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The EU Leviathan and Globalisation –
Is the EU Able to Take Over the Vital Functions of the Nation-State in the Changing Environment of the Globalised World ?

THE EU SYSTEM OF LEGISLATION

AND ITS MODERNISATION

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Abstract:

This paper examines the existing provisions of the EC and the EU Treaty regarding European legislation. It adopts a broad definition of the term "legislation" covering all acts listed in Article 249 EC, conventions negotiated under Article 293 EC, acts of "constitutional" character as well as the instruments provided for CFSP and PJCC under the second and third pillar of the EU. The analysis shows that the forms and procedures for European action reflect some systematic variation in the degree to which Member States exert control on the decisions to be taken, directly or through their ministers in the Council. On the assumption that the national and European levels for the exercise of public authority are complementary elements of one composed multilevel system, these variations can be interpreted as a means to finding a balance between a "national" and a "European" logic regarding the citizens participation in European politics.

The Treaty establishing a Constitution for Europe would simplify this system in many ways. Not only all different sources of relevant primary law are now merged into one Treaty and that this Treaty finally uses a more adequate/appropriate language. But, over and above all, in its part I, Title V, it strives to establish a systematic view on all legal acts of the Union which provides for the necessary transparency of what may become the future EU system of legislation, including rules on its implementation. Even though specific rules continue to exist for foreign relations and matters relating to the area of freedom, security and justice as well as for "constitutional" matters, these new provisions are a big step forward - let alone the fact that the role of the citizens and the modes in which the citizens participate in the decision-making process will be clarified further in Part I, Title VI, as well as other provisions of the Constitution. Thus, the EU system of legislation will be organised more clearly and presented to the public in a more understandable way, as a system of voluntary supranational self-regulation, and part of a multilevel system of governance.

I. Introduction

In no respect and from no perspective whatsoever can the EU be considered a Leviathan, and consequently it is not deemed nor expected nor able, to take over the vital functions of a nation state. It rather complements the nation-state insofar as nation states are unable or insufficient to meet all the challenges and to achieve the results citizens expect public authority to achieve. People's sovereignty is divided between two levels of action, one part of it being pooled at the European level for such specific purposes which are beyond the reach of national policy-making and are to be implemented through common policies in conformity with the principle of subsidiarity. From the perspective of "multilevel constitutionalism"[1] the EU and its Member States can be conceptualised as one consistent system, composed of two complementary levels of government, each one established by, and with the sole aim to serve the interest of those who are at the source of each level's respective legitimacy: The individual citizens, with their double identity - national and European. This structure has little to do, I submit, with the idea of a Leviathan; quite to the contrary, it results in a new kind of separation of powers, more precisely, in a vertical system of checks and balances between national and European authorities stabilising the composed constitutional system to the benefit of the freedoms and interests of the citizens[2]. While globalisation exerts certain (external) pressure on the Member States, the supranational system of decision-making and, in particular, legislation may provide them altogether with enough strength to meet the new global challenges.

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[1] The concept was first developed in *I. Pernice*, Constitutional Law Implications for a State participating in a Process of Regional Integration. German Constitution and „Multilevel Constitutionalism", in: Riedel (ed.), German Report on Public Law Baden-Baden 1998, p. 40; see also *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, Common Market Law Review 1999, p. 703.

[2] See *I. Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: Bieber/Widmer (eds.), The European constitutional area, Zürich 1995, p. 225 (261 et seq.), and idem, Multilevel Constitutionalism in the European Union, European Law Review (2002), p. 511; along the same lines *A. von Bogdandy,* Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam, Baden-Baden 1999, pp. 14-16.

I am grateful for the opportunity to illustrate this by talking about "the EU system of legislation and its modernisation". In order to do so, let me first describe the existing legislative system of the EU, taking into account the extent to which it is based upon the proper functioning of the national parliamentary systems (see II. below). That way, it can be seen how the modernisation of this system – as put forward in the Constitutional Treaty - indeed underlines the composed and co-operative nature of the EU, contrary to the hierarchical approach of state-like federal systems (see III. below). The analysis will conclude by asserting how, instead of chasing behind misleading visions of a European super-state reminding someway the Leviathan, the EU and architects of its future Constitution have, with a view to meeting the challenges of globalisation, rightly chosen the more sophisticated approach of supranational self-regulation based on the principles of multilevel constitutionalism (see IV. below).

II. The EU System of Legislation

Understanding the EU system of legislation requires, as a first step, an overview on the various forms of legal instruments provided for in the Treaty (see 1. below). A closer look at the decision-making process shows the different national actors involved acting next to, or sometimes through, the EU institutions; it also demonstrates the extent to which the varying degree of their respective participation has a substantial influence on the legitimacy of EU legislation (see 2. below). The same applies to the mechanisms through which such legislation is implemented: The legislative transposition and, as a matter of principle, also the administrative implementation of European legislation is left to the national authorities, their function being an important element of checks and balances in the European legislative system (see 3. below).

1. EU Legislative Instruments

The European institutions dispose of a broad range of legal instruments for the realisation of EC and EU objectives. Most of them might be considered "legislative" in a certain sense. Speaking about the EU's "legislative system", however, supposes some reflection on what exactly is meant by "legisla-

tion", and on the acts that can be classified as part of the "legislative" system. In order to conduct a comprehensive analysis of this system comprising all relevant acts of the EU, it will first be necessary to establish a definition of "legislation" (a.). With a view to establishing what would be the "European legislative system", then some classification of the relevant instruments will be needed (b.). Special attention shall be given, finally, to the "constitutional" acts as well as to measures provided for under the second and third pillars of the EU-Treaty (c.).

a. Terminology: What is meant with 'EU Legislation'?

What is covered with the term EU "legislative" instruments? The EC-Treaty does not use the term "legislation", with the only exception of Article 207, para. 3, EC relating to cases in which the public shall be granted greater access to documents of the Council, informed about results of votes including explanations as well as statements from the minutes. However, without referring to "legislation" explicitly, other provisions do refer to instruments whose potentially legislative nature deserves consideration.

aa. The instruments of Article 249 EC

The key provision concerning legal instruments put at the disposal of the diverse institutions in the exercise of their tasks under the Treaty is Article 249, para. 1, EC. It does not relate to "legislation" as such, but it does contain a non-exhaustive list of instruments enabling the institutions to take action according to their competences: They may adopt regulations, issue directives, take decisions, make recommendations or deliver opinions. While such acts may be adopted not only for genuinely legislative purposes, but also as implementing measures (Article 202, third indent EC), no formal distinction between these two categories can be found in the EC Treaty. In substance, however, there is an essential difference between these types of action, considering, among other aspects, that implementing measures must be in conformity with, and shall not derogate from the legislative act under

which they are taken. This follows from the (implicit) logic of the underlying EC-hierarchy of norms[3].

