appeal to co-operation or due regard to Community interests made in this context, however, cannot stop national courts judging, in a given case, the effectiveness of European law and, thus, of the relevance of the political will formed at another level of action. Even if (constitutional) autonomy of the European legal order is recognized, it is difficult to see on which normative criteria the Court of Justice can validly base its jurisprudence on the supremacy of Community law over national law, except such provisions and principles of the Community legal system itself, such as Article 10 (ex 5) EC, an argument a contrario from certain provisions for derogation from the Treaty, Article 249 (ex 189) EC and, finally the effet utile of the Treaty or "the very foundations of the Community".<sup>45</sup> But, on the basis of the "autonomy" thesis, these arguments are also valid only insofar as national law gives validity to Community law.<sup>46</sup>

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41. See Grussmann, "Grundnorm und Supranationalität - Rechtsstrukturelle Sichtweisen der europäischen Integration", in von Dannwitz et al. (Eds.), *Auf dem Wege zu einer Europäischen Staatlichkeit* (1993), p. 47 at 58, who accepts two basic norms in conflict, and Kaufmann, op. cit. *supra* note 39 at 538, finding the rule of conflict in the German Constitution (id. at 543 et seq.). Schilling, *supra* note 39, at 151 et seq., takes the principle of effectiveness as decisive factor, stating that there may be primacy of European law when in fact (as in the Netherlands) the primacy is recognized by the relevant actors.

42. See Heintzen, "Die 'Herrschaft' über die Europäischen Verfassungsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?", 119 AöR (1994), 564 at 587. See also MacCormick, "Das Maastricht-Urteil: Souveränität heute", 50 JZ (1995), 797 at 800 ("The Maastricht-Urteil: Sovereignty Now", 1 ELJ (1995), 259 at 265), who admits that not all problems of conflict can be resolved on legal criteria.

43. See Weiler, "The European Union Belongs to its Citizens: Three Immodest Proposals", 22 EL Rev. (1997), 150 at 155, proposing the creation for these questions of a new Constitutional Council consisting of judges from all the national constitutional courts as well as from the ECJ.

44. See the finally dualistic approach of Kaufmann, *supra* note 41, at 543-545; and Kumm, *supra* note 31, at 000IV.: "Liberal Legal Pluralism".

45. See *Costa/ENEL*, *supra* note 27; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] ECR 629.

46. See, on that basis, the attempt to resolve the problem through new procedural steps, like the institution of a "conciliation court", proposed by Schmid, "From Pont d'Avignon to Ponte Vecchio. The resolution of constitutional conflicts between the European Union and the Member States through principles of public international law", *EUI Working Papers Law No. 98/7*, p. 49 et seq. It is difficult, however, to see how conciliation should be a remedy in a situation where a serious breach of national constitutional law has been established by the Constitutional Court, and how the decision of a conciliation body under international law may be more binding for a Member State than a judgment of the ECJ: to talk about "limping monism" in this context (ibid., p. 57) is not a solution.

Arguably, it is this very last point which needs further examination and could be the key for resolving the problem. According to the concept of "multilevel constitutionalism", the Treaties are the constitution of the Community - or, together with the national constitutions, the constitution of the European Union - made by the peoples of the Member States through their treaty-making institutions and procedures.<sup>47</sup> The subject of this constitution, then, would be the creation of common institutions to meet challenges which each State individually or by simple cooperation with others has proven unable to handle satisfactorily. The foundation of the primacy of European law on the will of the "sovereign" people(s), having decided in favour of primacy in order to create an efficient tool for supranational action, easily suffices to explain why national courts may not question the validity and not refuse the application of law made under the Treaties. The question is how to reconcile this with the national claim for "competence-competence" and full determination by the constitutions of the exercise of public power.

## 2.2. *Integration clauses in the constitutions of the Member States*

It seems to be the general view that the constitution-making power for the European Union remains with the Member States.<sup>48</sup> However, the Court of Justice says that by bringing into effect the EC Treaty "the States have limited their sovereign rights".<sup>49</sup> According to the new Article 88-1 of the French constitution, the Member States may exercise some of their competences in common. A number of constitutions empower the State<sup>50</sup> to participate in

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47. For the interpretation of the constitution as a contractual process see Häberle, *supra* note 16, at 301; see also Pernice, "Gemeinschaftsverfassung und Grundrechtsschutz - Grundlagen, Bestand und Perspektiven", 43 NJW (1990), 2409 at 2410 et seq.

48. See Kirchhof, "Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht", in *EuR Beiheft* 1/1991, p. 11 at 13; Zuleeg, "What holds the nation together? Cohesion and democracy in the United States of America and in the European Union", 45 *AJCL* (1997), 505 at 507; Rodriguez Iglesias, "Gedanken zum Entstehen einer Europäischen Rechtsordnung", 52 *NJW* (1999), 1 at 2, stating that the constitution-making power in the EU remains with the Member States.

49. *Van Gend en Loos*, *supra* note 27, emphasis added.

50. Art. 88-1 of the French Constitution: "la République"; Art. 88-2: "La France"; Art. 29 III and IV of the Irish Constitution: "The state"; Art. 11 of the Italian Constitution: "Italy ... with other states"; Art. 7 VI of the Portuguese Constitution: "Portugal".

the European Union, others just leave it to the legislature,<sup>51</sup> to a treaty<sup>52</sup> or to the government<sup>53</sup> to take the necessary action. Under Article 23(1) of the German constitution it is not even the (federal) State but the federation (der Bund), as opposed to the confederated States (Länder), which may confer sovereign rights in the development of the European Union. Whether, in this context, constitutions talk about restrictions of their sovereignty or of its exercise,<sup>54</sup> provide for the transfer or delegation of specific sovereign rights<sup>55</sup> or (constitutional) powers, or of the exercise of such powers<sup>56</sup> - either generally to international institutions or organizations,<sup>57</sup> or specifically to the European Union<sup>58</sup> or for general purposes like peace and justice<sup>59</sup> - the basic question is, again: What is meant by the term States? Who is really acting, involved and concerned when the Treaties on European integration are concluded in order to constitute a supranational union?

The Treaty of Maastricht already says in Article 6(1) TEU (ex Art. F(1) as amended by the Treaty of Amsterdam) that the Member States' "systems of government are founded on the principles of democracy". In a democratic system, government action cannot exist except if founded on, and representing, the will of the people in accordance with the procedures laid down in the constitution. As a consequence, Article 48 (ex N) TEU provides for the ratification of each amendment to the Treaty by all the Member States "in accordance with their respective constitutional requirements". In all Member States these requirements are either a parliamentary act, often subject either to qualified majority conditions or to the provisions applicable to amendments of the Constitution, or/and to a mandatory or facultative referendum.<sup>60</sup>

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51. Art. 93 of the Spanish Constitution: "mediante la ley orgánica", Art. 9 II of the Austrian Constitution: "by law or agreement", idem: Art. 34 of the Belgian Constitution, Art. 28 § 2 of the Greek Constitution, Art. 69 I of the Finish Parliamentary Act, § 20 I and II of the Danish Constitution with the distinction of the "bill" which delegates powers, and the "agreement" by which "the international authorities" are set up, Chapt. 10 § 5 I of the Swedish Constitution: "The Riksdag may entrust".

52. Art. 49bis of the Luxembourg Constitution.

53. Art. 92 of the Dutch Constitution: "krachtens verdrag".

54. See Arts. 11 II of the Italian, 28 III of the Greek Constitution; Para 15 of the Preamble to the French Constitution.

55. Art. 9 II of the Austrian Constitution.

56. See Art. 92 of the Dutch Constitution (1983), § 20 I of the Danish and Art. 34 of the Belgian Constitution (1993/94), Art. 49 of the Luxembourg Constitution, Art. 93 of the Spanish Constitution.

57. See Art. 49 of the Luxembourg Constitution, § 20 I of the Danish Constitution, Art. 93 of the Spanish Constitution.

58. See Art. 23 of the German Constitution, Art. 7 VI of the Portuguese Constitution, Art. 88-1 of the French Constitution, Chapt. 10 § 5 of the Swedish Constitution.

59. See Art. 11 of the Italian Constitution.

60. For details, see Pernice, *supra* note 40, at note 10. For further references see the contributions in FIDE (Ed.), *Le droit constitutionnel national et l'intégration européenne* (1996).

Where constitutional amendments are not in accordance with provisions of national constitutions, treaty amendment is regarded in some Member States as a precondition for ratification.<sup>61</sup> Through these national procedures, not only does the process of European integration receive, at least indirectly, a specific legitimacy from the nation-States,<sup>62</sup> but the founding treaties as well as each amendment agreed upon by the governments appear as the direct expression of the common will of the peoples of the Union.<sup>63</sup> It is the peoples who decide to "constitute" their common institutions and entrust them with specific powers in order to pursue specific policies of common interest. Constitutional provisions which empower - or, like Article 23(1) of the German Constitution, oblige - the national authorities to negotiate and conclude such treaties with other nations, thus, are quite different from simple authorizations for the delegation or transfer of powers. These provisions constitute a reservation and procedure fixed in the national social contract for the conclusion and development together with the peoples of other European countries, of a European (or even international) social contract.<sup>64</sup> This in turn establishes direct constitutional relations between the people and the supranational institutions, effective through directly applicable rights and obligations for individuals (Article 249 (ex 189) EC). Although the form of an international treaty is maintained, such treaties can be regarded, therefore, as a common exercise of constitution-making power by the peoples of the participating State. Constituting the European Union and making its policies are joint exer-

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61. For the position of the French Conseil Constitutionnel on the Treaty of Amsterdam (Decision No. 97-394 of 31 Dec. 1997, Recueil 1997, 344), see Gundel, "Die Kontrolle der europäischen Integration durch den französischen Verfassungsrat", see 33 *EuR* (1998), 371; comparing this position with the German Constitutional Court's position Hecker, "Die europäische Integration vor dem Bundesverfassungsgericht", 123 *AöR* (1998), 577, and Graf Vitzthum, "Gemeinschaftsgericht und Verfassungsgericht - rechtsvergleichende Aspekte", 53 *JZ* (1998), 161 at 163 et seq.; Dutheil de la Rochère, "Les implications constitutionnelles pour un Etat de la participation à un processus d'intégration régionale", 50 *Revue Internationale de Droit Comparé* (1998), 577 at 591 et seq., and *The French Conseil Constitutionnel and the Constitutional Development of the European Union* in: Kloepfer/Pernice, (Eds.), op. cit. supra note 8, p. For the revision of the French Constitution dated 25 Jan. 1999 cf. *Journal Officiel No. 21 du 26 Janvier 1999*, p. 1343.

62Rodríguez .Iglesias, *supra* note 48, at 3.

63. See Pernice, "Die Dritte Gewalt im europäischen Verfassungsverbund", 31 *EuR* (1996), 27 at 30 et seq., and *supra* note 40, at point 21, with further references in point 128; see also Kadelbach, "Einheit der Rechtsordnung als Verfassungsprinzip der Europäischen Union", in von Bogdandy and Ehlermann, op. cit. *supra* note 6, p. 51 at 58; using the term "Gesamtakt" with regard to the European citizens see also von Bogdandy, *supra* note 40, at 173 et seq. When Ipsen, *Europäisches Gemeinschaftsrecht* (1972), p. 58, uses the term "Gesamtakt mitgliedstaatlicher Integrationsgewalt", he still puts too much emphasis on the State instead of the peoples.

64. see op. cit. *supra* note 24.

cises of the people's sovereignty.<sup>65</sup> The resulting constitutional process has a double effect: supranational institutions are created and vested with new powers and, as far as they are incompatible with provisions of the national constitutions, these provisions are changed either implicitly - a phenomenon called "constitutional mutation" by Hans Peter Ipsen<sup>66</sup> - or by express amendment.<sup>67</sup> The process of constituting supranational power or competence step by step may imply a loss of competence at the national level or, in other words, a partial and progressive "destitution" of national "sovereign" powers.<sup>68</sup> It gives the citizens of the Member States an additional identity and a new status as European citizens (infra 2.3) and transforms the national courts, administrations and legislatures into - partially - European agencies or institutions (infra 2.4).

