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EUROPEAN CONSTITUTION AND NATIONAL CONSTITUTIONS

edited by

Zbigniew Maciąg

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Preface

The history of the question of alliance, integration, and unification of European states along different lines reaches far back. We only have to mention I. Kant and J. C. Bluntschli, who saw the future of Europe in establishing a union of its states based on the rule of law. It was on the grounds of freedom and republican democracy that J. Lorimer of Edinburgh envisaged the possibility of uniting European states. Much like him, Polish thinkers too, including A. Mickiewicz, B. Limanowski, and K. Kelles-Krauz, believed that Europe would unite as soon as its constituent states were driven by shared ideals of freedom and republican democracy.[1]

This idea, together with the principles of special protection of life, freedom and property and of principles of equality and the rule of law, became the foundations of history's first draft Constitution for Europe, developed as early as 1831 by a Pole participating in the January Uprising, W. B. Jastrzębowski.[2]

The principles of the inalienable and inviolable character of human rights, freedom, equality, democracy, and the rule of law were acknowledged by the law of the communities and expressed in the Treaty establishing a Consti-

[1] For more information, see: Z. A. Maciąg, *Probleme der Anpassung der polnischen Verfassungsordnung an europäische Standards*, [in:] *Europäische Integration und nationale Rechtskulturen*, Hrsg. Ch. Tomuschat, H. I<ötz. B. v. Maydell, Köln-Berlin-Bonn-München 1995, pp. 181,182, and literature quoted there.

[2] W. B. Jastrzębowski, *Traktat o wiecznym przymierzu między narodami ucywilizowanymi. Projekt Konstytucji dla Europy jako ustawy mającej zapobiec wojnom. Warszawa 30IV1831*, [in:] W. B. Jastrzębowski, *Traktat o wiecznym przymierzu między narodami ucywilizowanymi. Konstytucja dla Europy*, opracowanie i zarys dziejów myśli pacyfistycznej F. Ramotowska. PWN, Warszawa-Łódź 1985, pp. 183-196.

tution for Europe of 2004. Yet the rejection of that Constitutional Treaty in France and the Netherlands resulted in withdrawal from further-reaching legal regulations and even rejection of the name "Constitution" itself. Following the work conducted in the years 2006-2007, the European Council determined the final text of the treaty, which only changed the Treaty on European Union and the Treaty establishing the European Community at a session held in Lisbon on 18th and 19th October, which was signed also in Lisbon, on 13th December 2007. This treaty, much like the Constitutional Treaty of 2004, defined the idea of human rights, freedom, democracy, equality, and the rule of law as its grounds. Thus the date for polishing up the text of the reforming treaty in Lisbon preceded - by just two days - the session of the *International Conference on European Constitution and National Constitutions,* which was held from 21 to 24 October 2007 in Krakow. It is therefore fully understandable that the speakers and participants in the discussion could not refer to norms and standards that were not yet known when the Krakow Conference opened. This is why the individual addresses presented during the Conference as well as the texts sent in at later dates refer only to the Treaty establishing a Constitution for Europe as well as to a variety of questions pertaining to the constitutionalisation of the European Union, its individual institutions, and legal solutions; most of them also in relation and reference to national constitutions. This is also why the notion of "European constitution" is understood not only formally as a uniform and coherent text but also - much like in the United Kingdom - in a material way as encompassing numerous acts regulating basic matters of the political system, and the court judgements in the matter. The latter, material understanding of the constitution is more proper for the legal order existing currently in the European Union, and shall continue to remain in force after the potential ratification of the Treaty of Lisbon.

Thus the organisers of the Conference, and especially its Programme Council, aimed to develop an opportunity for a broader exchange of ideas in the international dimension concerning the constitutionalisation of the European Union and appropriate changes in the constitutional systems of its Member States. For this reason, this general subject area was divided into three interconnected problem groups. The first of them, entitled *Treaties - Constitutions,* covered questions related to the reform of union treaties, legitimisation, and model solutions for the European Constitution, its ratification, overcoming the "democracy deficit", and increase in the importance of the European Parliament, as well as joint policy-making. In this problem team, emphasis was laid mostly on the treaty regulations and resultant consequences for the Member States.

The second problem team, working under the name *Citizen and Human Rights and Liberties,* covered the questions of guarantee and protection of hu-

man rights through the decisions of the European Court of Human Rights, the Charter of Fundamental Rights of the European Union, and especially the questions of freedom, flow of capital, social rights, and citizenship in the EU.

The third and last problem team, known as *European Union and State Political Systems,* placed its emphasis on questions resulting from the decisions contained in national constitutions towards the European Union, and the EU's impact on the legal and systemic changes in the Member States.

Conference materials were complemented not only by the additional texts that greatly expanded and enriched the content, but also by the eminent contribution of the Honorary Patrons of the Conference: Professor Jean-Paul Costa, President of the European Court of Human Rights, and Professor Hans--Gert Pottering, President of the European Parliament. Another extremely interesting position was presented by Professor Danuta Hiibner, European Commissioner for Regional Policy. The question of reform and démocratisation of the House of Lords in the United Kingdom was the subject of the interview with Professor Philip Norton, Lord Norton of Louth, the Chairman of the House of Lords Constitution Committee. For this reason, I would like to take the opportunity to express great gratitude, and thank in a special way these distinguished personalities of the world of European politics and science for their precious material contribution to the discussion covered by the subject range of this book.

It must be emphasised that the Conference was organised by the Jagiellonian University (Poland), the University of Hull (United Kingdom), and Andrzej Frycz Modrzewski Krakow University College (Poland, now Andrzej Frycz Modrzewski Krakow University). The sessions took place at the Campus of Andrzej Frycz Modrzewski Krakow University College and at the Jagiellonian University Conference Centre in Przegorzafy. The efficient running of the conference was significantly helped by the contributions of members of the Organising Committee: Professor Jo Carby-Hall from the University of Hull as well as Honorary Consul of the Republic of Poland in Beverley, Professor Bogdan Szlachta of the Jagiellonian University, Diane Ryland of the University of Lincoln, Professor Zdzisław Mach of the Jagiellonian University, the administrative staff of the University of Hull represented by Alexander Ward, and Andrzej Frycz Modrzewski Krakow University College represented by Agata Krawiec, Jerzy Marcinkowski and Katarzyna Banasik.

The organisation of the Conference was significantly supported by the funds of the Consulate of the Republic of Poland in Beverley (United Kingdom), and the Konrad Adenauer Foundation. I hereby thank them very warmly for their support.

I extend my thanks to Radio Krakow, TVP3, *Rzeczpospolita* national daily, *Przegląd Sejmowy* and *Przegląd* for media patronage of the conference.

Separate words of thanks go to the Jagiellonian University for its financial support in publishing this book.

Let me express my gratitude also to all of those who, through their work, supported the success of the Conference and publication of this book.

As honorary titles of the professors of Andrzej Frycz Modrzewski Krakow University College were awarded for the first time in the university's history during the Conference to three of its participants, namely Professor Jo Carby-Hall of the University of Hull and Honorary Consul of the Republic of Poland in Hull, Professor Rolf Grawert of Bochum University, and Professor Harald Kundoch of Gelsenkirchen University of Applied Sciences, the Appendix of the book contains brief information about the contribution of these distinguished scholars to the development of science and university education.

Zbigniew Maciąg

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INTRODUCTION

HONORARY PATRON OF THE CONFERENCE, PROFESSOR JEAN-PAUL COSTA, PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

Record of an extraordinary meeting with
the President of the European Court of Human Rights
Jean-Paul Costa at Andrzej Frycz Modrzewski
Krakow University College (AFM-KUC)[1]

- Dean of the Faculty of International Relations, Professor Bogusława Bednarczyk, PhD

Ladies and Gentlemen, distinguished Guests! Dear Students!

On behalf of the Rector and the academic community of Andrzej Frycz Modrzewski Krakow College I have the privilege to welcome Jean-Paul Costa, the President of the European Court of Human Rights.

The European Court of Human Rights was founded in 1959. It guarantees individuals all over Europe the right to seek legal protection of freedoms that their governments have signed up to uphold. In a week's time we will celebrate the 10th anniversary of the entering into force of Protocol No. 11 to the European Constitution Human Rights and Fundamental Freedoms. This Protocol amended the Courts, structure and procedures by establishing a full-time court and opening direct access to the Court for the people of all Member States of the Council of Europe. In order to help the Court to deal more quickly and efficiently with its ever growing list of pending cases the Protocol No. 14 was opened for signature in May 2004. However, this protocol is still awaiting ratification. Today we have a rare and unusual opportunity to ask questions and listen to the opinions of the President of the European Court of Human Rights. The floor is open for your questions.

- Student 1 (AFM-KUC)

Human dignity is commonly defined as the source of human rights. Why is it so difficult to find a comprehensive definition of human dignity in judgements of the Court?

- Professor Jean-Paul Costa

Before answering the question, let me thank you for being invited to Poland, Krakow, and to this university. I have been to Poland several times, but this is my first visit to this beautiful city and - of course - my first visit to this university.

[1] The meeting took place on 25 October 2008.

Your question is a very relevant one, but the answer is rather simple. We in the European Court of Human Rights are dedicated to ensuring respect by the Contracting States of the rights and guarantees which are defined and contained in the European Convention on Human Rights, an instrument which was signed in 1950, just after the second world war. Even if the concept of human dignity, of course, underlies many articles of the Convention, it is not as such protected by a specific article. If you take for instance Article 3 of the Convention, which prohibits torture and inhuman and degrading treatment and punishment, it is clear that it is very close to the concept of human dignity, but human dignity is not as such, I repeat, protected by a specific article of the Convention. This is the reason why in our judgments and decisions, although we do not ignore the concept of human dignity, we try to keep more to the text of the articles of the Convention. I must add that of course we adopt an evolutionary approach to the interpretation of the Treaty, i.e. the Convention and its Protocols, and we try to integrate new concepts. Maybe I will have the opportunity to develop this idea when answering other questions. But again, our Bible, in a sense, is the text of the Convention and of the Protocols thereto.