Article 249 EC, however, mentions not only legislative acts, given that a condition for accepting that an act is a legislative act is that it has legally binding effects. Therefore, since recommendations and opinions, by definition, do not have this effect, they will not be treated as legislative acts.

bb. Primary or constitutional law

Regarding the hierarchy of norms, the "constitutional" level - or primary law – also comes to mind and requires mentioning.[4] It has precedence over and is binding for all kinds of secondary law.[5] One may argue that primary law is set and changed only by the Member States and therefore not part of EU legislation. Though this is true for formal amendments of the Treaties under Article 48 EU, some "passerelle" clauses and provisions on specific issues like citizenship, own resources or the harmonisation of the national electoral systems (in spite of the assent of national parliaments required in some cases), in fact enable the European institutions to amend primary law. These acts indeed do have a constitutional character. They can, nevertheless, be considered "legislative" in a broad sense, because they constitute the laying-down of new legal provisions of a general and binding nature.

In contrast, normal amendments of the Treaties adopted according to Article 48 EU, and accession treaties concluded by

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[3] Talking about a „general hierarchy of Community rules" which, „unlike the hierarchical relationship of norms under the constitutional systems of most Member States, is not organised on formal lines but substantively determined by the content of the rule", see *K. Lenaerts/P. Van Nuffel*, Constitutional Law of the European Union, 2nd edition, London 2005, paras. 14-002 to 14-004; concerning the hierarchy of norms specifically, see ibid., 17-051 et seq.; *R. Bieber/I. Salomé*, Hierarchy of Norms in European Law, CMLRev 1996, p. 907; *A. von Arnauld*, Normenhierarchien innerhalb des primären Gemeinschaftsrechts - Gedanken im Prozeß der Konstitutionalisierung Europas, Europarecht 2003, p. 191; *M. Nettesheim*, Normenhierarchien im EU-Recht, Europarecht 2006, p. 737 (746) and *U. Wölker*, Die Normenhierarchien im Unionsrecht in der Praxis, Europarecht 2007, p. 32.

[4] About EC primary law as „constitutional law in a functional sense" see: *A. Peters,* Elemente einer Theorie der Verfassung Europas, Berlin 2001, p. 76; see also *I. Pernice* in: Dreier (ed.), Grundgesetz Kommentar, 2nd edition, Tübingen 2006, Art. 23, para. 21; for the underlying „postnational" concept of constitution and its application to „multilevel constitutionalism" see: *I. Pernice,* Europäisches und Nationales Verfassungsrecht, 60. VVDStRL (2000), p. 148 (155 et seq., 163-176).

[5] *M. Ruffert,* in: Callies/Ruffert (eds.), EUV-EGV Kommentar, 3rd edition, München 2007, Art. 249, para. 14.

the EU and its Member States with candidate countries according to Article 49 EU, do not belong into the "legislative system". They are acts taken mainly by the Member States and cannot be attributed to the European institutions as their authors. I therefore suggest excluding these acts from even a broad definition of "EU legislation".

cc. Instruments of EU pillars two and three

Strictly speaking, real legislative powers are only given to the EC, not to the EU. Pillars two and three of the EU were instead designed to exclusively represent a platform for specific forms of Member States' intergovernmental cooperation[6].

An argument for denying the legislative character of its acting could be that there is no express recognition of legal personality for the EU, whereas Article 281 EC states this clearly as regards the EC. Yet, this lack of an express provision does not necessarily imply that no act referred to in the EU Treaty may be covered by our definition of "EU legislation". Nowadays, scholarship and practice alike contend very strongly that the EU has legal personality.[7] Its acts are adopted by the European Council or by the Council in the area of the Common Foreign and Security Policy (CFSP) according to Articles 12 to 15, or in the field of Police and Judicial Cooperation in Criminal Matters (PJCC), under Article 34 EU. They are binding upon Member States, though they may not create rights or obligations for individuals. Hence, they are not legislative acts *strictu sensu.* On the other hand, at least framework decisions taken in accordance with Article 34, para. 2, lit. b) EU in the area of PJCC, such as for instance, the Framework Decision 2002/584/JHA of the Council on the European Arrest Warrant, have effects very similar to directives taken under the EC-Treaty.[8] To incorporate these acts assigned to the EU in the

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[6] See *K. Lenarts/P Van Nuffel* (note 3), paras. 2-009 and 15-001, 2nd edition, London 2005, as well as *W. Schroeder*, Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften, in: von Bogdandy (ed.), Europäisches Verfassungsrecht, Heidelberg 2003, p. 373 (378).

[7] See, inter alia, *M. Nettesheim*, Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung, Europarecht 1996, p. 3; see also, more recently, an overview by *D. Thym*, Die völkerrechtlichen Verträge der Europäischen Union, ZaöRV 66 (2006), p. 863, on about 60 international agreements concluded by the EU with third states that give further proof of this.

[8] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ 2002 L 190, p. 1. For an appraisal, also regarding the judgement of the German Constitutional Court (case BVerfG 2 BvR

definition of "legislative acts" would mainly serve practical reasons, because - especially in view of the new regime under the Constitutional Treaty - it permits analysing acts of general binding nature of both, the EU and the EC, as elements of a differentiated, yet coherent legislative system.

dd. International agreements

Furthermore, international agreements concluded by the EC are also covered by the term "legislation". They are not only binding upon the Community institutions and the Member States (Article 300, para. 7, EC), but, as the ECJ affirms, they even become an integral part of the EC internal legal order[9]. They have precedence over other EC secondary law[10] as well as over national law[11]. As a consequence, they are a special form of European legislative acts ranking somewhere below primary, but above secondary law.

A different kind of international agreements is provided for in Articles 24 and 38 EU in the areas of CFSP and PJCC. They are negotiated by the Presidency of the Council, with the support of the Commission, and concluded by the Council, which in certain cases may even decide by qualified majority. According to Article 24, para. 6 EU, international agreements are binding for the EU institutions and, as Article 24, para. 5 EU specifies, also for the Member States - except for those countries specifying that certain internal constitutional conditions have to be respected. The ECJ has no jurisdiction over these agreements. Nevertheless, as far as they contain provisions of general application they may have effects similar to framework decisions of the Council and therefore they may be considered as legislative acts in a broad sense.