According to this view - and contrary to that of the German Constitutional Court in its Maastricht decision,<sup>69</sup> and that (though more moderate) of the

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65. See also de Witte, "Sovereignty and European Integration: the Weight of Legal Tradition", in Slaughter, Stone, Sweet and Weiler (Eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (1998), p. 277 at 285.

66. Ipsen, *supra* note 63, at 58; for the expression "mutiert" see also Ipsen, "Als Bundesstaat in der Gemeinschaft", in Caemmerer et al. (Eds.), *Probleme des europäischen Rechts. Festschrift Walter Hallstein* (1966), p. 248 at 264; equally Tomuschat, "Die staatsrechtliche Entscheidung für die internationale Offenheit", in Isensee and Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. VII* (1995), § 172 point 72: "Mutation der Staatsverfassung durch Integration". Examples regarding the German Constitution are given in Pernice, *supra* note 10, at 54 et seq.

67. As recently required by the French Constitutional Court for the ratification of the Treaty of Amsterdam, *supra* note 61.

68. Further developed with references in Pernice, *supra* note 40, at point 22.

69. BVerfGE 89, 155 *Maastricht*. This judgment has been strongly criticized. See the recent comments by Ehmke, "Das Bundesverfassungsgericht und Europa", 21 *Integration* (1998), 168; Graf Vitzthum, "Gemeinschaftsgericht und Verfassungsgericht - rechtsvergleichende Aspekte", 54 *JZ* (1998), 161, comparing this jurisprudence with the much more appropriate concept of the French Conseil Constitutionnel (at 163 et seq.); Steinberger, *supra* note 13, at 1316, 1324, 1330; Hirsch, "Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?", 49 *NJW* (1996), 2457; with the perspective that this jurisprudence could apply only in very unlikely extreme situations, Hirsch, "Kompetenzverteilung zwischen EuGH und nationaler Gerichtsbarkeit", 17 *Neue Zeitschrift für Verwaltungsrecht* (1998), 907 at 909; similarly Schwarze, "Das schwierige Geschäft mit Europa und seinem Recht", 53 *JZ* (1998), 1077 at 1082 et seq. More restrictively, with specific procedural requirements, see Pernice, *supra* note 40, at point 29; see also Everson, "Beyond the Bundesverfassungsgericht: On the necessary cunning of constitutional reasoning", 4 *ELJ* (1998), 389 at 391 et seq.; and Grimm, "The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision", 3 *Columbia Journal of European Law* (1997), 229 at 235, where Grimm, judge at the Constitutional Court (though not at the senate that decided Maastricht), states 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". For the quite destructive conclusions drawn from the judgment see the comments on the judgment in Case C-170/96 *Commission v. Council*, [1997] ECR I-2763, of Pechstein, 53 *JZ* (1998), 1008 at 1009: "ultra vires" and void; as to the judgment in Case C-24/95,



Danish Supreme Court<sup>70</sup> - national constitutions could not require a national court to uphold national law against conflicting Community law. Even in the case of a conflict with the very substance of fundamental rights protected by the national constitution, a national court could not be required to override actions of European institutions or the content of European law which might be found to violate such fundamental rights or to be *ultra vires*. As can be seen from the new Article 6(2) (ex F(2)) TEU, fundamental rights are also part of the Community legal order and it is for the Court of Justice, according to the new provision in Article 46 lit. d) TEU (ex Art. L, as amended by the Treaty of Amsterdam), to ensure their respect by the institutions of the Union.

Therefore, it seems important to note that not only has the Court's case law on fundamental rights been given express recognition by the Treaty; also, the principles established by the Court of Justice on the relationship between Community law and national law have been confirmed. Such confirmation came from the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality, which states that these principles do not affect the Court's case law on the relation between Community law and the law of the Member States. Similarly, the European Parliament has resolved that primacy of Community law shall not be questioned by national Courts.<sup>71</sup> Thus, in the absence of any provision to the contrary, primacy of European law in the multilevel constitutional system of the European Union is founded on the common decision of the peoples of the Member States to achieve a functioning structure of political action above the State level. This structure may not be put into question by the institutions of an individual Member State.

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*Alcan*, [1997] ECR I-1591, see the comments of Scholz, "Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht", 51 DÖV (1998), 261 at 264 et seq.: void and inapplicable in Germany (commented by Frowein, "Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht", 51 DÖV (1998), 807 at 808, as "contempt of court"). Supporting the Maastricht Decision and developing further the concept of "cooperation" between the ECJ and national Courts with regard to the question of supremacy Kirchhof, "Die Gewaltenbalance zwischen staatlichen und europäischen Organen", 53 JZ (1998), 965.

70 The Danish Supreme Court, *supra* note 26, at point 9.6, restricts this reservation to an "extraordinary situation" only; the importance of the judgment is stressed by Rasmussen, "Denmark's Maastricht Ratification Case: The Constitutional Dimension", in Jyränki (Ed.), *National Constitutions in the era of Integration* (1999), p. 87, at 96, 111. For the position of other national (Constitutional) Courts see the analysis of de Witte, *supra* note 65, who concludes that a number of them found a "fine-tuned balance between the requirements of European integration and state sovereignty" looking like a "peaceful coexistence".

71. See also the Resolution of the European Parliament (Report Alber) on the status of Community and International Law in the EC, A4-0278/97. An interesting comparative study on the relationship between International Law, Community Law and Constitutional Law of the Member States was published in 1995 by the European Parliament, *Working Document Law Series W-6*, 1995.

### 2.3. European citizenship and belongingness

As already indicated, citizenship of the Union (or European citizenship) basically represents a new political and legal status<sup>72</sup> of the citizens of the Member States. The peoples of the Member States gave themselves this status by creating the European Community, governed by the principles of non-discrimination, free trade, competition and free movement of persons within the Internal Market. These principles were agreed upon by the peoples of the Member States as being common values determining their status as European citizens. They provide for a number of social and economic rights, as well as for fundamental rights to political participation and legal protection. In other words, by bringing about the Treaties, the peoples of the Member States started a process of political integration towards "an ever closer Union": simultaneously constituting a political structure for common action and a political identity of - and relationship between - the citizens belonging to this Union. Article 17 EC (ex Art. 8, as amended by the Treaty of Amsterdam) on European citizenship expresses clearly what has slowly evolved. It is "an unmistakable self-declaration of the Community as a political entity", more than that, it emphasizes the role of the Union citizens to "become the constituent components of a Euro-Polity in a not-so-far distant future".<sup>73</sup> It is not a pre-existing spiritual, social and political homogeneity<sup>74</sup> which holds this evolving citizenry together and could develop into the foundation of the peoples' "common myth",<sup>75</sup> we-feeling or belongingness.<sup>76</sup> Rather, it is - on

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72. The concept of a "status" for the citizen of the Union as a basis for the rights and obligations under the Treaty, including Art. 12 (ex 6) EC has been recognized by the Court in Case C-85/96, *Sala*, [1998] ECR I-2691 at para 62. For the description of citizenship as a "symbol for a politically active life" and a legal status, "a status of membership in a community", from a historical point of view, see Preuss, *supra* note 5, at 13 et seq., 19 et seq. Also Shaw, "The many pasts and futures of citizenship in the European Union", 22 *EL Rev.* (1997), 554, at 556, stresses the importance of the concept of Union citizenship for the "development of the status of the individual under Community law ...."

73. Preuss and Requejo (Eds.), "Preface and Acknowledgements", in *European Citizenship, Multiculturalism, and the State* (1998), p. 8.

74. This seems to have been the argument of the German Constitutional Court in its *Maastricht* Decision, case BVerfGE 89, 155 at 186; for a very thoughtful criticism on this concept see Bryde, "Le Peuple Européen and the European People", in Auer and Flauss (Eds.), *Le Référendum Européen, Actes du colloque international de Strasbourg* (1997), p. 251, at 256, with further references.

75. See von Simson, "Was heißt in einer europäischen Verfassung 'Das Volk'?", 26 *EuR* (1991), 1 at 3 et seq.

76. On the necessity of such conditions for a "multitude of individuals to become a nation", see Preuss, *supra* note 5, at 18 et seq.; he rightly points out: "The citizens must somehow 'belong' together", citizenship is the "'privilege' to rule one's equals and to be ruled by them" (*ibid.*, at 22), stressing however, that in the European Union citizenship "is much less dependent upon the social and cultural homogeneity of the group who form the citizenry than it is in the context of a nation-state" (at 24), and indicating, at the end, that a pre-existing homogeneity is not a condition for common institutions, but "sometimes successful institutions are able to generate a successful political culture".

the basis of their common history and experience<sup>77</sup> - their common desire: to safeguard peace among themselves; to overcome and abolish national frontiers in order to make way for the movement of goods, services, people and capital; to ensure equal treatment, freedom, safety, and welfare; and to face the challenges of globalization through common institutions, legal guarantees and procedures. In short, this foundation of identity emerges from the agreement on common values, which express an emerging political culture based on equal rights and which include the liberty to be different.<sup>78</sup> Thus, the identity of the European citizen is founded on law expressing common values, not on any kind of presumed homogeneity.

European institutions are created to contribute to the achievement of common goals. They are to design and implement common policies toward these ends on the basis of fundamental values common to European citizens. To give an example, let me refer to the decision of the German Constitutional Court on the Euro. The Constitutional Court interprets the creation of the European Central Bank as an act which defines the guarantee of private property in money as a fundamental right granted in Article 14(1) of the German Constitution. Until recently, the German Federal Bank was the guarantor for the stability and value of the money expressed in DM. This function has now been entrusted to - and the German Central Bank has been substituted by - the ECB.<sup>79</sup> It is from now on a European institution which has been vested with the power and responsibility to safeguard the money-owners fundamental right to private property. More generally: what has been, so far, a fundamental right for each of the peoples of the Member States to be protected by their national Central Banks or similar institutions, has now become a common concern and fundamental right of the European citizen to be met

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77. For this, from the historical perspective, see Stolleis, "Das 'europäische Haus' und seine Verfassung", 78 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1995), 275 at 281 et seq.

78. Similarly Zuleeg, *supra* note 48, at 522. See also Ehmke, *supra* note 69, at 172, stressing the common political convictions of the Europeans. A "constitutional patriotism" based on the socialization of "a common political culture" is the concept also of Habermas, *Faktizität und Geltung* (1992), p. 632 et seq., p. 642; see especially., p. 636: "Die Staatsbürgernation (im Gegensatz zur Abstammungsgemeinschaft) findet ihre Identität nicht in ethnisch-kulturellen Gemeinsamkeiten, sondern in der Praxis von Bürgern, die ihre demokratischen Teilnahme- und Kommunikationsrechte aktiv ausüben". It is worthwhile to note in this context, that "to safeguard the common values ... of the Union" is the first objective to be pursued by the Common Foreign and Security Policy of the Union according to Art. 11(1) TEU (ex Art. J.1, as amended by the Treaty of Amsterdam). Similarly, Art. 16 (ex 7d) EC speaks about "the shared values of the Union".

79. German Constitutional Court, decision of 31 March 1998, 9 EuZW (1998), 279 at 282 et seq. and BverfGE 97, 350.

and protected by the ECB, on the basis of the co-ordination and discipline provided for by Articles 98-104 (ex 102a-104c) EC regarding national economic and financial policies. Price stability, therefore, has not only become a "Grundnorm" of the EC<sup>80</sup> but a fundamental principle to be respected by all relevant actors, namely the ECB and the national governments, as a matter of common European interest. It is a requirement arising from the European citizen's fundamental right to the protection of private property.

Union citizenship, as recognized by the Treaty of Maastricht in Articles 17-22 EC (ex Arts. 8-8e, as amended by the Treaty of Amsterdam), represents a common belongingness of the peoples of the Member States to the European Union. They have agreed upon a European social contract,<sup>81</sup> based on national citizenship. It is complementary to, and not separable from, national citizenship just as the constitution of the Union is based on the national constitutions, complementary to and dependent on them, legally and institutionally as well as functionally.<sup>82</sup> The concept of "co-existing multiple Demoi" indeed "mirrors", as Weiler rightly expresses, the concept of supranationalism.<sup>83</sup> Union citizenship makes clear that the European Union is not a "compound of States"<sup>84</sup> (only), but a Union of peoples.<sup>85</sup> It adds to the concept of citizenship, which was previously only related to the nation-State, the supranational dimension and, with it, an additional "field for civic involvement".<sup>86</sup> A "postnational" community of citizens "beyond the nation-State"<sup>87</sup> is thus conceivable.