- Student 2 (AFM-KUC)

My question is about the case of Emmanuelle B. vs France, concerning adoption of a child. The point at issue was the sexual orientation of the applicant. I have two questions. First, when the European Court of Human Rights considers cases, does it pay attention only to the legal aspects or does it also consider the ethical aspects? And the second one: would the solution in the case have been the same if two men had wanted to adopt a child?

- Professor Jean-Paul Costa

Thank you. I know this case very well. As you know, we have a rule in the Convention according to which each judge elected in respect of the respondent country in question, for instance Poland for my friend Lech Garlicki, or myself for France, has the duty to sit on the bench - 7-judge Chamber or 17-judge Grand Chamber - when the application is brought against his or her State. So I sat in Emmanuelle B. vs France, and some years previously in Frette vs France, which dealt with the same type of problem, namely, is a man or woman - a man in the case of Frette, a woman in the case of Emmanuelle B. - is he or she entitled to adopt a child, or is it possible for the State to prohibit such an adoption based simply on the homosexual orientation of this person. First of all, to answer your second question: it is clear for the Court and in its judgments in Frette and in Emmanuelle B. cases that there is no distinction between a man and a woman. It does not matter whether the homosexual per-

son who would like to adopt a child is a man or a woman. The answer to your first question is more difficult, because of course we have not only to apply legal reasoning but in some cases - of course, this is not true for all matters - we have to consider also the ethical aspects of the problem. In the B. case, there was an ethical aspect. But the case raised a simple question of law, namely non-discrimination. Put simply: the case was against France, and we had to consider first the French Law. And according to French civil law, the Civil Code, it is possible - it is relatively recent, but it is possible - for a single person, who is not married, to adopt a child under certain conditions, for example provision of guarantees of a good education and material support for the adopted child. And the reasoning of the Court in the case you mentioned was as follows: in so far as the State - France - has given the possibility not only to married couples, but also to a single person, to adopt a child, it is contrary to the Convention, and more specifically to Article 14 of the Convention - which prohibits discrimination - to discriminate against a person simply because she is, or she alleges to be, or she appears to be, homosexual. Again, the same reasoning would have applied had the applicant been a man. Let me draw your attention to the fact that in the Frette case, the earlier case, which was a Chamber case, the solution given by the Court was different because it was simply concluded that there was no right under the Convention to adopt a child, and so the Convention was not engaged. Article 8 of the Convention in particular was not engaged, and we rejected the application of Mr Frette. The E.B. or Emmanuelle B. case is not only a more recent judgment but it is also a Grand Chamber judgment, adopted by the most important formation of the Court, namely the Grand Chamber - and in a sense, it did not uphold Frette but reversed the solution given in Frette.

- Student 3

I represent Krakow Internet TV and I would like to know what why some countries of Central and Eastern Europe very frequently violate human rights. Is the answer a political matter, a historical matter, or lack of education?

- Professor Jean-Paul Costa

It is difficult to give a brief answer to such a question, because there are various countries in Central and Eastern Europe and all of them have in common the fact of being in a transitional stage. The progress achieved in the transitional period is not the same in all countries: they move at different speeds. These countries are catching up very quickly with European standards of protection of human rights, for instance in the area of freedom of speech, freedom of assembly and association, etc. Yet even those countries that are best-ranked, if I may say so, have some problems with violations of human rights,

for instance as regards procedural matters, criminal procedure, civil procedure, and so forth. A very common violation of human rights which is found also in West European countries is the excessive duration of legal proceedings. The reasonable delay requirement is not respected. This is one of the problems of Poland, by the way. When we were discussing yesterday and the day before with the judicial and political authorities of Poland this was one of the main items. In some other countries, you find more serious violations of human rights. Excessive delay in obtaining a judgment *is* serious for the persons affected, but it is even worse when you are facing violations of human rights such as the right to life, prohibition of torture, or even arbitrariness in judgments. And for instance in the case of Poland, there are not too many serious violations of human rights, but there are still big problems, and we drew the attention of the authorities to them in our discussions. They say they are aware of the problems. First of all, the conditions of detention in prisons, mainly due to overcrowding in prisons, too many detainees for the space available. This amounts or may amount to a violation of Article 3 of the Convention: inhuman or degrading treatment. Another problem that is serious in Poland is the excessive duration of pre-trial detention. You are accused of a crime and you are put in pre-trial detention for a period of time that is excessive. On many occasions the person is eventually acquitted, but even if this person is convicted and sentenced to prison, it is not normal, it is not in accordance with the European standards of protection of human rights that he stays too long in pre-trial detention. First of all, it is contrary to the presumption of innocence, and secondly it contributes to the problem of overpopulation in prisons. Let me use an example of two countries which are not exactly Central or Eastern European, but which are both problematic: Russia and Turkey. In Russia, mainly due to the Chechen situation or war, we have found on many occasions violations of very important human rights, Article 2 and Article 3 of the Convention. This is connected with the “civil war” - and I say this in inverted commas - which has taken place in Chechnya. Several years earlier the same situation occurred in Turkey during the conflict with the Kurds. This allows a remark that may seem obvious, but I do insist on this point: there is of course a very strong connection and correlation between peace and human rights. External peace, for instance the war situation now in the Caucasus, is evidently giving rise to violations of human rights, probably on both sides, but it is premature to assess this. Conflict within countries such as the one in south-east Turkey between the Kurds and the central power, or in Chechnya, or in certain other places gives rise to human rights violations. If peace is missing, there is obviously the risk - and not only the risk: the certainty - of violations of human rights. Whereas on the contrary, if a country is peaceful, you see a progressive disappearance of the problems.

When I visit countries and when I exercise a kind of "judicial diplomacy": I insist very much on this link between peace, or peaceful situations, and good protection of human rights.

- Student 4

What if the country does not want to obey the jurisdiction of the European Court? I would like you to comment on cases where judgments were not obeyed by countries, as in the case of the Kurt vs Turkey.

- Professor Jean-Paul Costa

In general, the judgments of the Court are enforced. They are executed by the countries, by the defending States. We in the Court are not directly responsible for supervising the proper execution of our judgments. There is another organ of the Council of Europe, namely the Committee of Ministers, which under the Convention has the responsibility of pushing and pressing States in the direction of "obeying" - as you said - our judgments; of enforcing them. This means, by the way, not only paying financial compensation to the victims of human rights violations, but also taking steps, individual and general steps or measures, sometimes of legislative nature, for redressing the violation and preventing new analogous violations of human rights from being committed in the future. I would not like to comment on the Kurt versus Turkey case, because it is a recent case, but I can give you three historical examples of non-execution or non-enforcement of the judgments of the Court. By the way, these examples are nearly exhaustive in the sense that, I repeat, most States do execute our judgments.

The first case I am thinking of is the famous case of the Greek Refineries against Greece, which concerned a problem of property rights and fair trial under Article 1 of Protocol 1 and Article 6 of the Convention. In this case, the Court found that Greece had violated the rules of fair trial, because proceedings were underway in Greece in which the Greek State and some important Greek refineries were the opposing parties. The financial interests at stake were really high. In order to avoid, to be rid of the case before the domestic courts, the Greek government prepared a bill which was passed by the Parliament, which retroactively, or retrospectively, interfered with the proceedings, and gave the possibility to Greece to escape, to skip its responsibility before the domestic courts. We found that this was not in conformity with a fair trial, because it was an interference of the legislative branch and the executive branch of the government with judicial proceedings. The main problem was financial, because the Court said that under Article 41, former Article 50, of the Convention, Greece had to pay in material damages the sum which normally the refineries would have won had it not been for the inter-

vention of the Parliament. Greece for many years refused to pay, saying “We have no money”. Then the Committee of Ministers said to the Greek government “Well, you have to pay anyway, you have of course the choice of the means, you can increase taxes, you can save on expenditure, you can increase the deficit in your budget, but anyway you have to enforce the judgment of the Court”. Finally, I do not know how this was achieved, the Greeks did enforce the judgment.

The second case is more political than financial. It is the famous case of Loizidou vs Turkey. In this case, there was a problem of violation of human rights, again property rights, in the northern part of the island of Cyprus. The applicant, Ms Loizidou, was living in the southern part. She is a Greek Cypriot. The Turkish government was accused by this person of having violated her property rights in the northern part of Cyprus. The Turkish government stated before the Court “It may be possible, but we are not responsible, because there is a Turkish Republic of Northern Cyprus, and this state is responsible, if the violation is proven” At the time - it was in the mid-1990s - the Court said “Well, this state, the Turkish Republic of Northern Cyprus, is not recognised by the international community, the only state which has recognised it is Turkey, and Turkey, besides, has civil servants and a military presence in the northern part of Cyprus, so Turkey is exercising control or at least partial control over this part of the island. As a consequence, if a state has to be responsible, then it is Turkey.” In this way, the Court finally found that the violations were established, and that Turkey was responsible. Before the Committee of Ministers, Turkey again said “Well, we do not want to pay financial compensation to this person, because we are not responsible”. Eventually Turkey gave up, because the Committee of Ministers explained to them that the judgment of the Court was clear-cut, crystal clear, and they had to pay, and finally they did.

The last case, which is the most critical in a way, is the case of Ila§cu vs Moldova and Russia. Again it was a problem of territorial jurisdiction of the Court and territorial responsibility of the States concerned, because it dealt with detainees who were prisoners in Transnistria, a part of Moldova which is legally under the State responsibility of Moldova, but which is at the same time controlled by some remnants of the Soviet Army which at the time of the civil war, in the early 1990s, stayed on in Transnistria and exercised power. In the Ilascu case the Court decided that both Moldova and Russia, with some differences as to the grounds for responsibility, were responsible for keeping the applicants in prison. What happened then was that Moldova for its part executed, or tried to execute, the judgment, but Russia did not. Finally the applicants were freed, but they were freed simply because the term of their imprisonment had ended. This is the most serious case to my mind, because it shows

the willingness of a country not to recognise the force of a judgment of our Court and simply to allow time to pass in order not to enforce a judgment.