2236/04 of 18 July 2005 – *Darkanzali*) on the German implementation law, see: *I. Pernice*, Die horizontale Dimension des Europäischen Verfassungsverbundes. Europäische Justizpolitik im Lichte von Pupino und Darkanzali, in: Hans-Jörg Derra (ed.), Freiheit, Sicherheit und Recht. Festschrift für Jürgen Meyer zum 70. Geburtstag, Baden-Baden 2006, p. 282 (359).

[9] ECJ, Case 181/73 – *Haegeman*, para. 5, and Case 104/81 - *Kupferberg*, para. 13.

[10] This is one reading of ECJ, Case 21-24/72 - *International Fruit Company*, para 6.

[11] See K. *Lenaerts/P. Van Nuffel*, (note 3), para. 17-092, and ECJ, Case 104/81 - *Kupferberg*, para 14, Case 38/75 - *Nederlandse Spoorwegen*, para. 16, as well as *C. Tomuschat*, in : v.d. Groeben/Schwarze (eds.), EUV-EGV Kommentar, 6th edition, Baden-Baden 2004, Art. 300, para. 87.

ee. Conventions among the Member States

Answering the question, whether conventions negotiated between the Member States in the framework of Article 293 EC or agreements established by the Council under Article 34 § 2 lit. d) EU and recommended to the Member States for ratification should be considered as a form of 'legislation', is even more difficult. In the case of the former it is argued that Member States are acting like an agency, exercising competencies of and on behalf of the EC[12]. As these conventions are not, however, acts of the EC institutions, the European Court of Justice has no jurisdiction over them, except where expressly provided for in a specific protocol on the competence of the Court to give preliminary rulings on their interpretation.[13] It is difficult, therefore, to assimilate them to legislative acts of the EC.

Conventions concluded between the Member States in the framework of PJCC according to Article 34, para. 2, lit. d) EU, in contrast, are prepared in the Council on the initiative of a Member State or the Commission. They are subject to a limited jurisdiction of the ECJ under Article 35 EU and treated as if they were framework decisions of the Council. While, under Article 293 EC, no European institutions are involved at all, institutions, thus, are quite strongly involved in the adoption of EU-conventions. As far as they contain provisions of general application, good reasons exist, therefore, to consider them part of the European legislative system.

ff. „Legislation" and judge-made/case law

As a result, even a broad construction of the term "legislation" in the EU system would only cover measures of a legally binding and 'normative' nature, taken by – or accountable to – European institutions, though Member States and their respective parliaments may be involved, more or less directly, in the entire legislative process. What needs to be kept outside the scope of this definition, nevertheless, are the judgements of the ECJ – even if they recognise general principles of law as well as the fundamental rights of the individual in the terms of

[12] For details, see: *J. Wuermeling*, Kooperatives Gemeinschaftsrecht. Die Rechtsakte der Gesamtheit der EG-Mitgliedstaaten, Kehl 1988, pp. 67 et seq.

[13] Ibid., pp. 133 et seq., 141 et seq.

Article 6, para. 2, EU, and thus establish "unwritten" or "judicial" European primary law.[14] Yet, such judge-made law is made "case by case" and – at least in principle – only binding for the parties involved. It is subject to review in every new case, even though its effects may become stronger the more it evolves into an established jurisprudence of the ECJ recognised by the general public. Nevertheless, the term "legislation" shall be reserved to the acts of political institutions as opposed to the judiciary, the rules and principles recognised by which may always be taken over and confirmed by the legislative in terms of positive law.

b. Classifying European legislative acts

With the definition of "legislative acts" so developed, the question remains: what then constitutes the EU "legislative system"? Is a group of acts that may be understood as "legislative" sufficient to talk about a legislative "system"? To form a system, there should be a particular structure of this group of acts, or a clearly defined relationship between them, a logic of their differentiation, or some other reason allowing to ascertain that the instruments of European legislative action altogether constitute a "legislative system".

I propose to distinguish, at a first level, between legislative acts which, under the EC-Treaty, are taken by the European institutions under the "Community-method", those acts which could be said to have a "constitutional" character and such legislative acts that are, at least at first sight, intergovernmental. In each of these three groups there are some kinds of criteria for classification to be found, that may assist in, at a second level, establishing to what extent it is possible to be talking about a "European legislative system".

aa. Legislative acts taken under the „Community method"

As stated above, Community action generally takes one of the forms listed in Article 249 EC. Following their respective definitions in that Article, the first apparent criterion of classification

[14] Compare, in this regard, *G. Nicolaysen*, Historische Entwicklungslinien des Grundrechtsschutzes in der EU, in: Heselhaus/Nowak (eds.), Handbuch der Europäischen Grundrechte, München 2006, paras. 55 et seq., or *I. Pernice/F. Mayer*, in: Grabitz/Hilf (eds.), Das Recht der Europäischen Union. Kommentar, München, Nach Art. 6 EU, paras. 1-5.

is their potential to create a binding effect: Regulations, directives and decisions are legally binding, while recommendations and opinions are not. As it was developed before, recommendations and opinions will not be classified among the legislative acts.

Another relevant criterion could be the quality of the legal effect. Regulations and decisions have immediate, direct effect, while directives get full legal effect only once they are transposed into national law. They are specific instruments entailing a co-operative, two-step legislative procedure.

Jürgen Bast proposes further criteria to be used for a classification of secondary law instruments in the EC's legal order. He distinguishes them on the grounds of their formal addressee (general or specific) and their obligatory force. They may either create direct rights and obligations, like regulations or decisions addressed to Member States or individuals; or they could, if they are binding at all, only affect the EC institutions as "addressee-less" decisions.[15] One may hesitate to consider such decisions among the legislative instruments because they do not intend to create rights or obligations. The "obligatory" force, therefore, may hardly be a criterion for the classification of legislative acts. It rather excludes such acts from being "legislative" at all.