European citizens have declared themselves subjects of Union authority. As well as the non-discrimination principle laid down in Article 12 EC (ex Art. 6, as amended by the Treaty of Amsterdam) and market freedoms granted by Article 18 EC (ex Art. 8a, as amended by the Treaty of Amsterdam), Chapter 3 Titles I and III EC, they enjoy the fundamental rights developed

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80. See Herdegen, "Price stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom", 35 CML Rev. (1998), 9 at 21.

81. See *supra* note 24.

82. See 2.4 *infra*.

83. Weiler *supra* note 21, at 384 et seq., 386.

84. This is the qualification given to it by the German Constitutional Court in the Maastricht judgment, case BVerfGE 89, 155, (*Staatenverbund*).

85. See Everling, "Das Maastricht-Urteil des Bundesverfassungsgerichts und seine Bedeutung für die Entwicklung der Europäischen Union", (1994) *Integration*, 165 at 167 and 169. See also Schwarze, "Rechtsgemeinschaft und Institutionalisierung", in Hrbek and Schwarz (Eds.), *40 Jahre Römische Verträge: Der deutsche Beitrag. Dokumentation der Konferenz anlässlich des 90. Geburtstags von Dr. h.c. Hans von der Groeben* (1998), p. 214, at 217.

86. Cf. also Preuss and Requejo, *supra* note 73, at 8. For a critical analysis of the relationship between citizenship and nationality, decoupling the two concepts and introducing the idea of "coexisting multiple demoi", cf. Weiler *supra* note 3, at 236 et seq., 246 et seq.

87. See Shaw, *supra* note 72, at 561 for further references, looking for new new ways to ensure its cohesiveness.

by the Court of Justice on the basis of Article 220 (ex 164) EC as general principles of Community law. Following the terminology of Jellinek,<sup>88</sup> these rights determine the status negativus of the citizens, to which, unlike in the case of international organizations, corresponds a status positivus for citizens (consisting of their positive "access rights" to the markets for goods, services, establishment and employment) and a status activus, which is based on the rights of the citizens to participate actively in the political process of the Union. Their active participation is achieved through voting rights for the European elections (Arts. 19(2) and 190, ex Arts. 8b(2) EC, as amended by the Treaty of Amsterdam, and 138), the right of petition (Arts. 21 and 194 EC, ex Arts. 8d, as amended by the Treaty of Amsterdam, and 138d) etc. Indeed, these are the rights to have direct parliamentary representation with a progressive impact on the decision-making of the Community, to enjoy effective legal protection by the Court of Justice, and to participate in the law-making process of the Court of Justice.<sup>89</sup>

It is worth noting that even the German Constitutional Court recognizes the important role of the European Parliament, by which the peoples of the Member States are represented, and through which "additional" democratic legitimacy is granted to Union policies:

"The Union citizenship established by the Treaty of Maastricht ties long term legal bonds between the citizens of the Member States which, though not having a tightness comparable to the common membership to a State, does nevertheless provide a legally binding expression for the present degree of existential communityship".<sup>90</sup>

Although, for the time being, the German Court considers that democratic legitimacy for European policies comes mainly through the national parliaments, Union citizenship and the European parliamentary process is recognized as progressively taking on a similar role - provided certain institutional conditions of participation and transparency are met, and a European-wide political discourse evolves. Among these conditions, the German Court particularly stresses the need for a uniform electoral procedure and the role of

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88. G. Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. (1919), p. 86 et seq. For a modern revision of this concept, see Häberle, "Grundrechte im Leistungsstaat", in 30 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1972), at 43, at 80 et seq. As far as I can see, the doctrine of "status" has been applied to European law for the first time by Reich, *supra* note 11, at 136 et seq., 163 et seq.

89. For this aspect of judge-made law in the EC see Pernice, *supra* note 63, at 38 et seq.: "law-making as communicative process".

90. Case BVerfGE 89, 155 at 194 et seq. - *Maastricht*. "Mit der durch den Vertrag von Maastricht begründeten Unionsbürgerschaft wird zwischen den Staatsangehörigen der Mitgliedstaaten ein auf Dauer angelegtes rechtliches Band geknüpft, das zwar nicht eine der gemeinsamen Zugehörigkeit zu einem Staat vergleichbare Dichte besitzt, dem bestehenden Maß existentieller Gemeinsamkeit jedoch einen rechtlich verbindlichen Ausdruck verleiht".

the political parties.<sup>91</sup> Both of these points are already covered by Treaty provisions: Article 190(4) EC (ex Art. 138, as amended by the Treaty of Amsterdam) provides for the adoption of a common procedure for elections, while Article 191 (ex 138a) EC defines the role of political parties at the European level, which is to contribute "to expressing the political will of the citizens of the Union". Indeed, there could not be a more telling description of the concept behind Union citizenship, political parties and the democratic foundations of the Union. Even if this phrase is understood only in a programmatic sense: suffice it to say that the citizens of the Union may have a (common) "political will", and that political parties contribute to its expression and, therefore, have a positive and constructive role to play in the political system of the Union.<sup>92</sup>

#### 2.4. National institutions as Community authorities

The "symbiosis"<sup>93</sup> - or, indeed, unity in substance of Community and national law forming one composite legal system<sup>94</sup> - has its institutional corollary in the structure of the judicial, administrative and legislative powers of the Union. Just as the Court of Justice of the Community is accepted as an integral part of the judicial systems of the Member States,<sup>95</sup> the national courts are, no less than the Court of Justice, Community courts.<sup>96</sup> It has also been widely recognized that national administrative bodies are in an "agency-situation" regarding the transposition and application of Community law.<sup>97</sup> In fact, they are part of the European executive and exercise European authority, subject, in so doing, like the courts, to European loyalty commitments under Article

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91. Case BVerfGE 89, 155 at 195 et seq. - *Maastricht*. For the perspectives of development of the required conditions see Steinberger, *supra* note 13, at 1329.

92. Underlining the constitutive function of Art. 191 (ex 138a) EC compared with Art. 21 of the German Constitution, see Neßler, "Deutsche und europäische Parteien", 25 EuGRZ (1998), 191 et seq. See also Tsatsos, "Europäische politische Parteien?", 21 EuGRZ (1994), 45.

93. Schwarze, *supra* note 69, at 1088: "symbiotische Verflechtung"; similarly Rodríguez Iglesias, *supra* note 48, at 8: "enge Verflechtung".

94. See for a description in detail Pernice, *supra* note 10, at 45 et seq.

95. For the German Constitutional Court, see its judgment in case BVerfGE 73, 339 - *Solange II*, at 366 et seq., stating that the constitutional guarantee of access to justice (Art. 101 (1) of the Constitution) extends to Art. 234 (ex 177) EC, thus access to the ECJ is part of the German system of legal protection.

96. As was recently pointed out by Judge Hirsch, cf. Hirsch, *supra* note 69, at 910. See also Temple Lang, "The Duties of National Courts under Community Constitutional Law", 22 EL Rev. (1997), 3: "Every national court in the European Community is now a Community law court".

97. Kingreen and Störmer, "Die subjektiv-öffentlichen Recht des primären Gemeinschaftsrechts", 33 EuR (1998), 263 at 279.

10 (ex 5) EC<sup>98</sup> as well as to Community fundamental rights.<sup>99</sup> The Protocol to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality stresses the principle that the administrative application of Community law is a matter for the Member States, in accordance with their respective constitutional provisions. This vertical division of (legislative and executive) powers seems to confirm the functional complementarity of the two relevant levels of government, being two elements of one system.<sup>100</sup> Similarly, national legislatures, when transposing Community directives into national law - insofar as the Community provisions leave no legislative choice - act as an executive body of the Community.

What has been much less the subject of general discussion so far is the European role of the national parliaments. If it is correct to assume that democratic legitimacy of Community legislation is founded to a great extent in the legitimacy of the national governments acting together in the Council,<sup>101</sup> then national governments and the parliaments to which they are responsible are integral parts of the decision-making body of the Community as well. Several elements point to this, such as provisions in national constitutions and legislation (by which the national parliaments are given a say on, and control of, the position of the national minister in the Council<sup>102</sup>), Declaration No. 13 of the Intergovernmental Conference to the Treaty of Maastricht on the role of the national Parliaments in the European Union, as well as provisions for co-operation of the Parliaments in European matters (CO-SAC)<sup>103</sup> and for their rapid information and time to consider legislative proposals of the Community in Protocol No. 9 to the TEU after Amsterdam. All of these underline the new parliamentary role and responsibility in the multilevel constitutional system of the European Union.

### 2.5. Constitutional checks and balances in the European Union's system

Various constitutions of Member States lay down, in their respective integration clauses, structural and constitutional requirements for the supranational

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98. For this parallel obligation regarding the direct effect of directives, see Case 103/88, *Fratelli Costanzo*, [1989] ECR 1839 at 1871.

99. See Cases 5/88, *Wachauf*, [1989] ECR 2609; C-260/89, *ERT*, [1991] ECR I-2925; Case C-351/92, *Graff*, [1994] ECR I-3361. For a recent overview on the subject, cf. Baumgartner, *EU-Mitgliedschaft und Grundrechtsschutz* (1997), p. 186 et seq.

100. As to the possible consequence of a double loyalty of the civil servants concerned, see Pernice, *supra* note 47 at 2417.

101. This is the view of the German Constitutional Court in case BVerfGE 89, 155, at 187 and 191 *Maastricht*.

102. See e.g. Art. 23 (2) and (3) of the German Constitution, Art. 6 § 22 of the Danish Act of Accession (1972), and Art. 23e of the Austrian Constitution. More comparative references and details in Pernice, *supra* note 40, at point 13.

103. See Declaration No. 14 to the Treaty of Maastricht. After Amsterdam, the cooperation is addressed in part II of the Protocol No. 9 to the TEU.

organization entrusted with the exercise of their people's sovereignty. The most explicit provision is Article 23(1) of the German Constitution. It requires that the European Union be bound to the principles of democracy, the rule of law, social solidarity, federalism and subsidiarity, and that it ensure the protection of fundamental rights to a degree comparable to the protection provided by the German Constitution. Other constitutions are less detailed, but either require an effective protection of human rights,<sup>104</sup> the respect of subsidiarity and the principle of social and economic cohesion,<sup>105</sup> or the equality of the Member States.<sup>106</sup> On the other hand, it was clear already since the Copenhagen Declaration on European Identity of 1973<sup>107</sup> as a condition for membership - and it was generally taken up in Article 6 (ex F) TEU - that human rights are to be respected and that the governmental systems of the Member States are to be based on the principle of democracy. Much more explicitly, the revised or newly introduced Articles 6, 7 and 49(1) TEU (ex Articles F and O, as amended by the Treaty of Amsterdam) emphasize that respect for the principles of liberty and democracy, respect for human rights and fundamental freedoms as well as the rule of law are the foundation of the European Union. But they also go further, and set these as requirements for accession to and membership of the Union. The European constraints on national constitutional autonomy, as strengthened by the sanction procedure under Article 7 TEU, make clear that the concept of national sovereignty is overcome.<sup>108</sup> However, even more importantly, they offer a reciprocal assurance to the European citizens for the respect of these basic values upon which they agree, at both European and national levels. Such requirement of a minimum constitutional homogeneity in the Member States, comparable to that of Article 28(1) of the German Constitution concerning the constitutional order of the Länder,<sup>109</sup> may be necessary to safeguard the proper function-

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104. Chapt. 10 § 5 of the Swedish Constitution. Art. 28 § 3 of the Greek Constitution excludes the possibility that human rights or the democratic system in Greece be affected.

105. Art. 7 § 6 of the Constitution of Portugal: "tendo em vista a realização da coesão económica e social".

106. Art. 11 § 2 of the Italian Constitution, Art. 28 III of the Greek Constitution.

107. Copenhagen Declaration on European Identity (14/15 Dec. 1973), (1974) EA, D 54; see also the criteria laid down by the Copenhagen Summit on 22 and 23 June 1993, EC Bulletin 1993, 13 et seq.