- Student 5

Right after you were elected President of the Court, Mr Costa, you said in an interview that Poland was in the top of the league of the countries that are provoking cases against them. What did you mean by "provoking cases", and is Poland still among those so-called "bad students"?

- Professor Jean-Paul Costa

Yes, it is true that Poland was at the time one of the States against which there were the greatest number of applications. Probably I did not say "provoke cases" but "provide cases", yet the idea is the same. If you have many applications against a State, this means first of all that this State is not protecting or defending human rights enough, and secondly that the workload of the Court is of course increased insofar as the applications against this country are concerned. I must say, and I do not say it because we are in Poland, but because it is really the truth, that the relative rank, the classification of Poland, on the list of all the States, has improved. It has improved greatly and now Poland is in the fifth or maybe the sixth place, and does not produce as many cases. This is due to many factors. The number of applications is clearly more or less dependent on the overall population of the country. You have necessarily more cases against Poland or France or Italy than against Liechtenstein or Andorra or San Marino. Obviously the more people there are in the country, the more cases there are, and that goes for all countries. Yet if the situation of Poland has improved, it is thanks to several factors. One of them is that Poland has really become aware of the need to remedy violations of human rights, and this is more and more clear. Some categories of cases could and should be dealt with at national level, for instance length of proceedings, but there are also other systemic problems. I just recently mentioned the problem of excessive length of detention on remand. Three weeks ago a delegation of senior members of the Registry went to Poland in order to discuss with the authorities if it was possible to introduce legislative reforms and to reach friendly settlements with applicants where the cases are obviously well-founded. It is not necessary for Poland (it is actually the same for other countries!) to wait for a formal judgment of the Court: it is possible to settle a case beforehand by recognising the State's responsibility under international law and by affording the applicant compensation. This is a process which will certainly continue. For instance, you know that the Court decided seven years ago, at the beginning of this century, the famous Kudla versus Poland case, which was a signal not only for Poland but also for many

other States that it was necessary in excessive length of proceedings cases to introduce domestic remedies giving people ways of reducing the length and compensating them in the domestic courts for the damage they suffer. After this judgment, Poland adopted its first legislation in order to abide by our judgment, but our Court rapidly arrived at the conclusion that this legislation was not effective enough: it did not provide sufficient compensation, sufficient ways of reducing this problem. I heard when I arrived here in Poland two days ago that a new draft bill has been recently approved by the government and will be very soon sent to the Sejm and then to the Senate in order to improve protection. There is another reason why the number of cases against Poland is probably decreasing, not in absolute figures but in relative figures. It is the question of better information and education. We have to remember that many cases brought in Strasbourg before our Court are hopeless cases which finally result in rejection of the applications by 3-judge committees. This shows that many people in Europe think that the Convention and the Court can provide them with a solution to the problems in their daily life. By that I mean their happiness, health, love, such kinds of good things. I would like, as the President of this Court, to be a kind of Santa Claus and provide everyone with love, happiness, health, beauty, etc. Yet we cannot, and we are not of course conceived for that purpose. Nevertheless, many people simply hope that they can - or that the Court in Strasbourg can, or the European Convention on Human Rights can - remedy all the problems which affect their lives. This also raises the question of information. We are not a fourth instance court, we cannot review... We can of course review the judgments of domestic courts, even in penal matters, in criminal matters, but only from the angle of respect for fair trial requirements. We receive many applications from people saying “I was sentenced to 5 years imprisonment, and I should have had 2 or 3 years”. Still, we cannot re-judge it! It seems to me that a very important role has to be played at the national level by the Ombudsman or Ombudsperson, for example, to explain what the Court is actually able to provide and what it does not provide. Probably, we ourselves in the Court have to increase the level of information and education of lawyers, of NGOs, of representatives of applicants, and of potential applicants themselves, in order to avoid having such a huge amount of cases rejected. This is frustrating for applicants, but it is also a supplementary burden for the Court. We would be better to concentrate either on the very serious violations of human rights or on new problems, such as the issue mentioned before: adoption by homosexuals, rather than reject thousands and thousands of cases by 3-judge committees, which probably - most of them, not all of them - could have been avoided through better information and education.

- Student 6 (Krakow Internet TV)

Could you tell us what strategy you would suggest for the Polish society to improve the protection of human rights?

- Professor Jean-Paul Costa

The global strategy in a sense is simple, but it is difficult to be really specific. The strategy is simply the following one. First of all, States are never obliged to ratify international instruments such as the European Convention on Human Rights. When they decide, on the basis of sovereignty, to ratify such an instrument, they solemnly undertake the responsibility of protecting human rights such as defined and guaranteed by the Convention. This implies that all the authorities of such States - executive, legislative, the Parliament, courts, and so forth - (which may also apply in some cases to individual relationships) are committed to executing in good faith the engagements and duties they accepted by signing and ratifying the Convention. The Strasbourg machinery places reliance on the subsidiarity principle, which means in international law that the Court is simply a subsidiary court. This obviously does not mean a secondary court. It is a very important jurisdiction, but most of the problems should be either prevented or redressed at national level. And we have more than 800,000,000 potential applicants in Europe in the 47 Contracting States, and let us imagine that in their lives - of 80 years each - every one of the 800,000,000 (let me tell you: Europe *is* big!) brings a case to Strasbourg. That would mean ten million cases a year, once we divided 800,000,000 by 80 years. This is why we cannot simply be a court of first instance or fourth instance for all the people in Europe. Therefore, the message we convey, and I do it when I am on a mission with the national judges of the Court, in this case my friend elected in respect of Poland, Judge Garlicki, is simply to say to the countries: help the Court, not in order to help the Court itself, but to help your own citizens. You are not obliged, I repeat, to ratify the Convention, but if you do so, take it seriously. This message will hopefully be followed. It will take many years, but it is the only way of improving protection of human rights standards in Europe and to have a more efficient Court, one more able to give guidance to the States. Our role is not to unify the law, because the law is different from country to country according to their legal traditions, different legal cultures and so forth. Our role is to analyse the solutions, and to serve - as I said - as a guide, providing guidance to the various European States. It goes without saying that in some cases the Convention is binding without exception. For example, the abolition of the death penalty, which was decided in an additional Protocol to the Convention, Protocol 6, is certainly binding. And we know that in the world there are many large states: China, Japan, most of the United States, and even In-

dia, even if they apply a kind of so-called moratorium - there are many continents in the world where the death penalty is still in force. But as far as European states are concerned, when they ratify Protocol 6, they have to take it seriously and not re-introduce the death penalty. This is just an example, and I hope you can see now my point.

- Student 7

What do you think about limiting personal freedom, which is obviously a basic human right, in order to provide more homeland security?

- Professor Jean-Paul Costa

I would need at least an hour to answer your question! Simply, all States are facing the same dilemma between more security, and keeping and maintaining - and if possible improving - freedom. This is particularly true in a period like ours, the beginning of the 21st century, when we have such phenomena as terrorism, organised crime, drug trafficking, trafficking of human beings, etc. The need for security at national and international level is greater than before. Our simple answer in the Court - and this is the philosophy of the Council of Europe - is that we have to reconcile security and liberty. I will use just one example: terrorism, called so since the 1970s and the interstate case of Ireland vs the United Kingdom. We have had many occasions to state and to repeat that the fight against terrorism is not only legitimate but it is even a duty for States, because States are obliged under the theory of positive obligations to protect as far as possible their populations against phenomena such as terrorism. At the same time, we have always said that it is necessary to limit - within the framework of freedom, equality and justice - the ways in which or through which the States combat terrorism. For instance, at the beginning of this year we issued a very important judgment of our Grand Chamber, a unanimous judgment, in the case of Saadi vs Italy, which concerned the extradition of a Tunisian citizen living in Italy, who was accused of having links with terrorist organisations. At the end of the day, he was convicted in Italy of a less serious crime. Extradition was requested by Tunisia. In the examination of the case, the Court had asked the Italian authorities to seek diplomatic and political assurances from Tunisia, which they did. However, they did not obtain serious guarantees. For this reason, the Court said “If this person is to be extradited to Tunisia, Italy will be responsible for a violation of Article 3 of the Convention, because this person runs a very serious risk of inhuman and degrading treatment in Tunisia, if returned to Tunisia”. This was in a sense a confirmation of former caselaw of the Court, but with more emphasis and importance in the context of the growing threat of terrorism. It is very difficult to reconcile liberty and security, freedom and security, but it is the duty

of democracies to do so. I draw your attention to the fact that many articles of the Convention and the preamble itself refer to the notion of democratic societies, things which are necessary or legitimate in a democratic society. Our guidance, more moral and political than purely legal, even if the legal consequences are important, is that democracies must not lose their soul, even if it is for very understandable and good reasons.

- Student 8 (AFM-KUC)

Is it within the European Court's legal capacity to decide about shooting down a hijacked airplane?

- Professor Jean-Paul Costa

Well, I cannot answer your question for a very simple reason. We as judges avoid as much as possible speculating on theoretical situations. If I am not mistaken, we have never had this problem in the Court. Believe me, it is already very difficult to find a good solution in actual cases, in specific applications that are brought before the Court. It is very difficult to speculate on possible future applications. I am sorry not to be able to give as full an explanation as I should, but again it is difficult for me to give you an answer. First of all, because we are a collective court, so the decisions we make are based on collective decisions, which themselves are based on majority decisions. Moreover and more importantly, because it is impossible to speculate on theoretical cases.

- Professor Bogusława Bednarczyk

Thank you very much. The question session is over although - as I do understand and I realise - there are many additional questions and problems still facing us, especially the famous Protocol 14 and the so-called fast track procedure, and other issues. Therefore, I do believe that perhaps in the future, perhaps even in the foreseeable future, we will have the honour to host you here for a longer time. Then there might be more opportunity to ask you additional questions concerning the issues of human rights in the 21st century which we are faced with.