Classification of the EC legal instruments may further be established according to the principle of proportionality under Article 5, para. 3, EC that reads as follows: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". The Protocol on the Application of the Principles of Subsidiarity and Proportionality, attached to the Treaty of Amsterdam (1997), gives further explanation of what that means. Measures shall be enacted in the least prescriptive manner possible in order to leave the greatest autonomy and discretion to the Member States. The form of a directive shall therefore be given preference over that of a regulation, a framework directive shall be regarded preferable

[15] *J. Bast*, On the Grammar of EU Law: Legal Instruments, in: von Bogdandy/Weiler (eds.), European Integration - The New German Scholarship, Jean Monnet Working Paper 9/03, pp. 63 et seq. (www.jeanmonnetprogram.org), an English summary of his more extensive study along the same lines at: idem, Grundbegriffe der Handlungsformen der Europäischen Union, Heidelberg 2006, pp. 445 (447).

to a directive etc.[16] In this context, it should be kept in mind that even where the EC is attributed the competence to pass a legislative act, the choice of the appropriate instrument is always subsequently guided by this principle,[17] demanding that national autonomy is not limited more than absolutely necessary for the achievement of the act's objective. The rationale behind this criterion, hence, is the respect of national autonomy.

As a result the remaining criteria for a classification of Community legislative acts are their direct/indirect effect, their addressee and the degree to which they involve with national autonomy.

bb. Acts of „constitutional" character

The "constitutional" acts that form part of the EC legislative system not only require unanimity in the Council, but generally require the additional consent of all Member States, according to their respective constitutional provisions. Constitutional Acts of this kind are the following:

- Measures in application of the "passerelle"-clause contained in Article 42 EU, allowing to pass matters from the third pillar to Title IV of the EC Treaty, thereby subjecting them to the Community method;
- provisions extending the rights of the citizens of the Union according to Article 22, para. 2, EC;
- provisions regulating elections by direct universal suffrage and establishing a uniform procedure in all Member States or in accordance with principles common to all Member States, under Article 190, para. 4, EC;
- provisions to be taken under Article 269, para. 2, EC with regard to the system of the Community's own financial resources.

On the other hand, the Council may take decisions under Article 67, para. 2, EC with a view to subjecting areas covered by

[16] Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), paras. 6 and 7.

[17] Contrary to Article 5, para. 2, EC which applies only in non-exclusive Community competences.

Title IV of the EC-Treaty on Visa, Asylum and Immigration to the "Community method" under which an additional consent of Member States in the form of a formal ratification is not required. Such decisions are adopted simply by unanimous decision of the Council. Nevertheless, they do have a "constitutional" character, since their effect is a modification of the rules of the Treaty applicable to the EC decision-making procedures.

It is therefore suggested to classify legislative acts of "constitutional" nature according to the criterion whether or not the formal consent of the Member States is necessary in addition to the (unanimous) decision of Member State representatives in the Council.

cc. Acts in the Area of the Second and Third EU Pillars

Certain measures provided for in the second and third pillars of the EU have been considered as legislative while decisions taken according to Articles 13-15 EU, whether taken by the European Council – definition of "general guidelines" and common strategies – or, in implementing the common strategies, by the Council: Joint actions and common positions are only binding on the Member States and do not contain rules of general application. The same applies to common positions and decisions of the Council taken under Article 34, para. 2, EU. In contrast,

> framework decisions adopted under Article 34, para. 2, lit. c) EU have a structure similar to that of directives, except for the explicit exclusion of direct effect,
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> conventions prepared by the Council under Article 34, para. 2, lit. d), that are recommended to the Member States for ratification, and
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> international agreements concluded by the Council under Article 24 EU which are binding upon Member States and the institutions of the EU

have been considered as legislative acts so far, although neither of them may have direct effects for the individual. Also, there is no infringement procedure to enforce their respect like it exists for EC law under Article 226 EC, and the jurisdiction of the ECJ only extends to disputes among Member States as re-

gards the interpretation or the application of acts taken under Article 34, para. 2, EU in cases referred to the Court by one Member of the Council. The Commission can be the applicant only in disputes on the interpretation or application of a convention.

dd. Conclusion

As a result from the foregoing, a classification of acts adopted following the "Community method", those of a "constitutional" character and the legislative instruments provided for in pillars two and three of the EU Treaty can be undertaken according to :

- their direct effect – for individuals, Member States and EU institutions - and the degree to which national autonomy is reserved,
- the direct or indirect involvement of the Member States and, depending on their respective constitutions, of their parliaments in the decision-making process, and
- the full or limited jurisdiction of the ECJ, or even its exclusion, regarding the interpretation, validity and enforcement of the measure in question.

It should, nevertheless, be born in mind that the form of the legal acts and their classification alone do not suffice to describe the "legislative system" of the EU. The legal acts examined do not tell us enough about what could be the central characteristics of such a system. More could be learned from examining the actors and procedures for the adoption of the diverse measures.

2. National Actors and European Decision-Making

The question is whether it is possible to classify the above-mentioned legislative instruments according to the way and degree to which national actors, in particular governments, parliaments and, as the case may be, the peoples of the Member States are involved in their enactment. It is clear that all European acts draw their legitimacy from the citizens, either directly through the elections for the European Parliament, or – if not directly by national ratification – at least indirectly via the national parliaments which exercise parliamentary control

over the national ministers in the Council.[18] Would a classification of legislative acts therefore be more meaningful if it is done according to the "national involvement" (a.)? And if so, what is the relevance of that criterion for assessing the legitimacy of the acts in question (b.)?

a. The criterion of "national involvement"

Following the criterion of "national involvement", the legislative acts mentioned above may be classified not only with regard to their form, but rather in view of the procedure followed for their adoption. As far as unanimity is required for the Council's decision, Member States and the national parliaments controlling their ministers express the will of the respective citizens. For acts adopted by qualified majority, however, democratic control of the ministers at the national level is more limited, in particular, as long as meetings of the Council are private.[19] However, the right of co-decision of the European Parliament in the procedure of Article 251 EC not only allows for transparency and a public debate, but also compensates for the reduced "national" legitimacy by an enhanced "European" legitimacy that is based on the direct election of the European Parliament.

Hence, depending on the degree to which direct or indirect "national" legitimacy is involved or substituted by direct or indirect "European" legitimacy, the legal acts in the EU could be classified as follows, starting with those having greatest direct "national legitimacy":

- Decisions of the Council implementing European policies in the area of CFSP;
- Framework decisions and conventions in the area of the third pillar adopted on the initiative of a Member State or the Commission under Article 34, para. 2, lit. c) and d), EU;
- Provisions of "constitutional" character taken by the Council on the initiative of a Member State or the Commission, subject – or not – to national ratification;

[18] See, for example, *A. Peters* (note 4), pp. 556 et seq.