108. See also the statement of the French President Chirac in his speech at the World Congress for Nature in Fontainebleau, 3 Nov. 1998, <http://www.ELYSEE.fr/discours/> according to which the first obstacle to cope with the global environmental problems is "la volonté des Etats de préserver, dans ce domaine, une conception dépassée de leur souveraineté... L'interdépendance appelle des mécanismes régulateurs universels, des dispositifs impartiaux et efficaces de mise en oeuvre et de contrôle des engagements pris".

109. A constitutional pressure with homogenizing effects seems to be exercised by the US Supreme Court on the States, cf. Briffault, "Paradoxes of Federalism", in Pernice (Ed.) *Harmonization of Legislation in Federal Systems* (1996), p. 53 et seq.



ing of the Union and its institutions. If the rule of law, democracy and the respect of human rights were not fully implemented in one Member State, then the social contract, the reciprocal trust of the citizens in the institutions of each Member State in their quality as European agencies - and, therefore, the foundation of the Union - would be put into question. Protocol No. 20 to the EC Treaty, introduced by the Treaty of Amsterdam, is an example that the European peoples are taking this common basis and foundation of their "joint venture" seriously. The Member States are regarded as safe countries of origin in which, as a rule, violations of human rights and fundamental freedoms do not occur and, as regards the particular status of the citizens of the Union, a right of asylum is not granted to each others' nationals.

There are other safeguards which, in addition, ensure that a concentration of power and, accordingly, a threat to the rights and freedoms of the citizen is excluded in the multilevel constitutional system of the Union: first, the basic division of legislative powers between the national and supranational levels; second, the functional division of powers in the areas of Community legislative competence, between the European and the national authorities, in which the executive function is basically kept with the Member States;<sup>110</sup> third, the division of the judicial powers between the national courts, which handle the general legal protection of the citizen, and the European Court of Justice, to which the annulment of Community acts and the final word on their interpretation are reserved. In this system, nevertheless, a residual control of the Court of Justice by national Constitutional courts in cases of continuous and evident violations of fundamental rights or of Community acts *ultra vires* proposed as an element of balance of powers<sup>111</sup> is excluded, since, as explained above: non-application of Community law in one Member State would jeopardize the status of legal equality of the Union citizens which is the foundation of its functioning.<sup>112</sup>

Even outside the areas of Community competence, the Member States are integrated in a more or less tight discipline of institutionalized co-operation which limits their political discretion and constitutional autonomy. The EEC Treaty of 1957 provided in Article 2 for a two-tier approach to meet the

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110. See also, as an expression of the underlying rule, Art. 175(4) (ex 130s) EC; for the comparison with the federal system of the U.S. where the resulting "commandeering" and unfunded mandates would be contrary to the guiding principles, see Briffault *supra* note 109, at 51, referring to the case *New York v. United States*, 112 S.Ct. 2408 (1992), and to the "Unfunded Mandates Reform Act of 1995", 104-4. See also Bermann, "Constitution-making by jurisprudence: The role of the courts in divided power systems", in *Walter Hallstein-Institut Symposium 1998* op. cit. *supra* note 8.

111. So developed by Kirchhof, *supra* note 69, at 973 et seq.

112. See section 2.3 *supra*. For the application of a specific procedure of political litigation in such a case of extreme hardship in analogy to Art. 62 of the Vienna Convention on the Law of Treaties, see Pernice, *supra* note 40, points 29 and 31.

purposes set out in this Article: the establishment of a common market and the progressive approximation of Member States' economic policies. The Single European Act of 1986 introduced a new chapter on "co-operation in economic and monetary policy" (Articles 98 et seq. (ex 102a et seq.) EC). After Maastricht, monetary policy has passed to the European Central Bank; economic policy still remains a matter for the Member States who are, nevertheless, subject to close co-operation mechanisms, multilateral surveillance and constraints including sanctions under Articles 98-104 (ex 102a-104c) EC. Under the Treaty of Maastricht, the Community was given certain competences to enhance Member State co-operation in the areas of education, vocational training, culture and health policies (Arts. 149-152 EC (ex Arts. 126-129, as amended by the Treaty of Amsterdam)). Outside the EC, but using its institutional framework, the provisions for intergovernmental co-operation in the field of foreign and security policies (Arts. 11-28 TEU (ex Arts. J.1-J.18, as amended by the Treaty of Amsterdam) and co-operation in the fields of justice and home affairs (Arts. 29-42 TEU (ex Arts. K.1 to K.14, as amended by the Treaty of Amsterdam)), introduced by the Treaty of Maastricht and revised in Amsterdam, aim at ensuring that the Union appears as a unit on the global scene and that Member States' policies in general are supportive of the objectives of the Treaties. Finally, Article 48 (ex N) TEU establishes the procedure for the interaction of the supranational institutions and the representatives of national governments for revision of the Treaties, which is subject to the agreement of the peoples of the Member States according to their respective constitutional procedures. Powers which have been entrusted to the supranational authorities, thus, unless otherwise decided under the Article 48 (ex N) TEU procedure, may not individually be exercised at the national level, and vice versa.

From the perspective of multilevel constitutionalism, the European Union (including the Community), the Member States and the mechanisms of co-operation and co-ordination of their policies appear as one system of differentiated supranational and national involvement. It reaches from "autonomous" Community legislation voted by qualified majority on the one side, to "autonomous" Member State action which is only - or even possibly not - subject to a procedure or recommendations provided for in the Treaties (pillars 2 and 3), on the other side. For some areas, a switch from the latter to the former is provided for outside the revision procedure by unanimous decisions of the Union (Art. 42 TEU (ex Art. K.14, as amended by the Treaty of Amsterdam)) or the Community (e.g. Art. 22 (ex 8e) EC), subject to adoption by the Member States in accordance with their respective constitutional requirements. The result is a graduated system in which - depending on the field of action - the political expression of, and control by, the peoples is organized to take one of three forms: a common (Community) will formed through

supranational procedures; the will of the European Union, as expressed by the presidency being the result of intergovernmental co-ordination; or the autonomous will of each individual Member State, subject to the Treaties including their mechanisms for co-operation and consultation. Common objectives and values found in Articles 2 and 6 TEU (ex Arts. B and F, as amended by the Treaty of Amsterdam) and Articles 2 to 6 EC (ex Arts. 2 to 3c, as amended by the Treaty of Amsterdam) - based on national constitutions as well as on the European Convention on Human Rights, the single institutional framework of the Union and the principles of consistency and continuity (expressed in Article 3 TEU (ex Art. C, as amended by the Treaty of Amsterdam)) and also the revision procedure laid down in Article 48 (ex N) TEU - are designed to hold this system together.

### 3. The Treaty of Amsterdam

European integration is multilevel constitutionalism in the making. Proposals for the elaboration of a "European constitution"<sup>113</sup> in the classical sense as well as for the evolution of the Union into a State structure - none of which have been successful - question this successful approach. They represent, indeed, no more than a return to the out-dated concept of the nation-State at the European level.<sup>114</sup> The development of the European Union is an open and dynamic constitutional process of (re-)allocation and (re-)definition of powers in a multilevel system of political governance. The goal is not a "super-State". The goal is rather to open statehood and to complete it by supra- and, possibly, global structures of public policy and action according to the real needs of citizens. The Treaty of Amsterdam is an example of how this constitutional process works. Driven by the critical public debate on existing deficits it appears to be a major - though not final - step towards achieving and consol-

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113. After its 1984 proposal of a constitution under the label of a treaty project for a European Union (Spinelli report), the European Parliament gave up this approach. For the (alternative) solution of a consolidation of the Treaties in order to create more coherence and transparency, see the proposals by Bieber (Centre de Droit Comparé, Lausanne), *European Parliament Working Document Political Series W-16 and W-17*; Ehlermann and von Bogdandy, *A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty, Report for the European Parliament, Robert Schuman Centre, European University Institute* (1996), available at <http://www.iue.it/RSC/TREATY/Welco-fr.html>, both prepared at the request of the European Parliament; see also the report of CELS Cambridge, directed by Dashwood and Ward, "E.C. Treaty Project", 22 EL Rev. (1995), 395; for an overview and critical analysis: Schmidt, "Konsolidierung und Vereinfachung des europäischen Primärrechts - wissenschaftliche Modelle, aktueller Stand und Perspektiven", in von Bogdandy and Ehlermann (Eds.), *op cit. supra* note 6, at p. 17.

114. The risks of such a step (backwards) are described by Weiler, "The case against the case for statehood", 4 ELJ (1998), 43.

idating common principles and values, and towards enhancing structures and procedures for efficient supranational action. This holds especially for:

- the internal market and, thus, the full guarantee of non-discrimination, open markets, free movement of persons and fair competition;
- basic concerns of European citizens related to safety, social progress, in particular employment and sustainable development;
- the respect for human rights, fundamental freedoms and the rule of law with regard to Community action and its implementation in the Member States;
- democratic legitimacy of Community action, transparency of decision-making and full accountability of the institutions for their actions;
- the respect and safeguard of the (cultural) identity of the peoples (and minorities) united in the Union, and full regard for the principle of subsidiarity;
- efficiency of the institutional and procedural arrangements in view of achieving the political results for which the Union has been established.

### *3.1 Completing the Internal Market - the End of Pillar Three?*

Contrary to the objective agreed upon in the Single European Act in Article 14(1) EC (ex Art. 7a, as amended by the Treaty of Amsterdam), the internal market was not completed by 31 December 1992. Given the national sovereignty implications of Community measures regarding the status of third-country nationals, only incremental progress was achieved in Maastricht by means of the creation of the third pillar of the Union. A new step had yet to be taken towards the realization of free movement of persons through the establishment, as the Treaty of Amsterdam calls it, of "an area of freedom, security and justice".<sup>115</sup> According to Article 2(4) TEU (ex Art. B, as amended by the Treaty of Amsterdam), one objective of the Union is to develop the Union as an area in which the free movement of persons is assured in conjunction with appropriate measures regarding external border controls, asylum, immigration and the prevention of crime. Both elements of this objective set out in paragraph 11 of the Preamble of the TEU - to facilitate the free movement of persons within the Union and to ensure the safety and security of their peoples - respond to and, indeed, express basic

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115. See paragraph 11 of the Preamble to the Treaty of Amsterdam. See also the reiteration of the objective in Art. 2(1) (ex B) TEU and Art. 2 and 3 lit.c) EC as a means for the promotion of economic and social progress, a high level of employment, a balanced and sustainable development etc. Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the price of fragmentation", 23 *EL Rev.* (1998), 320 at 323, does not see that this new objective adds anything to the Treaty objective of free movement. For a general evaluation of the new provisions regarding pillar three, see Tezcan, "La coopération dans les domaines de la justice et des affaires intérieures dans le cadre de l'Union européenne et le traité d'Amsterdam", 34 *CDE* (1998), 661.

values common to European citizens. In giving the Community competence to implement these objectives, the European peoples - with the exception of three countries - merely gave effect to their resolution to enjoy this freedom, safety and security as European citizens.<sup>116</sup> The integration into the EU/EC framework of the "Schengen acquis" by Protocol No. 2 agreed upon in Amsterdam shows clearly the dynamics of the pressures "from the ground up" against sovereignty-rooted reservations: except for the UK and Ireland and some specific provisions regarding Denmark, any controls at the internal borders between the Member States are abolished and, what is more important, the relevant provisions are no longer part of an independent international agreement but will be subject, as appropriate, to the constitutional mechanisms of the Union or the Community.<sup>117</sup>

On the other hand, since Member States' responsibilities regarding the maintenance of law and order and safeguarding internal security still represent very sensitive areas of sovereign rights (they are "the cornerstone of classical statehood"), provisions are made to keep them a "domaine réservé" of the Member States. Article 64(1) EC, for example, provides that the new Title IV EC does not affect the exercise of these responsibilities. More evidence to this effect is that measures on expulsion or deportation are not listed in the catalogue of new Community areas of action in Articles 61 to 63 EC.<sup>118</sup>

At the same time, this is not the final word on the subject: despite excluding the jurisdiction of the Court of Justice on "any measure or decision taken pursuant to Article 62(1) EC relating to the maintenance of law and order and the safeguarding of internal security", the mere fact that the Treaty admits that such measures and decisions affecting this area are taken by the Council shows that the principle of Article 64(1) EC is not absolute.<sup>119</sup> Take another example: Article 61 lit. a) EC refers to Article 31 lit. e) TEU (ex Art. K.3, as amended by the Treaty of Amsterdam) for the adoption of measures to prevent and combat crime, and Article 61 lit. e) EC provides for "measures in the field of police and judicial co-operation in criminal matters aimed at a high level of security by preventing and combating crime within the Union" to be taken according to the provisions of the TEU. These provisions again, at first sight, seem to confirm the rule that police and criminal matters (law and order, internal security) remain within national competence and are subject only to co-ordination under the third pillar of the Union. However, Article 61 EC, in fact, includes these measures in the list of actions to be taken in

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116. For the importance of the change brought about by the transfer of these areas to pillar one see Hailbronner, "European immigration and asylum law under the Amsterdam Treaty", 35 CML Rev. (1998), 1047 et seq.