Mr President Costa, thank you very much for finding the time and coming to our College. We are all honoured very much. My deep thanks also go to Professor Lech Garlicki for accompanying Judge Costa. I also extend my thanks to all the students and professors who have come here today. Concluding, I do believe that the occasion has been truly worth it. Thank you all very much.

HONORARY PATRON OF THE CONFERENCE, PROFESSOR HANS-GERT POTTERING, PhD PRESIDENT OF THE EUROPEAN PARLIAMENT

Message from the President of the European Parliament Professor Hans-Gert Pottering, PhD

Ladies and Gentlemen, distinguished Guests! Dear Friends and Colleagues!

Let me start by expressing my gratitude for the invitation that was extended to me to participate in the International Conference "European Constitution and National Constitutions" organised by the Jagiellonian University, the University of Halle, and the Andrzej Frycz Modrzewski Krakow University College, and to address the participants of this distinguished gathering.

Unfortunately, due to prior commitments, I cannot be present. Fortunately, however, with the aid of modern communication technology I have the chance to address you from Strasbourg, where the European Parliament is having its regular monthly plenary session by means of this video message. For this opportunity, I thank the organisers.

It also gives me pleasure that I have granted my patronage, as President of the European Parliament, to this important event.

Ladies and Gentlemen, dear Friends, your meeting takes place at a crucial time for Europe, and concerns a topic of utmost importance. Only a few days ago in Lisbon, the heads of states and governments together with the presidents of the Commission and the European Parliament finalised the agreement on the new Treaty setting for the European Union of 27 member states. After several long years of discussions, we are on the right track to overcome the institutional crisis, to consolidate the Union, and give it the capacity to act. We in the European Parliament, and I myself as president, consider this issue the priority of priorities. The Union can now move forward and concentrate on tacking the challenges of today and tomorrow: climate change, globalisation, energy security, migration, or the dialogue of cultures, just to mention some responsibilities and challenges.

Ladies and Gentlemen! As president of the European Parliament I have to express my deepest satisfaction that the codecision procedure in which we, the elected representatives of the European citizens, decide on equal footing with the Council of Ministers, on legislation, will be extended to nearly 100% of policy areas. We consider this a great achievement, making the EU more democratic and transparent. Not without pride I would like to inform you that the Charter of Fundamental Rights will be formally proclaimed by the heads of the three institutions, Council, Commission and Parliament, in Strasbourg in December, one day before the Treaty is signed in Lisbon. The

legally binding character of this Charter we consider as a significant step forward for European institutions, and citizens especially.

Ladies and Gentlemen! I would like to conclude by extending my best regards to you all, and wish you a successful and fruitful conference in the beautiful city of Krakow, which I had the pleasure of visiting only last month. I hope that your meeting will bring positive results in a scientific analysis of our new Treaty, setting its relation to and with our national constitutions in the EU. Thank you for your attention.

OPENING OFTHE CONFERENCE

Chairperson:

Professor Barbara Stoczewska, PhD

Speeches of the representatives of the organisers of the conference

• Professor Barbara Stoczewska, PhD - Vice-Rector, Andrzej.Frycz Modrzewski Krakow University College

It is my great pleasure to welcome you all. Maybe for some of you this is your first visit in Krakow. I am sure you will find our city and its sights both interesting and beautiful. I also sincerely hope that this conference will meet your expectations. And I would like to wish all our participants a nice time in our city and I am sure you will find the conference stimulating, thought-provoking and rich in ideas. I have the privilege and honour to say that the conference has been organised under the honorary patronage of Professor Hans-Gert Pottering, President of the European Parliament, and Professor Jean-Paul Costa, the newly elected President of the European Court of Human Rights in Strasbourg.

This year's conference commemorates the 10th anniversary of adopting the Constitution of the Republic of Poland. Now I would like to say a few words about the conference, about a certain tradition that comes along with it. Today's conference expresses a continuity of a series of conferences on the issues of constitutionalism and its relationship to the European Union. The first conference took place two years ago, in 2005. It was co-organised with the University of Hull and was devoted to the issues related to Poland in the European Union and the social dimension. The following year the Jagiellonian University organised a conference focusing on the problems of applying the Constitution of the Republic of Poland from 1997 also in a broad European Union context, taking into consideration the past experience and looking to the future.

Let me now present and recommend the materials from last year's conference, hot *off* the press, edited by Professor Zbigniew Maciąg. This is the advance copy. You will have a chance to take a closer look at the materials and receive a copy during the course of the conference. And finally, today's conference, which I have the pleasure of opening, is the third one in the series. It is organised by the Jagiellonian University and the University of Hull, and co-

organised and hosted by Andrzej Frycz Modrzewski Krakow University College. After this short introduction, may I ask Rector Professor Jerzy Malec to officially open the conference.

• Professor Jerzy Malec, PhD — Rector, Andrzej Frycz Modrzewski Krakow University College

Thank you, Vice-Rector. First, please rise for the anthem of the European Union. Thank you very much. Ladies and Gentlemen! Before I officially open the conference, f would like to welcome our noble guests, ft is my pleasure to welcome Minister Krzysztof Szczerski, Undersecretary of State in the Office of the Committee of the European Integration. You're most welcome, Minister. 1 would also like to welcome Dr Rafał Trzaskowski, Advisor to the Chairman of the European Parliament's Foreign Affairs Committee. 1 am pleased to welcome two judges of the Polish Constitutional Tribunal: Professor Marian Grzybowski and Marek Kotlinowski. A warm welcome to Professor Osman Achmatowicz, the Secretary of the Central Commission for Academic Degrees and Titles. 1 would also like to welcome Michalina Nowokuńska, Head of the District Chamber of Legal Counselors, as well as Janusz Sobczyk, Head of the District Bar Council in Krakow. Welcome to Mariusz Maziarz, representing the Chief Education Officer in Małopolska region. A particularly warm welcome goes to numerous scholars, both from Poland and abroad. Let me begin with Professor Karol Musioł, Rector of the Jagiellonian University and co-organiser of the conference, ft is a great pleasure to welcome the professors who have been nominated to receive honorary degrees of the Krakow University College. The ceremony will take place this afternoon, and the details will follow shortly. And so 1 have the honour to welcome Professor Jo Carby-Hall from the University of Hull in Great Britain, who also represents David Drewy, the Chancellor of the University of Hull, the other organiser of today's conference. Welcome to Professor Rolf Grawert from Bochum University and Professor Harald Kundoch from the University of Applied Sciences in Gelsenkirchen.

I would also like to welcome other foreign guests, Professor Manfred Weiss from Johann Wolfgang Goethe University in Frankfurt, Professor Dieter Kugelmann from Harz University of Applied Sciences, Professor Ian Barnes from the University of Lincoln in Great Britain, as well as Associate Professor Allan Tatham, representing the Catholic University in Budapest. I would like to welcome Professor Alessandro Anastasi from the University of Messina in Italy, and Diana Ryland, representing the University of Lincoln, Great Britain. We are delighted you were able to make it to the conference. Welcome to Pamela Barnes, also from the University of Lincoln, Great Britain, as well as Dr Anneli Albi from the University of Kent, Great Britain, and Alexandra Hennessy from the University of Rochester in the USA.

I would like to welcome representatives of Polish academic centres from almost all major universities in Poland. Welcome to the professors and students of our Alma Mater.

Ladies and Gentlemen! The idea of the European Union has a history which goes back hundreds of years. Thoughts about a community of the European nations have always met with heated debate on its shape, and the situation today is no different. The conference in Krakow picks up on an incredibly important issue of establishing a relationship between the European Constitution and the national constitutions. It is important, among other reasons, because of the continued lack of unanimity in accepting the European constitution. Although as a principle it cannot give rights in the areas of freedoms, security or justice, it could be a step forward, a bridge between an economic union and a union of fundamental human rights and freedoms. The constitution could simplify issues relating to the system of justice, foreign affairs, and at the same time assure greater transparency of the decision — making process. It has been initiated by the biggest and the strongest countries. One should remember, however, that it is an expression of only one vision of further integration of Europe and its development. Is it the best one, though? As we are all aware, the European Constitution gives rise to much debate and controversy. Being a compromise, it never satisfied anyone in full. Its particular stipulations have been questioned, as has its claim to being called a constitution, rather than a set of legal regulations.

Another subject of heated debates were the accusations that it requires member states to resign from national sovereignty, by stipulating that the Constitution will have primacy over national laws, including national constitutions. The national constitutions would still exist, though not entirely independently. The guests of today s conference, highly acclaimed specialists in the fields of constitutional law and political systems from academic centres in different countries, will attempt to find answers to the crucial problems relating to the law-making process and the importance of the European Constitution for the future of the European Union and the entire continent. They will also present issues to do with harmonisation of European national laws with EU law.

In the sessions to follow we shall listen to presentation on the current state of affairs and the perspectives of the development of the European Union. We will deal with the structure of the European system and the concerns of modern constitutionalism. Finally, we will look into the hotly debated relationship between the European Constitution and the national constitutions in the light of particular legal systems. I believe many dilemmas which run parallel to the process of creating the common European fundamental statute will be resolved in the course of this conference. At the same time I would like to re-

mind you that it has been ten years since the current Constitution of the Republic of Poland was adopted and that a year ago we ran a session entitled: "The Constitution of the Republic of Poland after 1997. Experiences and perspectives." I hope this year's meeting will be as fruitful and rich in reflection. I also hope you will enjoy your time in Krakow, a special city. Many of you have been here before. We are particularly pleased you were kind enough to visit both the city and the university again. I hope you have a fruitful and intellectually inspiring conference. I declare the international conference, "The European Constitution and the national constitutions" open. Thank you very much.

- Professor Barbara Stoczewska, PhD - Vice-Rector, Andrzej Frycz Modrzewski Krakow University College

Thank you, Rector. Now I would like to invite Professor Karol Musiol, the Rector of the Jagiellonian University, to take the floor. Please.