[19] See, however, the new provisions on publicity of the Council meetings in the Council Conclusions of December 21, 2005, on Improving openness and transparency in the Council, see http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/87778.pdf.

- Directives and regulations adopted - according to their respective legal basis - by a unanimous decision of the Council, on the proposal of the Commission;
- Directives and regulations adopted by the Council deciding with qualified majority under the co-decision procedure of Article 251 EC;
- Implementing directives and regulations adopted by the Commission as authorised according to Articles 202, 211 EC under the conditions set out by the "Comitology-Decision" of the Council (Decision 1999/468);
- Directives and Decisions taken by the Commission on its own initiative, namely regarding public undertakings and national monopolies, according to Article 86, para. 3, EC;
- Decisions taken by the Commission in exercising its specific responsibilities for the implementation and application of the EC Treaty, namely in the area of competition and state aid law.

At first, the insights to be gained from this classification seem to be limited. The influence attributed to national governments as part of the European legislative differs from act to act. The classification becomes more meaningful, however, with a view to the responsibilities of the national parliaments in effectively supervising and guiding their respective governments. With this control-function they are given opportunities to pro-actively using the European machinery for implementing policies that at national level could not be realised.[20]

b. Relevance of the legitimacy question

It appears obvious that the different methods and the intensity by which national parliaments take part in the European decision-making process have some implication on the degree of democratic legitimacy of the act in question. Legitimacy of European legislation has a double basis: On the one hand, the directly elected European Parliament and on the other hand, the national parliaments exercising control upon their respec-

[20] For a comprehensive overview concerning the diverse functions of participation, control and influence exercised by national parliaments in general, see *A. Maurer*, Parlamentarische Demokratie in der Europäischen Union, Baden-Baden 2002, pp. 212 et seq. (214).

tive governments. With regard to the differentiated national involvement in European legislation two observations seem to be important for the understanding of this system:

- First, no European legislative act can establish its validity in any other way but by deriving it from the will of the citizens of the Union, either way, directly through the European Parliament or indirectly through the national parliaments. Thus, the system is entirely self-referential in the sense that those who are subject to its legislative acts are also the subjects of their legitimacy.
- Second, the different legislative procedures only reflect the path through which citizens exercise their power, they reflect a differentiated balance between direct (European) and indirect (national) legitimation; it varies depending on the type of act and the procedural setting for the adoption of each type of action.

The second aspect deserves further consideration with regard to the system of European decision-making in its entirety: As variations in decision-making procedures concern the mix of national and European logic or aggregation in which the will of the citizens is formed, the main question is to what extent the will formed by the citizens as national citizens is pre-empting the *volonté générale* formed by them altogether as citizens of the Union.

Looking at the extreme ends of the respective spectrum, we can see, on the one side, the constitutional acts adopted by the Council by unanimity and subject to ratification by the Member States. National parliaments express the aggregated will of the people of each Member State separately, they representing the citizens in their capacity as national citizens. On the other side, there are decisions and directives adopted by the European Commission under Article 86, para. 3 EC, for instance on the liberalisation of the telecommunications markets. Apart from the legal basis of such measures their legitimacy basically rests on the fact, that the President and the other Members of the Commissioners are chosen or appointed by the Council (Article 214, para. 2, EC). This is the "national"

pillar of their legitimacy.[21] In addition, some "European" legitimacy is derived from the European elections as the European Parliament has certain powers in approving the Commission's appointment (Article 214, para. 2, EC) and in exercising a growing political control over the accomplishment of its tasks (Articles 197, para. 3, 200 and 201 EC).

The classification of acts under the criterion of "national involvement", thus, does not necessarily correspond to more or less democratic legitimacy. Instead, as the relative influence of one citizen in democratic systems varies depending on the size of the community – or the number of citizens participating in the scrutiny, decisions taken at a level closer to the citizen offer more opportunities for individuals to take part in the debate and to influence the outcome.[22] This is why the principle of subsidiarity plays such an important role in a multilevel system of governance and why, in particular, implementation measures are, as a principle, a matter for the public authorities at the level that is the closest to the citizens.

3. Giving Effect to European Legislation

Considering the way in which the application of EU legislation is carried out, therefore, even if it does not provide other criteria for the classification of legislative acts, may add to the understanding of what the European legislative system is about. National involvement regarding implementation responds to the requirements of subsidiarity, but it also establishes a division of powers; it offers opportunities for checks and balances and is, therefore, an important element of that legislative system. Two principles seem to be fundamental for the specific positive role in which national authorities fit into this system:

- One is that the implementation of European legislation is conducted mainly by the national authorities,
- The other is the absence of any hierarchy between the European and national level.

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[21] On legitimation through appointment by national governments, check also *M. Ruffert*, in: Calliess/Ruffert (eds.), EUV EGV. Kommentar, 3rd edition, Baden-Baden 2007, Art. 214, para. 1.

[22] An extensive discussion of the subsidiarity principle and its reasoning can be found in: *C. Calliess*, Solidaritäts- und Subsidiaritätsprinzip in der EU, Baden-Baden 1996, pp. 26 et seq.

The former principle binds the European and national levels of governance together in the sense of a functional division of work and powers allowing reciprocal control. It is an expression of the principle of subsidiarity and gives the authorities of the Member States a specific European role (see a. below).

The latter principle reflects the fact that, at the European level, there are no capacities for a physical enforcement of European law against the will of the Member States or individuals. The system is, thus, entirely co-operative and not hierarchical (see b. below).

Checks and balances between the actors at both levels ensure that the common basic principles are effectively respected for the benefit of the citizens (see c. below).

a. European role of national authorities

Except for special areas like competition or, in part, agricultural policy, indeed, the administrative execution of Community law is not a task of the European Commission. The involvement of national authorities in the implementation of European law gives them a special European responsibility. The implementation of European measures at the national level may require either the adoption of a legislative acts at or simply of administrative action. Directives and framework decisions have to be transposed by national legislative bodies, to which discretion is left regarding the form and means of achieving the result laid down in the directive (Article 249, para. 3, EC, Article 34, para. 2, lit. b, EU). Provisions of the EC Treaty, as well as regulations and decisions of the Council, or implementing measures enacted by the Commission, may finally need legislative measures at national level or implementation and surveillance by administrative bodies.