117. For details see Hailbronner, *supra* note 116, at 1062 et seq.

118. See also Hailbronner, *supra* note 116, at 1049.

119. For a restrictive interpretation see Hailbronner, *supra* note 116, at 1052 et seq.

order to establish "progressively an area of freedom, security and justice" as a Community policy according to Article 3(1) lit. d EC and Title IV in Part 3 of the Treaty. Thus, the system established in many ways gives reason to assume that recourse to the (revised) third pillar is merely a transitional solution on the way to a European Union which is an area of freedom for the European citizen and not just an internal market.

Public safety from organized crime, terrorism and drug trafficking, finally, is established as a common good in the European Union. The Treaty of Amsterdam gives its institutions more competence to meet this basic concern. A first step towards a coherent supranational responsibility in this area could be the decision of a majority of Member States to establish closer co-operation in accordance with Articles 40 and 43 to 45 TEU (ex Arts. K.12 and K.15 to K.17, as amended by the Treaty of Amsterdam) with the aim of "enabling the Union to develop more rapidly into an area of freedom, security and justice" (Art. 40(1) lit. b TEU (ex Art. K.12, as amended by the Treaty of Amsterdam)).<sup>120</sup> Closer co-operation should, indeed, provide for powers and procedures for decision-making by the institutions which are similar to the EC system, and which must be open to all Member States (Art. 43(1) lit. g and h TEU (ex Art. K.15, as amended by the Treaty of Amsterdam), Art. 11(3) EC (ex Art. 5a, as amended by the Treaty of Amsterdam)).<sup>121</sup> The more rapid and complete method would still be a decision under Article 42 TEU (ex Art. K.14, as amended by the Treaty of Amsterdam), which facilitates progress towards an efficient instrument to achieve the objectives of the Treaties: a Council decision to transfer the relevant areas of action to Title IV EC. Such a decision - which at the same time would determine the relevant voting conditions - would need to be ratified in the Member States according to their respective constitutional requirements. True, Article 42 TEU (ex Art. K.14, as amended by the Treaty of Amsterdam) gives the Council the power to provide, as required in Article 6(4) TEU (ex Art. F, as amended by the Treaty of Amsterdam), the Union with the means necessary to attain its objectives more effectively. This decision would facilitate the completion of the internal market and, in particular, the freedom of persons to move within the Union. It would ensure a high level of safety for all citizens, and it might bring the existence of the third pillar to an end.

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120. For a thorough analysis of the relevant provisions see. Constantinesco, "Les clauses de 'coopération renforcée' Le protocole sur l'application des principes de subsidiarité et de proportionnalité", 33 RTDE (1997), 751 at 752 et seq.

121. The situation is different in the case of Art. 4(2) of the Schengen Protocol, where the decision on the inclusion of the UK or Ireland to the Schengen area is to be taken by unanimity; for the risks of this provision see Monar, *supra* note 115, at 333, 334 et seq.

### 3.2. *Social progress, sustainable development and environment*

Beyond the completion of the freedom to move within the Union, the Treaty of Amsterdam enhances more generally the transformation of the European Community from an organization with basically economic functions to a political Union with a more general scope of responsibilities. This transformation started long before but was an explicit goal of the Treaty of Maastricht. Provisions on the harmonization of legislation or specific policies now more expressly include requirements for a high level of public protection, such as for health, safety, environment and consumer protection (Arts. 95(3), 152, 153 and 174(2) EC (ex Articles 100a(4), 129, 129a and 130r(2), as amended by the Treaty of Amsterdam)). Accordingly, paragraph 8 of the TEU Preamble, in maintaining the objective to "promote economic and social progress for their peoples" states that account has to be taken of the principle of sustainable development. Article 2(1) TEU (ex Art. B, as amended by the Treaty of Amsterdam) mentions, as the first objective of the European Union: "to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through ... the strengthening of economic and social cohesion." In a way, such new and very fundamental values - agreed upon by the peoples of the Member States by the conclusion of the subsequent European Treaties - reflect quite basic concerns of society which do not, or only to a very limited extent, find expression and acceptance even in national constitutions. The European social contract, having started basically as a guarantee of equal treatment for the nationals of the different Member States, thus progressively includes a broad range of values to be defended by the common institutions of the Union,<sup>122</sup> constituted as a new level of political action, complementary to the Member States.

Accordingly, the transition to the third stage of the Economic and Monetary Union, the definitive transfer of monetary sovereignty to the European Central Bank and the introduction of the Euro as a common currency, are accompanied by two important decisions made in Amsterdam which complete and balance this new situation. First, the "Stability Pact" is meant to enhance the safeguard of price stability as an "overriding objective", a matter of protecting private property in money,<sup>123</sup> and put a stricter discipline on Member States' financial policies.<sup>124</sup> Second, the new Title on employment (Arts. 125 to 130 EC (ex Arts. 109n to 109s, as amended by the Treaty of Amsterdam)) and new

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122. For a thoughtful evaluation of the new provisions on economic, social, environmental and moral policies of the Union after Amsterdam, see Gosalbo-Bono, "Les politiques et actions communautaires", 33 RTDE (1997), 769.

123. This seems to be the view of the German Constitutional Court, *supra* note 79, at 282 to 284, and also Herdegen, *op. cit. supra* note 80, at 13.

124. See Reg. 1466/97/EC on the Strengthening of the Surveillance and Coordination of Budgetary Positions; Reg. 1467/97/EC on Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure, O.J. 1997, L 209/1 and 6; as well as the Resolution of the European Council on the Stability and Growth Pact, O.J. 1997, C 263/1; see also Herdegen, *op. cit. supra* note 80, at 15, 21 on "Price stability as the new 'Grundnorm' of the European Union".

provisions in the chapter on social policy, confirmed by the Resolution of the European Council of 16 June 1997 on Economic Growth and Employment<sup>125</sup>, aim to strengthen the social policy and cohesion of the Union. The two elements must be seen as complementary. It is important to observe that the EU is involved more and more in economic and social policies, both in view of strengthening the Union as a political unit and meeting basic needs and values of what is becoming, step by step, the European society.

First, the former "Social Protocol" has been integrated in the EC Treaty, bringing the special status of the United Kingdom with regard to the social policy of the Community to an end (Arts. 136 to 143 EC (ex Arts. 117 to 120, as amended by the Treaty of Amsterdam)). Second, the Treaty of Amsterdam includes in Articles 2 and 3(1) lit. i EC (as amended by the Treaty of Amsterdam) provisions aimed at a high level of employment and social protection. Accordingly, Articles 125 to 130 EC (ex Arts. 109n to 109s, as amended by the Treaty of Amsterdam) deal with - though in a rather limited way - competences of the Community in the area of employment and require a co-ordinated strategy for employment as well as the creation of an Employment Committee (Art. 130 EC (ex Art. 109s, as amended by the Treaty of Amsterdam)). Although these instruments could not be put into practice before the entry into force of the Amsterdam Treaty, some results had already been achieved in advance.<sup>126</sup> New initiatives by new governments in some Member States may give the employment and social policies more impact than it was considered possible at the time the Treaty was negotiated.<sup>127</sup>

More expressly, the Treaty of Amsterdam has qualified the protection of the environment as a first rank value and an element of all future policies of the Community by the reallocation of the "integration clause" to the principles of the Community (Art. 6 EC (ex Art. 3c, as amended by the Treaty of Amsterdam)). The Declaration on Environmental Impact Assessment, in addition, takes note of the commitment of the Commission to produce environmental impact studies for each legislative proposal having effects on the environment, so as to enhance its own and the other institutions' awareness

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125. O.J. 1997, C 263/2.

126. For the Luxembourg "Employment Summit" 1997 and the establishment of a more effective "employment strategy", see European Commission, "From Guidelines to Measures: The National Action Plans for Employment", 1988, and the Conclusions of the Cardiff Summit, 15 and 16 June 1998 (SN 150/98), points 12-16. For the Commission's Joint Employment Report (1998) see [http://europa.eu.int/comm/dg05/empl&esf/empl99/joint\\_en.htm](http://europa.eu.int/comm/dg05/empl&esf/empl99/joint_en.htm); also cf. points 7-17 of the Presidency conclusions of the Cologne European Council, 3 and 4 June 1999 (S/N 150/99): European Employment Pact.

127. For the German presidency's initiatives cf. <http://www.eu-praesidentschaft.de/>



and responsibility regarding the environment. Accordingly, not only the Commission in its proposals for the harmonization of legislation under Article 95 EC (ex Art. 100a, as amended by the Treaty of Amsterdam), but also the European Parliament and the Council are bound to seek the objective of a high level of protection for health, safety, environmental protection and consumer protection (Art. 95(3) EC (ex Art. 100a(4), as amended by the Treaty of Amsterdam)).

Another "value" has been recognized by the Treaty of Amsterdam as relevant for the "social model" of Europe. As a counterbalance to the economic freedoms and deregulation to be pursued under the principle of "an open market economy with free competition" in conformity with Article 3(1) lit. c and g, in particular in Articles 4(1) and (2) (ex Art. 3a, as amended by the Treaty of Amsterdam), 105(1), and inherent in Articles 86 and 87 EC (ex Arts. 90 and 92), Article 16 EC has been introduced to stress the importance and place of services of general economic benefit. These represent the shared values of the Union as well as promoting social and territorial cohesion.<sup>128</sup> Although this provision expressly does not aim to alter the Treaty rules regarding public undertakings and State aids, nor affect their interpretation by the Court of Justice,<sup>129</sup> it stresses the positive role which such services may play for the fulfilment of tasks of public concern, on both national and Community level, and stresses that these services may not be prevented (or hindered) from fulfilling their mission. The provision is far from clear. However, the intention to find a balance in the range of values recognized by the Treaty, to preserve elements of national identity in the European constitution, and thereby to add to the project of the model of society in the Union cannot be overlooked.<sup>130</sup>

### 3.3. *Respect of human rights and the rule of law*

The same aim is particularly clear in the field of human rights - which are the classical expression of common values in a modern society. Efforts by the European Parliament<sup>131</sup> and the German government<sup>132</sup> to include in the Treaty a catalogue of human rights and fundamental freedoms remained

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128. On the same line: Protocol 23 to the EC on public broadcasting stations.

129. See the Declaration of the IGC of Amsterdam on Art. 16 EC.

130. Similarly Gosalbo-Bono, *supra* note 122 at 772 et seq.

131. Cf. the catalogues contained in the Declaration of 12 April 1989 and in the Resolution of 10 Feb. 1994, Bieber et al. (Eds.), *Au nom des peuples européens - in the name of the peoples of Europe* (1996), p. 365 et seq.

132. Cf. the project of a European fundamental rights Charter suggested by the German Minister of Foreign Affairs, Joschka Fischer, in a speech held at the European Parliament on 12 Jan. 1999 in Strasbourg, [http://www.auswaertiges-amt.de/6\\_archiv/index.htm](http://www.auswaertiges-amt.de/6_archiv/index.htm). For a proposal of a Declaration on fundamental rights, prepared for the Green Party in Germany, Preuss, "Grundrechte in der Europäischen Union", 31 *Kritische Justiz* (1998), 1.

unsuccessful in Amsterdam. However, the commitment to the principles of liberty and democracy, the respect for human rights and fundamental freedoms, and the rule of law - already expressed after Maastricht in paragraph 3 of the TEU Preamble - has been given "teeth" by the above-mentioned procedure under Article 7 TEU.<sup>133</sup> This commitment has been extended to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers (paragraph 4 of the TEU Preamble), and to other fundamental values common to European citizens.