- Professor Karol Musiol, PhD — Rector, Jagiellonian University

Ladies and Gentlemen! I think the conference had precisely the appropriate opening - the anthem of the European Union - for this puts us all on one platform. We remember the words of the original text, *Allé Menschen werden Brüder,* and we all agree with them. But since we started building the common European edifice, we have discovered that there are different stones. Some of the stones we are using fit perfectly, which means the building is growing fast. However, there are a few that do not quite fit. Such stones need to be smoothed and an agreement has to be reached as to how we smooth them; this, I believe, is the problem with the European Constitution.

But let us be frank. Although the constitution will probably never exist in the form proposed by Giscard d'Estaing and his team, I am among those who believed that the proposal needed amending. I remember conversations with friends in France and being amazed at how many objections they had. I also remember the first conference in the Council of Europe after the European Constitution was rejected in the constitutional referendum by the French and the Dutch. I can now recall the shocking effect the news had on an auditorium consisting mostly of European university chancellors. The unanimous reaction was that such a rejection must spring from ignorance, that maybe the way we have taught and talked about Europe has been wrong. And it would be difficult not to agree.

Then a new project emerged, one which encouraged universities to go back to some sort of European-oriented education and teach the principles that unite Europe. We said it should be treated like philosophy - a prerequisite for all educated individuals. Are we doing it? Yes, but not well enough! That's why the im-

portance of conferences such as this cannot be underestimated. Even if we can decide nothing, certain solutions can be brought to our attention and maybe one day we will be able to vote for them. If not, then maybe we will get a chance to convince our families and friends, our students, that these solutions are good for the future of Europe. I would like to mention just one issue we rectors discuss frequently, both in Poland and abroad - university tuition fees. This is a problem that needs a solution, and the matter is treated differently in various national constitutions. Some critics say there is not a single country in Europe which could afford free university tuition for everybody. Others claim that providing free access to university-level education is one of the state's responsibilities. The problem is perhaps worst solved in a couple of countries, including Poland, where the system shows symptoms of schizophrenia in that some students pay for tuition, while others do not. There is an enormous desire in young people to educate themselves, yet there is no social justice in this particular outcome. Let me remind you that we have four times as many students as fifteen to seventeen years ago. This is an amazing phenomenon, and the fact that the system has been able to accept all those young people into universities is a great success indeed. It was made possible partly thanks to the emergence of private universities, and partly due to low-fee universities based on German models.

This is a short summary of our reality. I hope it will feature in your discussions, as it is up to us to find good solutions. It seems to me that the creation of a common educational space and common research space are the two most impressive, most crucial projects in the entire European Union programme. For those concepts to be realized successfully, students need to able to choose where they want to study and be sure that the level of education is equal across all member states. Once free movement is here, and students can receive world-class education in their homeland or anywhere within Europe's boundaries, we can finally agree that Europe has been built.

How we educate our youth will have an enormous influence on the future of the European Union. Let me therefore stress, again, how pleased I was to hear the anthem of the European Union at the very beginning of the conference. Let us not forget our goal, but let us also remember we all have to work together. I am optimistic about the future, and if we have not yet been educating correctly about the European issues, then this conference is surely a very good place to start. Thank you very much.

- Professor Barbara Stoczewska, PhD - Vice-Rector, Andrzej Frycz Modrzewski Krakow University College

Thank you, Professor. Now I would like Professor Jo Carby-Hall, the Honorary Consul of the Republic of Poland, to take the floor. The professor is speaking on behalf of Professor David Drewy, the Vice-Chancellor of the University of Hull.

• Professor Jo Carby-Hall, PhD - The University of Hull

In the absence of the Vice-Chancellor of the University of Hull, it is my great pleasure to speak on behalf of the University of Hull, which is one of the organisers of this conference. It is also my pleasure and joy to do so because of a number of factors which I shall explain in the next few minutes.

First, Rector Magnificus of the Jagiellonian University, Professor Musiol, I have had the privilege of having had a long-established contact with your prestigious University, dating back to 1986, when I recall I was invited by Professor Tadeusz Zieliński to give a paper in your magnificent Senate room in Collegium Novum. As one of Tadeusz Zielifiski's friends it was a honour also to have been invited to write a chapter in a book dedicated to him, and published just before his death. Since 1986 I have had many friends at the Jagiellonian University and collaborated with some of them in various research and publications programmes. So we have a pedigree between Hull and your University, Rector Magnificus.

The second reason why it is my joy and pleasure to speak, Rector Magnificus of Andrzej Frycz Modrzewski Krakow University College, Professor Malec, is that, although my contact with your University has been more recent, in the last three and a half to four years, initiatives carried out and about to be carried out have been numerous, ambitious and intense. They consist of an active collaboration agreement in international conference organisation of which this is one, an Erasmus programme (exchange of students) between our two universities, research and publication programmes, exchanges of students and staff, and so on. The list is long. Three master's dual degrees, in international, European and legal studies, are currently being set up, and other initiatives are also being planned.

The third reason for my pleasure to speak to you today is that the Consulate of the Republic of Poland has been active in the organisation of this conference, as a sponsor of this conference, not an organiser this time, and some other conferences as well, not only here but also in other countries. It is appropriate to mention that this consulate has a branch, the only branch of a Polish consulate in the world, and maybe the only branch of any consulate, although I am not sure of that, which specialises in scientific, research and educational cooperation. And this branch is situated in the University of Hull. We have got two consulates: the main consulate in Beverly and the branch in Hull. And it is a very active branch in a variety of educational activities, and more recently there has been founded in the University of Hull, through the branch consulate, a Polish research fellowship, and we have got our first research fellow coming in November, next month.

Finally, I need to say a word about the University of Hull. Founded in 1928, it is not as old as your University, Rector Magnificus. We have 18 000 students, which by British standards is quite a large university. We don't have now such universities in Great Britain, apart from London University, Oxford and Cambridge. So it is a large university, attracting students from all over the world. This university is headed by a very able, energetic and experienced, Vice-Chancellor - Rector, in your terms, who unfortunately cannot be here because although he is in Poland at another conference, he is giving a paper this morning at that other conference in Wroclaw, I believe. So there we are: my joy to have dealings with three universities and a consulate.

Let me speak briefly now on the Treaty Establishing the Constitution for Europe, which is part of our discussion during this conference. The Treaty was signed, as you all know, on October 24, 2004. The status of the Treaty is, to put it at its best, in great grave doubt, and to put it at its worst, it is in the waste paper basket of history. Referenda in France and the Netherlands resulted in a "no" vote. The respective governments accepted the vote and accepted that outcome. Although these two member states voted against ratifying the Constitutional Treaty of 2004,18 member states had in fact ratified it. Because of the "no" votes in the two countries, the process of ratification in the remaining countries had stalled. And the politicians, taking the "no" votes as an opportunity, avoided difficult and awkward debates in their own countries. Mine, the United Kingdom, was a very good example of this hot potato issue with British voters. The European Union has thus entered, and I use the official term, into a period of reflection. Not stagnation, ladies and gentlemen. Reflection. To consider how best to proceed with the Treaty. Should the constitution be revised? Should it remain in its current form? Should it change in form and in content? Three important questions which were asked at the time. The answer lies in the draft Reform Treaty, signed in Lisbon on October 19th this year, three days ago. The word "constitution" has disappeared from the Reform Treaty. It is not popular among the European Union states. It has been dropped, but the original provisions mainly have reappeared in a chameleon, transformed form, in the Reform Treaty.

It is your task as experts, authorities, scholars of constitution law, in your respective countries - and we have many countries represented here today - to analyse, to appraise, to constructively criticise and make valuable suggestions as to how best to proceed with regard to a constitution for Europe. The conference papers will be published and we will look forward to reading your materials, giving solutions to the complex and controversial issue of the European constitution. This conference will be instrumental, will be telling, in the kind of content we need in a constitution for and of Europe. Vaclav Havel, then president of the Czech Republic, said this:

"A concise, clearly formulated and universally understandable constitution is needed". He went on to say: "It must be made easier for the citizens of the integrating Europe to recognise what the European Union stands for, to understand it better and to consequently identify with the European Union." Will this conference achieve this? Hopefully, ladies and gentlemen, it will. The results of your deliberation on the European constitution and national constitutions could become the benchmark, could become the blueprint for a fertile and imaginative debate in the European Union and in its member states. Together with my two Rector colleagues we wish you and all of us good luck, much inspiration, and all success and progress in your deliberations on the Constitution.

- Professor Barbara Stoczewska, PhD - Vice-Rector Andrzej Frycz Modrzewski Krakow University College

Thank you very much for your very interesting speech, and we ask for more during the next parts of our conference! Ladies and gentlemen, now we will listen to Danuta Hübner, the European Commissioner for Regional Policy.

- Professor Danuta Hübner, PhD - European Commissioner for Regional Policy

Message to the participants of the conference

Ladies and Gentlemen! I am pleased that technological advances enable me to participate almost in person in the conference devoted to the discussion of the future development of the European Union. I wish to congratulate the consortium of splendid European universities which combined their efforts to organize this conference, not simply because it is held in Krakow, which has been a European academic centre since its establishment, but also because the European academic centres contribute significantly to the debate about the essence and the future of the European Union. Each and every forum where ideas and opinions are exchanged not only facilitates the process of reforming the Union, but also helps the citizens understand it better. The start of the conference coincides with some fascinating events. This debate is probably the first one to follow directly after the end of the convention in Lisbon. This convention should definitely go into history books on European integration as one of its greatest achievements. When I say these words to you, I am not yet aware of the course of the history. I do believe, however, that the determination of the member states is equal to their involvement and that we will have had enough strength, solidarity and trust in the future, to agree the text of the Reform Treaty. I believe we can be proud of it and that today we're beginning the next stage on the road to the better and more effective Union of the future.

This is the message I'd like to communicate to all of us who make this Europe happen every day: the process of uniting Europe is continuous and is happening exactly every day. We are witnesses to gradual European integration, which brings along constant challenges to member states, European institutions and all citizens of the European Union. It is only natural we want to make the process smoother and easier. The new treaty will help us cope with the fundamental challenges resulting from the largest expansion of the European Union in its history.