Regarding national administrative action, the basic principles have been established by the jurisprudence of the ECJ, starting with the *Milchkontor*-Case, as early as in 1982. Member States are bound, under Article 10 EC, to ensure the implementation of Community law. To this end, certain requirements need to be fulfilled: In the absence of European rules on the administrative procedure national authorities shall apply their national law with due regard, however, to the princi-

ples of non-discrimination and *effet utile.*[23] Community law shall, thus, be given full practical effect and the application shall be as strict, complete and loyal as any comparable rule of national law.[24] In case of conflict with a provision of national law, it is the established jurisprudence of the ECJ since the 1964 judgement in *Costa/ENEL* that Community law shall be given precedence, while the validity of the national provision may not be questioned by the ECJ.[25] This national involvement and "European" loyalty in the implementation of European legislation is one pre-condition for the functioning of the European Union being a multilevel system of governance.

Thus, national parliaments, when transposing directives and framework decisions, act as European agents, agents of the European Union and, when implementing European legislative, national administrative authorities are in the same role[26]. Their loyal cooperation required by Article 10 EC, is essential for the functioning of the system.[27]

b. Co-operative nature of the European legislative system

The specific character of the European legislative system is consequently illustrated by the requirements of cooperation and loyalty of the national authorities involved being legal obligations only, without any hierarchy or European instruments for physical enforcement of such obligations[28]. The monopoly of physical force which, following *Max Weber*, essentially defines the state, remains in the hands of the Member States. No European authority, but only the law itself, can enforce proper implementation of European law against national authorities. While according to Article 228, para. 2, EC, a Member State which is in infringement of Community law may be imposed, on request of the Commission, a lump sum or a penalty by the

[23] ECJ, Case 205-215/82 - *Deutsche Milchkontor*, paras. 17-19.

[24] Ibid., paras. 22 and 23.

[25] ECJ, Case 6/64 - *Costa/ENEL*, paras. 8-13.

[26] See already *I. Pernice*, (note 4), pp. 176 et seq.

[27] See, for example, *W. Kahl*, in: Calliess/Ruffert (eds.), EUV EGV. Kommentar, 3rd edition, München 2007, Art. 10, para. 8.

[28] For more details on the consequences regarding the relationship between the European Courts and the Supreme Courts of the Member States see: *I. Pernice*, Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund, Berlin 2006, pp. 53 et seq.

European Court of Justice, there are no means at the disposal of the Community institutions to enforce this payment[29]. The EU neither has an army nor does it have police forces. Even when the European Commission imposes fines or penalties on a private company for having violated competition rules, the enforcement of these fines is left to the national authorities (Article 256, para. 2, EC)[30].

The European Union indeed is a "Community of Law" (*Walter Hallstein*)[31] only; its authority is based entirely on the voluntary respect of the law - as opposed to (physical) enforcement. This principle is illustrated best by the relationship between the ECJ and the national courts: The ECJ has no power to judge upon the validity of national law, nor may a national Court declare null and void a provision of Community law. While national Courts are legally bound to follow the judgements of the ECJ, the latter has no means to set aside any judgement of a national court. The ECJ is not considered a higher instance to them, but a co-operative partner, giving advice on the interpretation of Community law and, in case of doubts, on the validity of a provision thereof – all this in the framework of the judicial dialogue provided for under Articles 234 EC and 35 EU.

The absence of hierarchy or enforcement capacities in fact appears to be a common trait of the European Union's legal system[32]. This specific relationship between the two levels of government clearly differs from the one we know in federal states (e.g. Articles 31 and 37 of the German Grundgesetz): In the German federal system, federal law "breaks" state law, and, in the case of failure to comply or disobedience, the federation may even use force against component states[33]. To see the

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[29] Some scholars argue that judgements of the ECJ, including those against a Member State under Article 228, para. 2, EC, may be enforced by the national authorities, considering that the ECJ is not mentioned in Art. 256, para. 1, EC; see *B. Wegener*, in: Calliess/Ruffert (eds.), EUV EGV. Kommentar, 3rd edition, München 2007, Art. 244 para. 1.

[30] For more details on the procedure of enforcement by national authorities, see *G. Schmidt*, in: v.d. Groeben/Schwarze (eds.), Vertrag über die Gründung der Europäischen Gemeinschaften. Kommentar, 6th edition, Baden-Baden 2004, Art. 256, para. 12.

[31] See *W. Hallstein*, Discourse on "Die EWG-Eine Rechtsgemeinschaft", held in Padua in 1962, in: Oppermann (ed), Walter Hallstein, Europäische Reden, München 1979, pp. 109 and 343. Stressing the same aspect, see also ECJ, Case 294/83 - *Les Verts*, para. 23.

[32] See, in particular: *I. Pernice*, (note 28), p. 24.

[33] *H. Dreier*, in: idem (ed.), Grundgesetz. Kommentar, Tübingen 2006, Art. 31 para. 18, and *H. Bauer*, in: ibid, Art. 37 paras. 4 et seq.

difference between the EU federal system and a federal state is essential for understanding the European legislative system. This system is based on co-operative action and self-regulation of the citizens and states, instead of being subjected to a higher authority ordering a specific behaviour. This specific nature of the EU legislative system as a composed, a multilevel system founded on voluntary cooperation, is all the more confirmed by the various modes explained above, of how national actors representing the "national" citizen have a stake in the making of European law.

c. Checks and balances: Safeguard for the common principles

The division of work and separation of powers between the European legislative and national implementation not only corresponds to the principle of subsidiarity, but it also excludes such centralisation and concentration of power at the European level as may be a threat to national autonomy and individual freedoms. The mere absence of hierarchy between supranational and national authority, in addition, gives the national authorities a specific responsibility which, so far, has not been articulated in sufficiently clear terms: They play the role of a "watchdog" regarding the compliance of European legislation with the general principles of law, common values and fundamental rights referred to in Article 6, paras. 1 and 2, EU. They are, themselves, bound to these principles in implementing European legislation, and, in complying with this obligation, they are bound to verify for each single case whether or not the act to be implemented is in compliance with the common principles. Administrative and parliamentary bodies can refer questions of doubt to their governments or to the European Commission, like national courts have to refer preliminary questions under Article 234 EC to the ECJ.

As the European institutions have no device of direct enforcement against national authorities, they will, in order to avoid risks for the proper functioning of the Union's legal order, feel compelled to consider any of such question or argument seriously and in the spirit of cooperation.