The sanctions for a Member State which is in breach of the principles and values laid down in Article 6(1) TEU (ex Art. F, as amended by the Treaty of Amsterdam), provided for in Article 7 TEU, are limited to the suspension of certain of the rights deriving from the application of the TEU. However, (new) Article 309 EC provides for further measures under the EC Treaty. It is important for the efficiency of the system that the initiative for such a procedure may come not only from a Member State, but also from the Commission as a central and neutral institution of surveillance. Also important is that the European Parliament is involved before the Council may determine by unanimity (save the Member State in question) the existence of "a serious and persistent breach by a Member State of principles mentioned in Article 6(1)".

This procedure is unique, both for its effect on preserving constitutional homogeneity in a federal system, and as an instrument for the international safeguard of human rights and democracy. There seems to exist no example of a more efficient procedure for the supra- or international protection of human rights and democracy worldwide.<sup>134</sup> Only States respecting the principles of Article 6(1) TEU (ex Art. F, as amended by the Treaty of Amsterdam) may become Member States to the Union (Art. 49(1) TEU (ex Art. O, as amended by the Treaty of Amsterdam)). As a logical consequence of the assumptions and duties under Article 6(1) TEU (ex Art. F, as amended by the Treaty of Amsterdam) regarding the general level of protection for human rights and fundamental freedoms in the Member States, Protocol No. 20 to the EC Treaty assumes that as long as there is no procedure started under Article 7 TEU they are all "safe countries of origin" vis-à-vis the right to asylum. On the other hand, should a Member State observe a growing number of refugees

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133. See section 2.5 *supra*.

134. For an excellent overview see Oeter, "Inspection in International Law. Monitoring compliance and the problem of implementation in international law", 28 NYIL (1997), 101, 130 et seq.

from another Member State requesting asylum, this could be reason enough to investigate and, eventually, initiate a procedure under Article 7 TEU.

Laying down these conditions for membership and accession to the Union in the Treaty is consistent with the provisions existing since the Treaty of Maastricht for the objectives of the EU foreign and development co-operation policies: to develop and consolidate democracy and the rule of law as well as the respect for human rights and fundamental freedoms (Art. 11(1) TEU (ex Art. J.1, as amended by the Treaty of Amsterdam), Art. 177(2) EC (ex Art. 130u)).<sup>135</sup> Only if the Union itself is subject, as Article 6(2) TEU (ex Art. F, as amended by the Treaty of Amsterdam) now stresses, to the respect of the fundamental rights guaranteed under 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", can it legitimately require the same from its contractual partners. The Court of Justice has been conferred express jurisdiction to give effect to Article 6(2) TEU (ex Art. F, as amended by the Treaty of Amsterdam) - which reflects its own constant case law<sup>136</sup> - through Article 46 lit. d) TEU (ex Art. L, as amended by the Treaty of Amsterdam) "insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty".

As to the protection of social rights, the Union's commitment is confirmed by the general reference to the social fundamental rights in Article 136(1) EC (ex Art. 117, as amended by the Treaty of Amsterdam) regarding the objectives of the Community social policy. Although, in this field, Article 137(6) EC (ex Art. 118, as amended by the Treaty of Amsterdam) specifies that the competences given to the Community under this Article do not apply to the right of association, the right to strike or the right to impose lock-outs, this provision does at least contain a recognition of such rights, with which (at least) EC legislation or action may not interfere.

Similarly, a fundamental right to data protection seems to be incorporated in the Treaty, at least indirectly, by Article 286(1) EC (ex Art. 213b, as amended by the Treaty of Amsterdam). It declares "Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data" applicable also to "the institutions and bodies set up by, or on the basis, of this Treaty". In order to ensure respect for it,

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135. The Community practice, and its impact, on human rights and democracy clauses in EC agreements with third States has been thoroughly analysed by Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (1998), English summary at p. 605 et seq.

136. See for a recent overview Besselink, "Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union", 35 CML Rev. (1998), 639 at 633 et seq.

provision is made in Article 286(2) EC (ex Art. 213b, as amended by the Treaty of Amsterdam) for the establishment, by the Council, of a supervisory body and the adoption of "any other relevant provisions as appropriate". Although reference is made in the Treaty to secondary law only, the Treaty contains express recognition of the "protection of individuals with regard to the processing of personal data and the free movement of such data" as a fundamental value to be respected by the Community institutions and bodies.

For certain fundamental rights and values, the Treaty of Amsterdam goes even further. It requires proactive Steps towards equal rights. The new Article 3(2) EC provides that the Community shall aim to eliminate inequalities, and to promote equality between men and women in all its activities. Article 13 EC (ex Art. 6a, as amended by the Treaty of Amsterdam) empowers the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". In other words, this provision recognizes the principle of specific non-discrimination - or the freedom to be different - not only as a constitutional value of the Community to be enforced throughout it,<sup>137</sup> but also as an indirect guarantee of the freedom of religion and belief. Article 12(2) EC (ex Art. 6, as amended by the Treaty of Amsterdam), finally, provides specifically for legislation - adopted by a qualified majority of the Council in co-decision with the European Parliament (Art. 251 EC (ex Art. 189b, as amended by the Treaty of Amsterdam)) - to enforce non-discrimination on grounds of nationality confirming that this is indeed a particular concern of the Treaty.

All these new provisions show that the Treaty of Amsterdam expresses a common concern of the European citizens for an effective protection, by the Community, of the fundamental rights which are the foundation of the Union. At the same time, they aim at implementing the requirements laid down by several national constitutions as the normative basis of European Integration.<sup>138</sup> This seems to be, indeed, a realistic and appropriate method for the incorporation into the Treaties - step by step and according to the needs and priorities consented by the peoples of the Member States - of those relevant fundamental rights, which are to be common values respected and (affirmatively) safeguarded by the institutions of the Community.

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137. For the importance of this guarantee *supra*, section 2.3.

138. e.g. Art. 23 ( 1) of the German Constitution; Chapt. 10 § 5 of the Swedish Constitution; Art. 28 § 3 of the Greek Constitution. These provisions refer to the respect of human rights and democracy, while the Portuguese Constitution refers to the principle of subsidiarity and economic and social cohesion (Art. 7 (6)).

### 3.4. *Democracy, transparency, accountability*

Closely linked to, and often part of, the human rights discourse is the recognition of democracy as a basic value and concern of the Union. A number of new provisions take this principle into account, demonstrating the efforts of the Intergovernmental Conference to meet the requirements for more direct and visible democratic legitimacy, accountability and control of Community action.<sup>139</sup> The further development of democratic structures seems to be the clearest indication of the constitutionalization of the Union as a federal system, centered - apart from the Member States' constitutions - on the European Parliament. The Parliament, indeed, was called the winner of the Conference;<sup>140</sup> it was given observer status at the IGC, more weight in the nomination of the Commission and the right of co-decision in most areas of legislation.

What democracy means in fact has not been defined. Article 6(1) TEU (ex Art. F, as amended by the Treaty of Amsterdam) just states that the Union is founded on the "principles ... of democracy ..., which are common to the Member States". It is clear, however, that the concept of democracy entails representation, and that the European Parliament is the body where the elected representatives work. According to the new wording of Article 190(2) EC (ex Art. 138, as amended by the Treaty of Amsterdam): "the number of representatives elected in each Member State must ensure appropriate representation of the peoples of the States brought together in the Community". It is worth noting, that it is still the "peoples of the States" which are represented in the Parliament, not the European citizens. Article 191 EC (ex Art. 138b, as amended by the Treaty of Amsterdam), however, seems to indicate the next step when it qualifies the role of the European parties in "expressing the political will of the citizens of the Union".

According to Article 214(2) EC (ex Art. 158, as amended by the Treaty of Amsterdam), the President of the Commission is nominated by common accord of the governments of the Member States and "shall be

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139. For a very clear claim to achieve more democracy, see the German Constitutional Court case BVerfGE 89, 155 (213) - *Maastricht*, with the request case "that the democratic foundations of the Union are extended progressively with the process of integration...". The endless discussion on the democratic deficit of the Community and the Union cannot be described here, for some references see Pernice, "Maastricht, Staat und Demokratie", 26 *Die Verwaltung* (1993), 449, at 451.

140. See Brok, "Der Amsterdamer Vertrag: Etappe auf dem Weg zur europäischen Einigung", 20 *Integration* (1997), 211; Blumann, "Aspects institutionnels", 33 *RTDE* (1997), 721 at 736: "Le Parlement européen, principal gagnant"; Nickel, "Ein Kommentar zum Amsterdamer Vertrag aus Sicht des Europäischen Parlaments", 20 *Integration* (1997), 219 at 220; Barents, *supra* note 3 at 337: "The European Parliament: The Big Winner"; Dehousse, *supra* note 2, at 603.

approved by the European Parliament", while the governments nominate the other Members of the Commission "by common accord with the nominee for President". This gives the Parliament a strong say in that the governments may not nominate a candidate who is unlikely to find a majority in the Parliament. It also confers on the candidate-President a heavy political responsibility in deciding who may join his or her team. Consequently, Article 219(1) EC (ex Art. 163, as amended by the Treaty of Amsterdam) subjects the work of the Commission to the "political guidance of its President" and so clearly indicates who is politically accountable for Commission policies.

A step towards democracy and transparency can also be seen in Article 251 EC (ex Art. 189b, as amended by the Treaty of Amsterdam), which simplifies the co-decision procedure giving the EP equal say in legislation. Together with the extension of this procedure to many areas formerly governed by the co-operation procedure or by simple consultation, this means that the Parliament is now co-legislator in about 80% of the areas of Community legislation.<sup>141</sup> What is excluded, mainly, is agriculture and external trade: Article 300(3) EC (ex Art. 228, as amended by the Treaty of Amsterdam) leaves the European Parliament out when treaties on commercial policy are concluded, and limits its participation to consultation in any other area of external action, even if *ratione materiae* the procedure of Article 251 EC were applicable. Its assent is required only for treaties establishing an association with third countries (Art. 310 EC (ex Art. 238, as amended by the Treaty of Amsterdam)).

The Treaty of Amsterdam is responsive to the need for more transparency. At a very prominent place the Treaty on the European Union states that it is about a Union in which decisions are taken not only as closely as possible to the citizen, but also "as openly as possible" (Article 1(2) TEU (ex Art. A, as amended by the Treaty of Amsterdam)). Access to European Parliament, Council and Commission documents is now provided for under Article 255 (ex Art. 191a, as amended by the Treaty of Amsterdam), subject to limits on grounds of public or private interest to be determined under an Article 251 EC (ex Art. 189b, as amended by the Treaty of Amsterdam) procedure within two years. A number of other new provisions add to that "move to transparency". Articles 207(3), 255 EC (ex Arts. 151, 191a, as amended by the Treaty of Amsterdam) provide generally for the access to Council documents. "[G]reater access to documents" is granted in "cases in which it is to be regarded as acting in its legislative capacity". The Article insists at the same time on preserving the effectiveness of the Council's decision-making process. In those cases, nevertheless, "the results of votes and explanations of vote as well as statements in the minutes shall be made

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141. Brok, "Verfassungsperspektiven der Europäischen Union auf dem Weg ins 21. Jahrhundert", in Kloepfer and Pernice (Eds.), *op.cit. supra* note 8.

public".<sup>142</sup> So the relationship between secrecy as the rule, and openness as the exception, has been reversed.<sup>143</sup> This development is to the benefit of both the citizen (and his participation in the decision-making process) and the national Parliaments (regarding their possibilities of control over their governments' positions in the Council).<sup>144</sup> By guaranteeing each citizen the use of his or her own language for communications with the institutions, Article 21(3) EC (ex Art. 8d, as amended by the Treaty of Amsterdam) directly meets a constitutional requirement pronounced by the German Constitutional Court.<sup>145</sup> Lastly, Declaration No. 39 of the IGC on the redactional quality of Community legislation requires common guidelines for the institutions for legislation, and the application of the interinstitutional agreement on simplified procedures for codification measures.<sup>146</sup>

Consequently, important improvements have been achieved in the direction of more democracy and transparency. It is doubtful, however, if traditional models of democratic legitimacy in a parliamentary system are sufficient in the multilevel structure of the European Union. New kinds of legitimacy through participation<sup>147</sup> and proceduralization, involving interested and informed groups and organizations more closely in the decision-making process, seem to be necessary. This new involvement would help overcome the remoteness of Strasbourg, Luxembourg, and Brussels as well as the difficulties in achieving equal representation and voting rights for the people of different Member States. Enhanced use of "green" and "white" papers in the process of preparing new legislation, and free accessibility for the public to proposals, comments and final (consolidated) legislative texts by means of internet (with the possibility eventually to comment and make suggestions from practical experience on them) could strengthen the interest and involvement of the "active citizens" in the policies of what is their European Union. Such European political discourse is the foundation of a democratic system. It is also the foundation for the development of a European identity which complements the national and regional identities, based on a feeling of belongingness and real concern vis-à-vis the Union.