On the other hand, in times of globalisation and dynamic change around the European Union, it should facilitate the enforcement of strategies and achievement of targets in areas crucial to us all and the European Union as a partner in the world. I'm thinking about security, justice, immigration, fundamental rights, the environment, energy policy, scientific research and technological advancement, but also about economic, social and territorial cohesion. Combining the tools of European foreign policy in the areas of creating and implementing political strategies will allow us to raise the profile of the European Union internationally and will ensure greater unity of European foreign policy.

Today I would like to draw your attention to one issue in particular, one which is of fundamental importance for the European project and to whether this project gets the necessary support in society. One of the most important challenges the united Europe is facing today is undoubtedly the democratic deficit. We should appreciate the fact that the Reform Treaty deals with this challenge with all diligence. We have a chance for enhanced and improved democracy and transparency in Europe by strengthening the role of the European Parliament and the national parliaments, the option of civil interventions in the form of legislative initiative of a group of one million citizens, and clearer division of tasks and competences between the European and national authorities. The Reform Treaty proposes a number of solutions which ultimately are to reduce the democratic deficit in the European Union. One of the examples of these solutions is broadening the scope of applying the procedure of codecision with the participation of the European Parliament and the Council of Europe to almost fifty areas, including areas of great sensitivity, such as freedom, security and justice. The Reform Treaty will increase the importance of national parliaments, including Polish MPs, in the decision-making process, for example by ensuring that the subsidiarity principle is observed. The Reform Treaty will strengthen the union of law and values, solidarity and security and clearly define its values and objectives. The Charter of Fundamental Rights includes a clear definition of citizens' rights, political, economic and social. The Treaty will also ensure greater solidarity and security of energy policy, climate change, protection of citizens, humanitarian help, public health.

It will also help increase the Union's potential in the areas of freedom, security and justice.

I'm always pleased to visit Jagiellonian University. I come here often and we have always discussed the future of the European Union. I could say I will pop in before the beginning of the academic year. I visited in September this year and the year before. Last year I said Europe was a beautiful, but not an easy project. Europe does not just happen, we make it happen and we are responsible for its future. And I think these words have kept their validity and I can safely suggest them as a motto for further discussion. I hope you have a fruitful debate on the Europe of our dreams. Thank you very much.

• Bogdan Klich - Member of European Parliament

Current State and Future Perspectives of the Reform of the European Union Treaties

I have a slight problem here. Namely, when I was talking to professor Maciąg about the subject matter of this presentation, it was, if I remember correctly, May. Therefore, it was before the Brussels summit which took place in June and which made the decisions regarding the Reform Treaty, as well as before the final decisions which took place three days ago in Lisbon. Consequently, we are all clear about the current situation. For this reason, I will only focus on in-depth analysis of a certain aspect thereof.

As for the perspectives - they are of a strictly political nature. What they really reflect, or what they really stem from, are the abilities of European leaders to mobilise the electorate in the countries where a referendum will be necessary, or to prevent a referendum in the countries where it is not obligatory under the ratification procedures.

Let me therefore focus on comparing two things: the first of them is what the European leaders left Lisbon with after the recent summit, i.e. what has been signed as the Reform Treaty, and the second one is the decisions from the June summit in Brussels - especially in the light of what already constitutes the subject matter of the Reform Treaty - and the present state of European Union treaties.

As we are all aware, after the constitutional fiasco the European Union decided to give up the constitutional approach to its new fundamental legislation and to limit itself to a reform of the existing legislation.

This was achieved by adopting the idea of a simple revision treaty. This is a strictly political solution. It allows for the elimination of a referendum wherever possible, and moreover, it makes it possible to bring the Reform Treaty into force before the next election to the European Parliament, which is due in June 2009.

It also opens the way for the reform of the European Commission in 2014, even if it is rather late compared to the original intentions.

The solutions of the Constitutional Treaty form the point of departure for the reform of the fundamental legislation and for the Reform Treaty itself. The modifications and provisions of the Reform Treaty are to a large extent limited to the departure from the constitutional character of the treaty. Frankly speaking, this is legally rather insignificant. The significance is much rather political and symbolic. It appears that it was precisely the constitutional character of the intentions that led to the fiasco of the constitutional treaty. Thus we see a departure from the name, from the term constitution'. We see a retreat from terms such as a European statute, a European framework statute, to denote statute-like legislation, and a return to terminology such as regulation, directive, decision. We see a retreat from symbolic references in the constitution, such as a flag or anthem of the European Union.

Finally, we see cosmetic corrections such as replacing the name 'minister of foreign affairs' with 'High Representative of the Union for Foreign Affairs and Security Policy'. This is quite interesting, given that since the Amsterdam Reform there has been a position in the European Union of a High Representative for the Common Foreign and Security Policy. Lastly, we also see a withdrawal from one of the articles which spell out the principle of primacy of European law over member state regulations. Instead, the new treaty includes a declaration which expresses the primacy of the treaties and the legislation adopted by the Union of the basis thereof. Nonetheless, Article 1.6 of the Constitutional Treaty was removed in its expressis verbis version. There is also the issue which has been handled very emotionally in Poland, for reasons that remain quite unclear, namely the issue of taking a decision by qualified majority in the Council, and more precisely speaking the modification of how this mechanism can be used in the interim period 2014-2017, as proposed by the constitutional treaty, and then after 2017 according to rules which make it easier to launch the procedure.

I would like to say a few words also about the application of the Charter of Fundamental Rights. If you compare at first sight the Constitutional Treaty with the proposed Reform Treaty, you notice that the Charter is missing from its position in the second chapter, which may seem dangerous and surprising. It is true that as a consequence of limitations to the length of the Reform Treaty, the Treaty only includes a provision stipulating the legally binding character of the Charter. The Charter itself is annexed to the Reform Treaty, together with the opt-out clauses which apply to three member states, namely the United Kingdom, Ireland and Poland.

I will not dwell here on less significant matters, such as for example the solution to a seemingly unsolvable dilemma: how to observe the regulation which

limits the number of the members of the European Parliament to 750, while at the same time satisfying the expectations of Italy and its prime minister Romano Prodi that the number of Italian representatives should reflect the potential of this country. I will also not discuss here the problem of the advocates general of the Court of Justice of the European Communities, because it seems to be a modification of lesser importance compared to the principles adopted at the Brussels summit, which on the other hand seem rather important.

I would like to speak mostly about the changes that were introduced into the fundamental law of the European Union already by the constitutional treaty and which have been retained in the Reform Treaty. What seems to be most significant is giving the Union legal personality. It is an important step forward. On the one hand, it makes it possible for the Union to be a member of international organisations, and on the other hand gives it the ability to be a party to international agreements, such as for example the European Convention of Human Rights. Another such change is the inclusion of the Charter and giving it a legally binding character, as opposed to simply a political declaration, which the Charter used to be.

Another point of great importance is definition of the Union, according to which the Union exercises competencies conferred to it by the member states following the principle of subsidiary and proportionality, i.e. in accordance with the old maxim "as much of the Union as is necessary and no more". The Treaty re-states the guarantees of respect for national identities, cultural diversity, and linguistic variety, i.e. the aspects which had been raised with anxiety during debates not only in Poland, but also in other countries. One must concede that the constitutional attempt at first, and now the attempts to revise the fundamental regulations, may lead to blurring and dissolving the national, cultural and linguistic differences between the member states.

There can be no doubts that the Treaty introduces greater order and simplicity into both the institutional framework and the legal instruments of the Union. A fortunate consequence of the Treaty's provisions is the abolition of the division into Communities, which introduces a unified system of legal acts into the entire legal procedure of the Union. What is uncertain is the clarity of the division of competencies of the Union into exclusive, shared and subsidiary. It is also uncertain whether the list should be open or closed. However, the sheer fact of the introduction of the division into these three categories seems significant.

An objective which most certainly has been achieved in the Treaty is the démocratisation of the Union, which had been indicated as a necessity during the Laeken summit in 2001 where political objectives for the fundamental reform of the Union had been discussed. Démocratisation is achieved through the strengthening of the role of the European Parliament as one of the three chief institutions as well as through the strengthening of the role of national

parliaments. Personally I have my reservations as to whether it is a good solution that national parliaments should participate in the law-making process, through the assessment of law-making proposals of the European Commission in the light of the subsidiary principle. I believe that the coherence of the Union should be increased through the strengthening of the role of the European Parliament in the law-making process, rather than through supporting national parliaments. This is a decentralising tendency, diminishing the role of community institutions to the advantage of national ones. In any case, this is what the constitutional treaty stipulated and what the Reform Treaty stipulates now.

From the point of view of those who believe that the Union should be advanced, that it should increase inward solidarity as well as outward efficiency, it seems that the most important development is the strengthening of the community method, both through widening the scope of majority voting and through acknowledging the codecision procedure, i.e. the procedure in which the Parliament plays a greater role than in other procedures. This codecision procedure now has the status of a normal legislative procedure.

Now let me say a few words about the widening of the scope of majority voting. Firstly, it is important that the number of areas in which the Union will make decisions by means of a qualified majority vote is increased by about 40. Secondly, one should realise what these areas are, and which areas have been reserved for a unanimous decision of the Council. The unanimous procedure will still apply in sensitive areas such as tax policy, social policy, common foreign and security policy in terms of strategic decisions, defence policy also in terms of strategic decisions, as well as issues of accession and amendments to the treaties. This seems to be a sensible decision. I am not certain whether it is a fortunate decision that this procedure will soon apply also to structural funds. It would seem that structural funds should gradually be moved into the area of majority vote. Of course, one must think here about what is in the best interest of Poland. As a country which is influential in the European Union politically and in terms of its population, but which is economically weak (only 4th from the bottom among the 27 member states, if we measure economic potential by gross national product per capita), it should be interested in having a situation where as many areas as possible are moved from the intergovernmental method to the community method. It is therefore in our interest to widen the scope of application of the community method of law-making in the European Union.