4. Conclusion

The existing legislative system of the EU cannot be understood by analysing the institutional and procedural provisions of the EU and the EC Treaties only. Only when the involvement of the national authorities and their specific European role is taken into account the picture becomes complete. The very complex structures and forms of co-operation and involvement reflect the varying balance, depending upon the subject matter concerned, between what can be called the European and the national logic under which participation of the citizens (as European or national citizens) in the decision-making is organised.

III. EU Legislation and the Constitutional Treaty

The Treaty establishing a Constitution for Europe (CT) does not change these basic features of the multilevel character of the European construction nor, in principle, of the European legislative system. Neither did it intend to do so. But there are a number of considerable improvements regarding simplification, effectiveness and democratic legitimacy of the EU and its legislative system. Each of these factors will now be considered in turn, dealing with them separately though they are strongly interdependent and interrelated.

1. Simplification

With regard to the perception of the Constitutional Treaty by the general public, what seems to be most important is the progress in simplifying the structure and in clarifying the language of the Treaties. Leaving aside the European Atomic Community, all different sources of relevant primary law are now merged into one single Treaty. The three-pillar structure has been abandoned. This has important effects also for the legislative system. In particular, the system of "legal acts of the Union" established in Part I Title V on the "exercise of the Union competence" comprises systematically all acts previously spread over the three pillars. The institutions are supposed not to adopt any other acts but those provided for in each relevant area (Article I-33, para. 2, CT). As will be explained further below, clear and correct language, a systematic approach in defining the forms of legal acts and the distinction

between legislative and implementing acts are important steps in order to facilitate the comprehension of the new Constitution for Europe.

a. Correct language

Primary law is now referred to as the Constitution. The new Treaty, thus, finally uses the correct word for what in substance would have been the proper expression from the early years of the EEC on, and what was even recognised by the jurisprudence both of the ECJ[34] and the German Constitutional Court:[35] Regulations are now called "laws", directives "framework laws", and Article I-33 CT provides these terms with definitions and a substantive content. Most important in the present context, however, is the following: The Constitution draws a systematic distinction between legislative and non-legislative implementation acts by referring to either the European Laws/European Framework Laws (Article I-34 CT) or to European Regulations/European Decisions (Article I-35 CT). As we recall, this has not been the case so far (see above, II.1.a).

b. A new system of legislative acts

But the Constitutional Treaty went even beyond a pure simplification of terminology and words. It managed to streamline the use of all those legal instruments with regard to their procedure, decision-making actors and effects. Whereas their aggregation and classification as parts of a common "legislative system" has proven to be difficult in the past (see above, II), they can now be considered as elements of one truly systematic scheme thus constituting a coherent "legislative system".

One of the key aspects of using rational terminology lies in the fact that the new language of the Constitutional Treaty allows the future EU system of legislation to be understood more easily by the general public. European laws and framework laws can be understood as the solemn acts of the legislative by every citizen, while in issuing European regulations and decisions the Council or the Commission can be expected to adopt

[34] ECJ, Opinion 1/76 - *Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels*, Case 294/83 – *Les Verts*, and Opinion 1/91 – *European Economic Area I*.

[35] BVerfGE 22, 293 (296).

implementing measures either of legislative acts or of "certain provisions of the Constitution" (Article I-33, para. 1, subparas. 4 and 5 CT). In defining the conditions under which a European law or framework law may enable the Commission to adopt "delegated European regulations", to supplement or even to amend certain elements thereof, Article I-36, para. 1, CT draws a clear distinction between "real" legislation and subordinated quasi-legislative acts: "The essential elements of an area shall be reserved for the European law or framework law", delegated regulations are for "non-essential" elements only.

Another element for streamlining the EU "legislative system" is introduced by Article I-34 CT. This article states the co-decision procedure to be the "ordinary legislative procedure". There are three essentials to it: European laws and framework laws require a proposal from the Commission, they are adopted "jointly by the European Parliament and the Council" and the procedure is that of Article III-396 CT. Thereby, it is made clear that, in principle, no act can be passed as long as there is no common agreement between both these institutions, Council and Parliament.

The importance of these definitions of 'laws', 'framework laws', 'regulations' and 'decisions' is further increased by their consistent application throughout the Constitution. As a consequence, there will be no more framework decisions; instead, all measures regarding the area of freedom, security and justice will be adopted following the same method as all other legal acts – the previously so-called 'Community Method'.

Admittedly, there do remain a few singular exceptions to this ordinary legislative procedure. In the field of PJCC, for example, Articles I-42 and III-264 CT allow for an initiative of "a quarter of the Member States" instead of the Commission's initiative for a legislative act, and with regard to the CFSP Article I-40, para. 6 CT expressly excludes European laws and framework laws. In certain special areas like monetary policy or institutional matters, the Constitution still does provide for special legislative procedures by giving the ECB (Articles III-187, 190, para. 3, and 191 CT) or the European Parliament (Article III-330, para. 1, CT) a say in the procedure, or even

the right to adopt European regulations (Article III-190, para. 1, for the ECB) or a European law (Article III-330, para. 2, CT for the European Parliament regarding the duties of its Members). Nonetheless, the new provisions on legislation in the Constitution simplify and clarify the EU legislative system considerably.

c. Implementing measures

Further clarification of the 'legislative system' is also achieved with regard to implementing measures: Only the form of regulations and decisions may be used, with the term regulation including acts binding the Member States to which they are addressed as to the result to be achieved and, as Article I-33, para. 1, subpara. 4, CT specifies, "leaving to the national authorities the choice of form and methods" (like formerly the directive).

In addition to the general loyalty duties of the Member States set out in Article I-5, para. 2, CT, a specific provision of the Constitution now emphasises that "Member States shall adopt all measures of national law necessary to implement legally binding Union acts" (Article I-37, para. 1, CT). This highly important principle corresponds to the principle of subsidiarity and is also stressed in Article III-285 CT stating that "effective implementation of Union law by the Member States … is essential for the proper functioning of the Union". The provision highlights national implementation of EU legislative acts as a "matter of common interest". The Union must provide Member States with support and cooperation for the sake of its legislative system's effectiveness. The provision maintains, finally, that such support "shall be without prejudice to the obligation (!) of the Member States to implement Union law". These terms clearly take over the above-mentioned ECJ-jurisprudence.[36]

As far as uniform conditions for the implementation of legally binding Union acts are needed, Article I-37, para. 2, CT establishes that the basic legislative act shall confer implementing powers on the Commission and, exceptionally, upon the Coun-

[36] See note 23, above.

cil, while, according to para. 3, a European law should lay down the general principles concerning the mechanism for the Member States' control over the Commission's exercise of the implementing powers. This reminds of the previous Comitology system as established in Decision 1999/468, but its application would be more limited.