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142. As to the position of the Court of Justice on transparency most recently, see (through the eyes of the CFI) case T-124/96, *Interporc*, 33 EuR (1998), 362 et seq.

143. See Dehousse, *supra* note 2, at 617 et seq., 620.

144. As to their effective and timely information, see Protocol No. 9 to the EC on the role of national parliaments in the European Union. On the possible role of the national Parliaments in the decision-making process of the EC, see Zuleeg, "National Parliamentary Control and European Integration", in Heukels, Blokker and Brus (Eds.), *The European Union after Amsterdam* (1998), p. 295, at 300 et seq.

145. Case BVerfGE 89, 155 (185) - *Maastricht*.

146. O.J. 1996, C 102/2.

147. For this approach cf. O'Keefe, *supra* note 8, after footnote 36. As to the provisions for participation of the social partners in the area of social policy: Betten, "The Democratic Deficit of Participatory Democracy in Community Social Policy", 23 EL Rev. (1998), 20.

### *3.5. Cultural identity and subsidiarity, regional differences and cohesion*

In a broader context, the common European identity is also at stake when Article 2(2) TEU (ex Art. B, as amended by the Treaty of Amsterdam) defines one of the objectives of the European Union: "to assert its identity on the international scene in particular through the implementation of a common foreign and security policy". Article 11(1) first indent (ex J.1) TEU, makes clear what is meant: "common values, fundamental interests, independence and integrity of the Union" being the first set of objectives of its foreign policy.

On the other hand, Article 6(3) TEU (ex Art. F(3), as amended by the Treaty of Amsterdam) stresses more clearly than before that the Union shall respect the national identities of its Member States. Unlinking this provision from the provision dealing with the principles of democracy and human rights gives the latter more objectivity, while the preservation of the national identities becomes a value as such. The principle of subsidiarity is closely linked to this obligation of the Union and its institutions. While Article 5 EC remains untouched, the Protocol No. 21 EC on subsidiarity and proportionality gives many details on its use. It explains subsidiarity as a dynamic concept (point 3), and stresses that in case of non-action with regard to subsidiarity the Member States are bound under Article 10 (ex 5) EC to take the necessary measures at the national level in order to implement the Treaty obligations (point 8). The clauses for more stringent protection measures in paragraphs 4-7 of Article 95 (ex Art. 100a, as amended by the Treaty of Amsterdam), Article 153(5) (ex Art. 116, as amended by the Treaty of Amsterdam) on consumer protection and Article 176 (ex 130t) EC on environment serve the same purpose: to ensure as much legislative autonomy for the Member States in harmonized areas as possible, while preserving the protection objectives and the functioning of the Internal Market.

If it is not subsidiarity, it is the wish to preserve national identity and autonomy or the political culture in the Member States that brought the Treaty to safeguard diversity and Member States' competence in many areas. As to the common procedure for the elections of the European Parliament, there can be proposals "in accordance with principles common to all Member States". Instead of requiring a uniform procedure, under Article 151(4) EC (ex Art. 128, as amended by the Treaty of Amsterdam) account is to be taken of the cultural aspects in other policies, namely in order to respect and promote the diversity of cultures. Many provisions mention the reservation to the responsibility of the Member States of law and



order, public safety<sup>148</sup> and the organization and delivery of health services and medical care, according to Article 152(5) EC (ex Art. 129, as amended by the Treaty of Amsterdam).<sup>149</sup> Likewise, measures of the Community in the field of social policy shall not apply, as is stressed in Article 137(6) EC (ex Art. 118, as amended by the Treaty of Amsterdam), to pay, the right of association, the right to strike, or the right to impose lock-outs. All these matters can be regarded as too sensitive and "local" as to be subject to a common rule. They are items of national identity and reserved to the national level of action.

The question now is whether the system established so far for dividing and defining the respective powers of the Member States and the Union according to the principle of subsidiarity does not require more consideration, in view of providing more legal certainty to the actors as well as more transparency to the citizens and their multiple identities. The more diffuse and complex the system, the less identification and active involvement at each level of governance can be expected. Cohesion requires, as a precondition, a certain degree of autonomy and identity (at least cultural) of the constituent parts of the system, and it is doubtful if the general clauses and disparate provisions of the Treaties are a sufficient guarantee thereof.

### 3.6. *Efficiency of institutions and procedures*

Plenty of steps have been taken in Amsterdam to enhance the efficiency of the Union's institutions and procedures. Covering all three pillars they tend to ensure coherent policies in all different areas of the Union's action. They are necessary in view of the high expectations the citizens put on the European level of governance. The constitution and the costs (financially and politically) of the Union would not appear justified if its performance were poor. While the institutional arrangements preparing the enlargement of the Union under the Treaty of Amsterdam are rather modest to nonexistent, more important steps have been taken regarding CFSP and pillar three.

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148. See also Arts. 33 TEU (ex Art. K.5, as amended by the Treaty of Amsterdam) and 64(1) EC (ex Art. 73I, as amended by the Treaty of Amsterdam: reservation for the responsibilities incumbent on the Member States with regard to the maintenance of law and order and the safeguarding of internal security, Art. 35(5) TEU (ex Art. K.7, as amended by the Treaty of Amsterdam: no judicial review on the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security,) Art. 68(2) EC and Art. 2(1) third para, last sentence, of Protocol No. 2 on the Schengen acquis: no jurisdiction of the ECJ on questions regarding the maintenance of law and order and the safeguarding of internal security.

149. Art. 152(5) EC specifies national responsibility for the organization and delivery of health services, medical care and the donation or medical use of organs and blood.

### 3.6.1. *Institutions and procedures of the Community*

With a view to the institutional framework, Article 189(2) EC (ex Art. 137, as amended by the Treaty of Amsterdam) limits the number of European Parliament Members to 700 for the sake of efficiency. The co-decision procedure has been extended to many areas of Community action, and it has been simplified so as to give the European Parliament more efficient powers, equal to those of the Council.<sup>150</sup> Its work will be facilitated by new and common rules governing the performance of the duties of its Members, which the European Parliament may adopt under the new provisions in Article 190(5) EC (ex Art. 138, as amended by the Treaty of Amsterdam). As to the seat of the European Parliament, Protocol No. 8 to the TEU does not add to efficiency; but clarifying and fixing the rules, and determining the seat of the other institutions, at least puts long-lasting discussions to an end. Declaration No. 32 to the EC on the organization and work of the Commission aims at a new division of responsibilities, more discretion and powers for the President, and the responsibility of the Vice-President for external relations.

### 3.6.2. *Arrangements for an efficient Common Foreign and Security Policy*

As to the Common Foreign and Security Policy (CFSP),<sup>151</sup> the new provisions of Articles 12 and 13 (ex J.2 and J.3) TEU introduce common strategies as a new instrument of action. Common strategies may be decided by the European Council, on the recommendation of the Council, which then implements them by joint actions and common positions taken by qualified majority according to Article 23(2) (ex J.13) TEU. Similarly, decisions implementing a joint action or a common position are adopted by majority. Although decisions having military or defence implications are exempted and a "Luxembourg-like" veto is possible, in which case a referral to a unanimous decision by the European Council may be made, the principle of unanimity in CFSP matters seems to be broken up, at least in part.<sup>152</sup>

As to the material scope of the CFSP, the decision for the integration of the WEU into the Union has been taken in Article 17(1) (ex J.7) TEU, as well as for enhanced co-operation with the WEU (Protocol No. 1 on Art. 17 TEU); it has been made clear that the Petersberg tasks are a matter of Union policy. As to its instruments, Articles 24 and 38 (ex J.14 and K.10) TEU provide for the possibility of agreements to be negotiated by the Presidency (assisted by the Commission, "as appropriate") and concluded by the Council. Nothing is said about under which name such agreements are to be

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150. Dehousse, *supra*, note 2, at 603 et seq.

151. For a more complete analysis, see Dashwood, "External relations provisions of the Amsterdam Treaty", 35 CML Rev. (1998), 1019 at 1028 et seq.

152. See the critical comments of Dashwood, *supra* note 151, at 1034 et seq., namely concerning the revival of the Luxembourg Compromise of 1967.

concluded. Since it is for the Presidency, according to Article 18 (ex J.8) TEU to represent the Union and for the Council to conclude them, all indications point to agreements concluded in the name of the Union and not the individual Member States. The possibility given to Member States to "opt out" with regard to the need for ratification in accordance with their national constitutions and for the "other members of the Council" (not: "Member States") to apply the agreement provisionally, seems to confirm this view. The result comes close to the acceptance of the international legal capacity of the Union<sup>153</sup> in the representation of the European multilevel constitutional system.

New institutional and procedural provisions aim at creating a new bureaucracy for CFSP in order to give this policy a face and administrative support. The Secretary-General acting as a "High Representative" for the CFSP will have to assist the Council according to Articles 18(3) (ex J.8), 26 (ex J.16) TEU, and Article 207(2) (ex 151) EC, while a vice Secretary General will be nominated for the organization of the Secretariat General. According to Article 18(4) (ex J.8) TEU, he will be part of the "new troika", consisting of the Presidency, the Secretary-General and the future Presidency, and he will be the head of a new Strategic Planning and Early Warning Unit to be created within the Secretariat General of the Council, according to Declaration No. 6 to the EC, in view of an effective and coherent foreign relations policy. The Political Committee is, nevertheless, maintained under Article 25 (ex J.15) TEU, while numerous provisions give the Commission a limited role to play or stress that "the Commission shall be fully associated with the work carried out" in the CFSP.<sup>154</sup> All these arrangements are complex and puzzling. They create parallel structures and superfluous bureaucracies instead of allocating all these administrative and representative functions to the Commission (and its President), who is responsible already for foreign relations in the fields covered by Community competences and who could easily and much more effectively be used for the administrative support and representation of the CFSP as well.

### 3.6.3. Pillar Three: Police and Judicial Co-operation in Criminal Matters

Also in the framework of Pillar Three, the Treaty of Amsterdam develops the procedures and measures of Member States' co-operation into a system which is more efficient and closer to the supranational method. While stressing -

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153. See also Dashwood, *supra* note 151, at 1040 et seq.; Zuleeg, "Die Organisationsstruktur der Europäischen Union - Eine Analyse der Klammerbestimmungen des Vertrags von Amsterdam", *EuR Beiheft* 2/1998), 151 at 153; De Witte, "The pillar structure and the nature of the European Union: Greek temple or French cathedral", in Heukels et al. (Eds.), *op. cit. supra* note 144, at 63; Langrish, *supra* note 3, at 14.