Another underlying concept of the constitutional process discussed in Laeken was bringing the Union closer to its citizens. The two methods proposed were through popular statutory initiative (where a million citizens may put forward a draft of a legal act) and the obligation to sustain dialogue with non-governmental organisations. It seems that the current version of the Treaty fulfils these expectations.

Let me now focus on foreign and security policy and defence policy. As I mentioned before, from the Polish point of view it is highly satisfactory that the unanimity principle has been retained in these areas, even though the qualified majority principle was introduced at the subsequent stages of implementation of fundamental decisions undertaken by European leaders. This consolidation of the common foreign and security policy, as you are well aware, will be exercised through the function of the High Representative of the Union for Foreign Affairs and Security Policy. This function will also work to bring close the Commission and the Council, and it will eliminate the unfortunate dualism where there is a separate scope of responsibility of the European Commissioner for External Relations and of the High Representative for Common Foreign and Security Policy. Giving the Representative the rank of Vice-President of the Commission should additionally fortify and align the foreign policy of the EU. With the backing of the External Action Service, this policy should be enforced efficiently under the Treaty. Of course, the question remains open whether there is the political will to do so. Naturally, even the most efficient institutions will be useless if there is no political will to use them for the common good. I am however deeply convinced that no treaty could possibly instil this will in European leaders. This must flow from the community of interest of the member states. It is therefore a favourable circumstance that the reform ensures the efficiency of the institutions which will be at the disposal of the leaders.

As far as defence policy is concerned, two or maybe three elements are important. Firstly, the introduction of the solidarity clause. This is the clause which compels the Union to react if the security of one of the member states is under threat, for example due to a terrorist attack. Secondly, the introduction of the principle of mutual assistance, which does not collide with NATO obligations but strongly resembles Article 5 of the Washington Treaty. Of course, the European Union will only be able to enforce the mutual assistance principle if it has the appropriate, sufficient, at least minimal military potential, and this is not going to happen immediately. The European Defence Agency will not work in a vacuum, which is important too; it was established in 2004 but only now is being placed in the European treaties.

Another novelty is the provision on energy solidarity. This is a consequence of the Ukrainian and Belarusian crises of 2005 and 2006, as well as of a certain change in mentality in the member states and of the coordinated efforts of the government and the opposition to see this kind of provision introduced.

And finally, to conclude this overview of the changes, the change in the double majority voting system, i.e. the departure from the system negotiated in Nice. I believe this is not a good time to return to the old disputes. Suffice it to say that the prolongation of the application of this system until de facto 2017 has its im-

portance to Poland, and the eventual introduction of the double majority system after 2017 is just an addition to what has been decided earlier. Poland's interests should be well-protected by both of these mechanisms. Of course, as a member of the party which very strongly supported the "square root of the population" system, I deeply regret the fact that this system failed to win sufficient support among the other member states. Frankly speaking, in the tough world of European Union politics it matters very much how the proportion of votes is shaped, and for Poland, the square root system would have generated much more favourable results.

To conclude: First of all, the Reform Treaty, as opposed to the constitutional treaty, does not have constitutional character. It is also not revolutionary in terms of the legal system of the European Union. It does however make things more efficient, it modifies them, introduces a sense of order. From the Polish perspective, the adoption of the Treaty, with its provisions, structure and contents, is advantageous. Undoubtedly Poland wins more than it loses as a consequence of adopting the Treaty. The new Treaty will certainly demand more from the Polish political elites than the previous Treaties did.

From the European perspective, does the Reform Treaty satisfy the requirements set out in Laeken in 2001? It certainly brings the Union closer to its citizens, makes it more democratic, more transparent. Whether or not the Union will be more efficient and whether it will gain greater significance in the world, will have more impact on global matters? I do not believe this depends on the Treaty. What it does depend on is the potential of the European Union, its political potential. This potential in turn stems from the shared political will of the leaders of the European countries to act together on the international scene. Thank you very much.

TREATIES
- CONSTITUTIONS

Chairpersons:

Professor Barbara Stoczewska, PhD

Professor Andrzej Bryk, PhD

Part 1

Professor TADEUSZ BIERNAT, PhD - Andrzej Frycz Modrzewski
Krakow University College

The Structure of the European System and the Legitimization Process of the European Constitution

The problem

Due to the constitutional crisis in the European Union caused by rejecting the Constitution which was accepted and signed by 25 member states and on the account of stopping the process of ratification, it is worth drawing attention to the problem of legitimisation of the European Constitution.[1] This issue has been thoroughly discussed in the literature of the subject. I strongly believe that such analysis is necessary in order to explain the existing paradox and the misunderstandings. In this short essay I aim only at presenting the direction of a possible explanation of the problem and not at an explanation, which would require, at least in the most fundamental points, a thorough justification.

In my deliberations, I concentrate mainly on two issues which seem to be of utmost importance for the problem under discussion. The first problem concerns excluding the Constitution from legitimising analysis. It is only a part of a broader issue concerning legitimization of law. The second is connected with structural interdependence of a constitution from the existing

[1] In this essay I use the notion "European Constitution" as an equivalent for the *Treaty establishing a Constitution for Europe*, Official Journal of the European Union, C 310 Volume 47,16 December 2004. The use of this equivalent term is not only a mere simplification. In this way I emphasise "a constitutional character of this legal act" I fully agree with Rainer Arnold's standpoint on this issue expressed in the monograph *The Different Levels of Constitutional Law in Europe and Their Interdependence*, [in:] *Challenges of Multi-Level Constitutionalism*, ed. J. Nergelius, P. Policastro, Kenji Urata, Polpress Publisher, Krakow 2004, pp. 105-106.

system, which is a feature of the European system. The hypothesis which is under analysis in these deliberations is as follows: the legitimisation of a political system as well as the legitimisation of constitutional solutions is interdependent. The development of the European system determines constitutional solutions. The elements of the system that gain the highest social approval potentially influence the process of legitimising a relevant constitution. Such constitution grants a legitimising support to the system.

/. Constitution and the problem of legitimacy

The answer to the question of whether the European Constitution needs legitimisation depends on settling a broader issue, namely if any constitution needs legitimisation. Both of these notions, namely constitution and legitimisation, have many meanings, and combining them results in even greater interpretative problems. The problem concerning the circumstances and factors of a constitution's legitimisation process depends on how one understands the term "constitution".

In the traditional interpretation, a constitution is characterised by properties which are considered indispensable for a constitutional act - a feature well visible in many perspectives. Two such properties are subject sovereignty and the power derived from the sovereign subject. Apart from these fundamental qualities, there are additional specifications which allow for a more ample characteristic of the constitution by accepting a particular definition, such as, for instance, the one stating that a constitution is: "The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the fundamental principles to which its internal life is to be conformed, organising the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. A charter of government deriving its whole authority from the governed."[2] Other fundamental features of a constitution emphasise its following aspects: a constitution is the absolute rule of action; any official act in breach of it is illegal, and the constitution frequently lists the rights of the individual and guarantees their protection.[3]

Beside this traditional perspective, many interpretations appear, not only historically changeable, which point to the evolution of a constitution from a set of institutional decisions to an anthropocentric approach that places an individual in the centre of a normative constitutional order. These approaches

[2] P. Jean-Claude, *Does the European Union have a Constitution?Does it need one?* (available at www.jean-monetprogram.org/papers/00/000501.html).

[3] *Ibidem.*

also come as a result of putting the focus on various aspects of the constitution. As Dario Castiglione observes, "from this perspective, we can distinguish between four general meanings of the constitution, referred to here as the positive, the absolute (either in the normative, the positivist, the voluntarist, or the organic sense), the functional and the instrumental."[4] Nevertheless, the main focus in this approach is placed on constitution as a complete act, "constitution in the true meaning of this word". Castiglione emphasises that the most fundamental meaning of the constitution is the absolute concept of the constitution. The use of "absolute" does not indicate any transcendental quality, but the sense in which the constitution itself provides the basis for a normative order. "In its absolute sense, the constitution, or the constitutional meta-text, needs to be distinguished from individual constitutional laws and even from the sum of them. As the source of legitimacy, it must possess a certain unity and internal coherence, so that appeals to it may be meaningful and capable of carrying conviction. The purely formal characteristics of a constitutional text - such as written form, its aggravated amendment procedures, etc. — cannot by themselves be the basis for such a coherent normative order, so that the constitution must either have or stand for some more substantive norm-engendering principle."[5]

Both approaches to a constitution, namely the traditional one and "constitution in the true meaning of this word" to a large extent complement and supplement each other. A constitution in such meaning is primarily the source of legitimisation, and it is only to a very limited extent subjected to a legitimisation process. It is the act of emanating the general will, which does not require any explanation or justification because of its nature. The way a given constitution is legitimised derives from the constitution itself.

In this sense, the constitution is making stands, above all, for a choice between the possible versions of the organisation of a social and political order. The creation of the constitution understood in this sense is a specific process requiring both a certain amount of social support regarding its content and clearly regulated procedures of its acceptance. Most of all, however, the issue concerns appointing a subject that can and should be given the authority, that is the competence, to become involved in constitutional activity, as well as appropriate representation. It should also be assigned an object - a clearly determined sphere subject to constitutional power *(pouvoir constituant).*

The process of applying this meaning of a constitution is closely connected to the political and social situation of a given entity. It concerns two paral-

[4] C. Dario, *The Political Theory and the Constitution*, [in:] *Constitutionalism in Transformation: European and Theoretical Perspectives*, ed. R. Bellamy and D. Castiglione, Blackwell, Oxford 1996, p. 6.