Concluding the analysis of how EU legislative acts are given effect, the underlying principle of the Member States' responsibility is stressed in the Constitutional Treaty in the same way as it has been established by the ECJ case-law in the existing legislative system.

2. Efficiency

In simplifying the EU legislative system, its language, procedures and related mechanisms, the Constitutional Treaty also makes the system more efficient. The most important measures taken to that effect are the following:

a. The Treaty provides for only one ordinary legislative procedure applicable to most of the legislative acts; where specific legislative procedures still exist, they can be modified at a later date by using the passerelle of Article IV-444, para. 2, CT that allows to subject these competencies to the ordinary procedure.

b. Majority voting at the Council has been extended to become the general rule (Article I-23, para. 3, CT). Where unanimity is still required, the passerelle of Article IV-444, para. 1, CT allows to introduce majority voting at a later stage.

c. New provisions regarding the principles of subsidiarity and proportionality and, in particular, the "early warning system" referred to in Article I-11, para. 3, CT allow for a more efficient control by the national parliaments on the respect of these principles.

This mechanism leads directly to the third aspect of what altogether marks the overall modernisation of the European legislative system by the Constitutional Treaty:

3. Democratic legitimacy and control

There are several improvements that specifically concern democratic legitimacy and control, thus underlining the interaction of the European and national levels of governance: The first follows from opening the meetings of the Council to the public. The second concerns the now explicit role of national parliaments in the EU legislative process. And the third consists in the emphasis given to the role of the Union citizens and their rights of active participation in the political process at the EU-level.

a. Public Council meetings

Though provisions already facilitate publicity of Council sessions in certain cases,[37] Articles I-24, para. 6, and 50, para. 2, CT now expressly lay down as a general rule that the Council shall meet in public "when considering and voting on a draft legislative act". Media, but in particular the national parliaments and parties of the political opposition will then be given the opportunity to see - and thereby control – directly the behaviour of the ministers as legislators. Such genuine "transparency" seems to be the very condition for the exercise of the national parliaments' "European responsibility" as a source of democratic legitimacy for European legislation through the parliamentary control of their respective governments.

b. The role of national parliaments

The Early Warning System referred to in Article I-11, para. 3, CT and in a special Protocol on the Application of the Principles of Subsidiarity and Proportionality, not only provides national parliaments with an explicit – though rather negative – role in the decision-making process of the EU legislative system. What is more important is that the national parliaments will officially be informed on all legislative activities of the Union. The new right they are given to interfere in cases of presumed excess of competence or violation of the principles mentioned attaches more relevance to their consideration of such information, on the national as the European level. The reference

[37] See note 19, above.

to the national parliaments under the heading of Part I, Title VI: "The democratic life of the Union", implies that they indeed play a role as an element of the European democratic process. Article 46, para. 2, CT stresses that within the national legal systems, they are the bodies to which the national governments represented by the Member States' delegates in the European Council or the Council, are "democratically accountable".

c. Citizens' participation in the EU legislative system

In accordance with a reference to the citizens will in the preamble Article I-1, para. 1, CT, of the Constitutional Treaty articulates the intention of the Convention to draft a Constitution on behalf and in the interest of the Union's citizens. As a consequence, the citizens are, for the first time in the EU primary law, mentioned as the Union's ultimate subject and source of legitimacy. Consequently, the new Articles on the European Parliament state that the parliament shall be composed of "representatives of the citizens of the Union" instead of simply referring, as the EC-Treaty still does, to the 'peoples' of the Member States. These new formula do not change the existing law in substance. But they do, nevertheless, strengthen the concept of European citizenship, contribute to raising people's awareness for the Union and its policies, and lay down the basis for them to take ownership of the Union.

The emphasis on the citizens being the origin of the Union's legitimacy is underlined by Article I-47, para. 4, CT, on the citizens' initiative. While admittedly it may be true that citizens could already take such initiatives under the existing law, if one considers the monopoly of the Commission to propose legislation, then this provision does represent a step forward for the citizens. It confers onto the Union citizens the same explicit rights towards the Commission, as the Council and the European Parliament already have today (Articles 192, subpara. 2, 208 EC). Such modest changes may have an important impact in terms of democratic awareness and on the citizens' perception of "their" Union.

IV. A System of Supranational Self-Regulation

The European Union can be considered as a system composed of two or more levels of government, established by and for the citizens of the Member States considering and defining themselves, insofar, as European citizens. In the light of multi-level constitutionalism, national constitutions and the European primary law which, in the light of a "postnational" concept of "constitution" can already be considered as constitution today, together form one material legal entity: Its national and European components are complementary, closely intervowen and interdependent, and so are the actors of the EU legislative system.[38] Thus, the functioning of this system is based upon and depends decisively on the proper functioning of the Member States' political systems, both as regards legitimacy and effectiveness in full respect of the rule of law. It requires democratic parliamentary procedures and control in the Member States, and strong European loyalty and solidarity of the national authorities, governmental, legislative and administrative. This is why Article 6, para. 1, and Article 7 EU and in future, more explicitly, Article I-2 CT - read together with Articles I-58 and I-59 CT - make clear that the common principles and values are conditional for membership to and the functioning of the European Union. This is the reason also why, in turn, national authorities when implementing European legislation not only have to respect these principles and values but also take and active part and responsibility to ensuring that European acts are in compliance with them, in the common European interest of the citizens. While European legislation pre-empt national provisions in cases of conflict because, ideally, it is representing the common will of the European citizens, and equal application throughout the Union is constitutive for a rule to be considered law at the European level – Article I-6 CT rightly confirms this very fundamental principle – European and national authorities have a shared and common responsibility for the surveillance of its constitutionality. This corresponds to the voluntary, non-hierarchical and co-operative character of the European multilevel structure in which supranational legislation – except for the number of

[38] See more in detail: *I. Pernice*, (note 1), p.724.

people represented and concerned – is not less "self-ruling" of the citizens than national legislation in each Member State.

The new provisions of the Treaty establishing a Constitution for Europe would not only simplify this composed legislative system of the Union, but also make it more transparent, more effective, more democratic and more stable. The new Treaty would, indeed, strengthen the Union as a system of voluntary supranational self-regulation of its citizens.