154. Arts. 14(4) (ex J.4), 18(4) (ex J.8), 20(1) (ex J. 10), 21(1) (ex J.11), 22 (ex J.12), 24 (ex J.14), 27 (ex J.17) TEU, and Declaration No. 6 to the EC.

again - that its provisions do "not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security",<sup>155</sup> it provides under Article 31 TEU (ex Art. K.3, as amended by the Treaty of Amsterdam) for "common action on judicial co-operation in criminal matters" including under lit (e) "progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking". To this effect, Article 34(2) lit b) TEU (ex Art. K.6, as amended by the Treaty of Amsterdam) gives the Council competence to adopt binding, although not directly applicable, "framework decisions for the purpose of approximation of the laws and regulations of the Member States" in such areas. Article 35 TEU (ex Art. K.7, as amended by the Treaty of Amsterdam), moreover, extends the jurisdiction of the Court of Justice (i) to review the legality of this legislation (para 6), (ii) to rule on any dispute between Member States regarding its interpretation and application (para 7), and - as an option for each Member State - (iii) to give preliminary rulings concerning the validity or interpretation of acts taken in the area. Again, this jurisdiction is generally excluded for "operations carried out by the police or other law enforcement services of the Member States" and the exercise of their responsibilities regarding "the maintenance of law and order and the safeguarding of internal security". But, while confirming the wish to limit the Union's judicial powers in this domain,<sup>156</sup> the provision seems to accept that measures of the Union may affect the exercise of these responsibilities.

In general, the new provisions on Police and Judicial Co-operation in Criminal Matters (PJCCM) after the Treaty of Amsterdam give the Union more effective means of action and control.<sup>157</sup> Article 34(2) lit. b) TEU (ex Art. K.6, as amended by the Treaty of Amsterdam), as indicated, provides for "framework decisions" on the approximation of laws on organized crime, terrorism, illicit drug trafficking mentioned in Article 31 lit. e) TEU (ex Art. K.3, as amended by the Treaty of Amsterdam), and Article 34(2) lit. c) TEU (ex Art. K.6, as amended by the Treaty of Amsterdam) gives the Council power to take binding decisions for any other purposes. The ini-

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155. Art. 33 TEU (ex Art. K.5, as amended by the Treaty of Amsterdam).

156. There are good reasons, however, for closer cooperation of the police, as may be concluded from the provisions and the Convention on EUROPOL, and for the harmonization of criminal law and a common criminal prosecution authority see Sieber, "Auf dem Weg zu einem europäischen Strafrecht, Einführung zum Corpus juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der EU", in Delmas-Arty (Ed.), *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union* (1998), p. 1, at 3 and 7.

157. Monar, *supra* note 115 at 327: "Overall the new Treaty brings substantial progress in terms of the range, the legal quality and potential effectiveness of instruments in the areas of justice and home affairs".

tiative for such action may come from a Member State, but may also come from the Commission. Yet, such measures are to be taken with unanimity. But, to unblock a legislative process in case of a veto by one or more Member States, Articles 40, 43 and 44 TEU (ex Arts. K.12, K.15, K.16, as amended by the Treaty of Amsterdam) create a closer co-operation mechanism, which allows an action to be taken by a majority of the Member States, with the possibility for the others to join this group later. These procedures may be particularly important after the integration of the Schengen acquis into the framework of the European Union (as provided for by Protocol No. 2 to the TEU) which gives Pillar Three again and as long as it deems necessary (*supra*, 3.1) an increased area of application with a view to a more coherent policy in the field of internal security. Instead of pure international law, the application and further development of the Schengen acquis will from now on be subject to the decision-making and legislative procedures of the TEU and EC. The Court of Justice will have jurisdiction, respectively, over the provisions and decisions taken in this area depending on their allocation to pillar 1 or 3 of the Union in accordance with the procedure of Article 2(1) of the Protocol.

#### 4. Conclusions: Outlook for a new Intergovernmental Conference

In spite of the clear intentions of the 1996 Florence European Council and the excellent preparatory work done beforehand,<sup>158</sup> the Intergovernmental Conference failed to find "possible way(s) of simplifying the Treaties so as to make the Union's goals and operation easier for the public to understand".<sup>159</sup> What was to be a consolidation of the Treaties simply ended up being a clean-up of obsolete provisions and a renumbering of the texts of the EC Treaty and the Treaty on European Union. Any appearance of a European Constitution was avoided; the Treaty of Amsterdam in many respects develops the constitutional basis and structure of the Union in "bits and pieces"<sup>160</sup> instead. Contrary to the vision of a "finite" constitution, established once and forever by a constitutive act, a more "proceduralist" path of adjudicating powers to different levels of government seems to be the approach chosen by political practice.<sup>161</sup> Amsterdam represents clear progress in making the

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158. See the proposals and reports referred to *supra*, note 113.

159. Florence European Council, 21 and 22 June 1996, Presidency Conclusions (SN 300/96 EN), point V, last paragraph.

160. Cf. for this notion Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", 30 CML Rev. (1993), 17.

161. In the light of multilevel constitutionalism the "overarching normative/constitutional order" advocated by Everson, *supra* note 69, at 403 (see also *ibid*, at 407: "search for a proceduralized constitutionalized European order") already exists and is progressively further developed by the sequence of Intergovernmental Conferences.

European Union more efficient, closer to the citizen, more coherent and more meaningful regarding the common values expressed in the objectives of the Treaty as well as in the fundamental rights expressly granted or referred to. These values are not those of "States" but reflect the common concerns of the European citizens. They are based on the constitutional traditions of the Member States, which the "European house" must be, and is, built upon.<sup>162</sup> Although it has failed to resolve the institutional problems linked to the enlargement of the Union, Amsterdam has given both the contract establishing the Union and European citizenship a new impetus; it moves towards Union policies of benefit to the European citizen and towards more transparency, individual rights and democratic procedures. The amended Treaty gives the European citizen a more clearly defined political status in the Union.

While the Treaty of Amsterdam maintains the three pillar-structure of the Union, there is a clear tendency towards concentration, coherence and consolidation in substance. Matters covered by pillar three have largely been transferred to the Community. The Schengen acquis, outside the Treaties, previously becomes part of the Community and of the third pillar. The procedures for co-ordinated action under the second pillar have been streamlined and strengthened by new competences and institutional arrangements. The question is: why should the three pillar-structure be maintained in the future? As it has been shown (*supra*, 2.5 *in fine*), the EC Treaty itself distinguishes between areas of supranational action, on the one hand, and areas of action limited to support and encouraged co-operation between Member States or to supplementing their action, on the other hand, such as education, vocational training, culture (Arts. 149-151 EC (ex Arts. 126 to 128, as amended by the Treaty of Amsterdam)). For other areas, finally, no more than the co-operation and co-ordination of the Member States policies is provided for; this is the case in particular for economic and financial policies of the Member States (Arts. 98-104 EC, (ex Arts. 102a to 104c, as amended by the Treaty of Amsterdam)). Even the principle of complete jurisdiction of the Court of Justice under the EC Treaty has not been maintained in the areas of visas, asylum, immigration etc. (Art. 68 EC (ex Art. 73p, as amended by the Treaty of Amsterdam)). Given the common objectives and the common institutional framework as well as the common foundations of the Union as laid down in Articles 1 to 7 TEU (ex Arts. A to F, as amended by the Treaty of Amsterdam), could not the two other pillars of the Union be integrated into the EC Treaty as specific chapters providing for specific instruments of action and procedure? There is little reason, indeed, for maintaining the three

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162. See Stolleis, *supra* note 77, at 281 et seq., 294.

pillar-structure of the TEU for the future.<sup>163</sup> This structure was said, anyway, to be more a matter of presentation than of substance.<sup>164</sup> In any event, there is need for a more transparent system of differentiated forms of action - from independent national action, co-ordination and common action of the Member States, to binding Community legislation by framework directives, setting minimum requirements and regulations with direct effect excluding any national action - to be attributed to each of the specific areas of public responsibility. It would reduce the complexity of the Treaties, provide more legal certainty as to the structure of competences within the Union, make the primary law more understandable and bring it closer to the citizen.

The European citizen will no doubt urge for more democratic transparency and participation. Citizenship is to be recognized, as Jo Shaw stresses, and practised as "an integral part of the Union polity understood as a dynamic governance structure". The citizen's political participation in the Union's constitutional design and policy-making is, indeed, constitutive for "the construction of citizenship in an active sense" and "as a product of communication processes".<sup>165</sup> But there is a need, also, for enhanced concentration on specific common values and the safeguard of human rights. Obviously, the principle of equal treatment regardless of nationality, the market freedoms inherent in - and derived from - it and the existence of a common rule of law which creates the status of equality for all European citizens have always been,<sup>166</sup> and still are, the key values upon which the European constitutional system is based. Equal rights were among the basic objectives of the Treaty and, thus, are an important element of the original European social contract. Many values have been added, meanwhile. The Treaty of Amsterdam stresses the basic need to protect these values within the Union (Arts. 6 and 7 TEU (ex Art. F, as amended by the Treaty of Amsterdam)) and to defend them in international politics. Article 11(1) TEU (ex Art. J.1, as amended by the Treaty of Amsterdam) rightly stresses as the first objective of the Common Foreign and Defence Policy: "to safeguard the common values... of the Union in conformity with the principles of the United Nations Charter". The further development of common values will depend on the further development of the Union and the tasks entrusted to it by the European citizenry. Only if the will

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163. See also De Witte, *supra* note 153, at 55, stating that "it is now the turn of the other pillars [i.e. two and three] to be eroded". On the contrary, Dashwood, *supra* note 151, at 1019 and 1020, concludes from the strengthening of the CFSP by the Amsterdam Treaty that hopes for a merger of the pillars are "misguided. No longer, it is submitted, can the division between EC external competence and the CFSP be regarded as merely temporary".

164. De Witte, *supra* note 153, at 53, drawing his conclusions at 66 and 67.

165. For this conception of European citizenship: Shaw, *supra* note 72, at 564, 572.

166. For an early analysis of the implicit fundamental rights guarantees inherent in the provisions of the EEC Treaty as an expression of the common constitutional traditions of the Member States, see Pernice, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht* (1979).

is present to implement policies which make a fundamental right relevant and meaningful, is it worth considering that right's incorporation into the Treaty. Hence, a catalogue of European fundamental rights and values, though in a form specific to the character of the evolving European constitution, will emerge step by step with the development of the constitutional foundations of the Treaty as a European social contract.

Such an evolution requires reconsideration of the revision procedure of the Treaties, which is, in the light of multilevel constitutionalism, a constitution-making and -amending procedure. Maintaining the form of an international treaty, to be ratified according to the constitutional requirements of each Member State, is in no way in contradiction with the existence of a European social contract. However, the proposal of an amending treaty to be submitted to the Intergovernmental Conference should be worked out by institutions which represent the European citizens and the peoples of the Member States. Similar to the way the Tsatsos-De Vigo report on the Treaty of Amsterdam was produced,<sup>167</sup> the European Parliament should develop on proposal of - or, at least, in close consultation with - the Commission and in cooperation with the national Parliaments, a political draft. Such a draft should reflect what the peoples of the Member States wish to see in the Treaty and what they may accept, at a later stage, when the text negotiated by the IGC is submitted for ratification. Key items of the revision of the Treaty could become an issue even for the electoral campaign of the European Parliament and should be subject to a European referendum. The aim is to involve the European citizen more directly and to enhance a Europe-wide public discourse on the constitutional future of the European Union,<sup>168</sup> making clear that the future tasks and design of the European Union - including the implications of its constitution for the constitution of each Member State - are matters of concern for every European citizen. The European Council of Cologne has not opted, in its Decisions on the IGC 2000,<sup>169</sup> the institutions to coordinate their proposals in the way indicated above.

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167. European Parliament, "Resolution on the Amsterdam Treaty (CONF 4007/97 - C4-0538/97 (de Vigo and Tsatsos Report)", 19 HRJ (1998), 135, 138 et seq. For the procedural aspects, Tsatsos, "Zum Prinzip der Europäischen Verfassungsverantwortung - Am Beispiel der Vertragsrevisionsproblematik", lecture given at the Walter Hallstein-Institute for European Constitutional Law, 28 Jan. 1999, 2 *Forum Constitutionis Europae* (1999), to be published on the website *supra* note 8.

168. For the actual existence of elements for a Europe-wide public discourse already now, as a basis for a functioning democracy, see Häberle, "Gibt es eine europäische Öffentlichkeit?", in Ehrenzeller et al. (Eds.), *Der Verfassungsstaat vor neuen Herausforderungen* (1998), p. 1007, published also in (1998) *Thüringer Verwaltungsblätter*, 121.

169. Points 52-54 of the Presidency Conclusions, *supra* note 127