[5] *Ibidem*, pp. 7-8.

lei processes, namely the creation of a constitution and formation of a political system which starts "from the basis" This is a particular period in the life of any political community *(demos).* It is a special political time in which the opposition against the old, destroyed order is a strong motive justifying the assumed values, expressed in the principles and norms which constitute the normative basis of a new social and political order. The same causes and forces have a decisive influence on this process. As Urlich K. Preuss writes:

"The power to make a constitution is the power to create a political order *ex nihilo.* Of course, in reality there is no such thing as a *nihil,* therefore new constitutions are empirically instituted on the ruins of an order which has collapsed after a revolution, a lost war, or similar catastrophic event. In modern terms, constitution means the active making of a new order, as opposed to its gradual emergence in the course of a continual historical development. Constitution - making involves the idea of an authority and an author whose willpower is the ultimate cause of the polity. This is an idea that could only spring from the natural law assumption that "all men are by nature equally free", since only the voluntary acts of free men could justify their duty to comply to any kind of human rule. Hence, only the collective acts of free men could be accepted as the legitimate source of political rule."[6]

It should be emphasized in the context under discussion that such a meaning of the constitution occurs not only in scientific research. Such a standpoint, based on the findings from the history of the constitutionalism, is clearly seen in commonly shared social attitudes to a constitution, its significance and function. A constitution understood in such a way has the meaning of a symbol in social consciousness and is treated as a *sui generis* act of exceptionally creative force. The reality is "created" by a constitution and is perceived through the prism of constitutional assumptions.[7]

2. Questioning the universality of modern constitutional visions

In the abovementioned situation, it is hardly possible to do away with a dominant, or to simplify, a modern vision of a constitution, closely connected with the notion of sovereignty, which also has a well-established meaning. The concept of sovereignty constitutes the basis of fundamental theoretical construc-

[6] U. K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution,* [in:] *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives,* ed. by M. Rosenfeld, Duke University Press 1994, p. 143.

[7] It is seen in the Constitutional acts, e.g. the Constitution of the Republic of Poland of 2nd April 1997. Article 1 states: "The Republic of Poland shall be the common good of all its citizens" and Article 2: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of the social justice." The Constitution of the Republic of Poland of 2nd April 1997 as published in Journal of Law, No. 78, item 483, in: *Polish Constitutional Law. The Constitution and Selected Statutory Materials, Bureau of Research Chancellery of the Sejm,* Warsaw 2000.

tions. “Sovereignty is, or has been, an important component of the conceptual apparatus not only of jurisprudence, but also of legal philosophy, political science, sociology, and political praxis.”[8] In the classical view, sovereignty is “the ultimate source of absolute, inalienable, indivisible political authority within a realm.”[9] On the other hand, the problem of sovereignty in the modern world makes it easier to question the traditional conceptions of a constitution.

The critique of the dominant paradigm of sovereignty takes two forms. The first one is of a philosophical nature, typical of post-modern thinkers. The idea of sovereignty is a part of the “grand narratives” of the Enlightenment philosophers and later thinkers of the modern era. The postmodernists reject foundational concepts of sovereignty. They are sceptical about the modernists’ claims for the use of reason as a way of solving social and political problems. The juridical-political model of sovereignty must be rejected on the grounds that people are not free and autonomous but, instead, they are determined by the narratives in which they are situated.

They are critical about foundational concepts of the theory of sovereignty, such as justice, the social contract, and autonomy of individuals, natural laws, and consensus. “Consensus is a legitimating myth that has been used as an excuse for state tyranny, a way of rationalising the accumulation of knowledge that only enslaves us but does not lead to the emancipation promised.”[10]

The second form of criticism has a different point of departure. This point is a question of whether the classical model of sovereignty is still adequate to the contemporary world and useful in a theoretical approach. The contemporary world is changing, and the changes of political organisations are extraordinary.[11] The globalisation of the community of states, the erosion of all the elements of the classic concept of the state, the transferring of sovereign rights to international organisations, the supremacy of international law over the national legal order - all these facts are important and decide that sovereignty has been constantly eroded in the contemporary states of Western Europe.

[8] A. Jyranki, *Transferring Powers of a Nation State to International Organisations: The Doctrine of Sovereignty Revisited,* [in:] *National Constitution in the Era of Integration,* ed. A. Jyranki, Kluwer Law International, London-Boston 1999, pp. 61.

[9] C. W. Morris, *An Essay on the Modern State*, Cambridge 1998, p. 178.

[10] D. E. Litowitz, *Post-modern Philosophy & Law,* Kansas 1997, University Press of Kansas, p. 113.

[11] A. Jyranki writes: “There is a growing tendency in the world which has been called the ‘erosion of all elements of the classic concept of the state’. This all belongs to the world of facts. What about the normative world? What has happened to the constitutional doctrine of sovereignty in our time? Soon after the end of World War II, a new trend was seen in international constitutions adopted particularly in Western Europe: in certain constitutions provisions were included, which in various ways linked together constitutional law and international law. These were provisions which explicitly established the supremacy of international law over the national legal order or empowered transferring sovereign rights to international organizations or limiting state sovereignty in favour of such organizations”. A. Jyranki, *op. cit.*, p. 63.

The changes taking currently place in the forms of a political organisation of a society, the process of diminishing the sovereignty in a classical understanding, result in the fact that the concept of a constitution, used for a long time in different meanings in political and legal discourses, should be much more closely connected with development tendencies taking place in modern times. Such interconnection makes discussions on the subject of a constitution not only more clear but also closer to real problems. When we pay attention to the development of a modern polity, including the European Union, which differs from the state and international organisations,[12] we can find new bonds in relations between a political system and a constitution. These relations point to the necessity to reach an "adequate" conception of a constitution. Among numerous suggestions, the one which deserves our attention is to differentiate three conceptions of a constitution, namely a formal, material and normative one.[13]

These suggestions are as follows: "*The formal constitution* can be defined as the set of legal norms contained in a document (or compilation of documents) that is referred to as the constitution in social practice."[14] The idea of a formal constitution is intrinsically modern. Modernity came hand in hand with the identification of law with written law. The second type is "the material conception of the constitution". "The material constitution can be defined as the norms of social interaction that are regarded as fundamental norms according to social practice. Legal scholars tend to refer to the material constitution in a more narrow sense, namely as the norms that can be considered as the fundamental norms of the legal order of a given community according to the social practice of the legal actors of the said community."[15] The third type is "the normative conception of the constitution". "The normative constitution is composed of those norms that present certain properties which are normatively relevant" (...) "The concrete 'ideal' standards to be considered vary with different normative conceptions of the Constitution. There could be as many normative conceptions of the constitution as there are normative theories, that is, theories about what is right."[16]

[12] "While it is easy to give a negative definition of the European Union - it is not a state, not even a federal state, it is not a traditional alliance of states, it is not a confederacy - it is impossible, at least up until now, to define it positively". N. MacCormick, *Liberalism, Nationalism and the Post-sovereign State*, [in:] *Constitutionalism in Transformation: European and Theoretical Perspectives*, eds. R. Bellamy and D. Castiglione, Blackwell Publishers, Oxford 1996, p. 137.

[13] A. J. Menendez, *Three conceptions of the European Constitution*, (available at http://www.sv.uio.no/arena/presentation/Menendez.htm).

[14] *Ibidem*, p. 4.

[15] *Ibidem*, p. 5.

[16] *Ibidem*, pp. 8-9. The basic insight underlying the normative conception of the Constitution can be derived from Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789. Any society in

The differentiation, which has been introduced, seems to be justified from an analytical point of view; what should be emphasised, however, are the existing relations and the interdependency of particular types. In practice none of them exists in pure form; however, the value of such differentiation lies in the possibility of choosing a more adequate type regarding the problem of constitutionalisation of the European system and the process of legitimisation. From the point of view of the European system's character 'the material conception of constitution' seems to be more adequate, although it creates more difficulties in the analysis of the legitimisation process.

3. The problem of legitimacy

Real problems with legitimisation of a constitution arise when we question this type of legitimisation process that is based on the assumptions of sovereignty and general will. I am far from the opinion that legitimacy is the myth and that: "Politicians talk about legitimate government, but people feel that the government is a joke. Lawyers speak of justice, yet the country is torn apart by race and class divisions. We plunder third world nations in order to 'liberate' them, and we harm indigenous peoples and deprive them of their right to seek redress. Finally, we talk about consensus, but nobody really believes that we actually give ourselves laws; instead we feel that laws are imposed on us from above."[17]1 would like to stress that legitimacy has significant importance for the functioning of social and political system and its elements. However, in the case of determining the concept of "legitimacy" attention should be drawn to the relation with reality, which is more complicated than it could be inferred from even such deeply grounded theories as the theory of a social contract. In fact, these theories employed for research of reality pose more questions than give answers.[18]

which the protection of rights is not guaranteed and the separation of powers is not established, has no Constitution. According to the said article, what is the constitution is not something to be determined by mere reference to social practice. 'Ideal' standards (in the sense of counterfactual) play a major role.

[17] D. E. Litowitz, *Post-modern Philosophy & Law,* University Press of Kansas, Kansas 1997, p. 125.

[18] Legitimising processes are in the centre of attention. On the one hand, legitimisation is perceived as an indispensable basis of a system's proper functioning. On the other hand, lack of legitimisation is perceived as a phenomenon characteristic of modern forms of a society's political organisation. The fundamental problem of changing the ways in which the legitimisation process is carried out is caused by many reasons. Some of the latter are as follows: questioning legal justification, legality of a system as a synonym of legitimisation; questioning democratic procedures as sufficient for legitimising the creation of authority and law-making; questioning and rejecting the creation of political reality based on grand narratives and ready-made projects worth realising (the thesis of post-modernism). The most crucial issue is formulated in the following way: *"From the principle ofpopular sovereignty derives, most obviously, the electoral authorisation of government, and the criteria of representation, accountability, and soforth, that comprise the manifestly democratic aspects of legitimacy. At the same time, however, the legitimating belief that the people constitute the ultimate source ofpolitical authority raises acutely the question 'Who constitutes the people?' and makes issues ofpolitical identity, of territoriality, of inclusion and exclusion, equally crucialfor political legitimacy"*. D. Beetham, and C. Lord, *Legitimacy and the European Union,*

Even more difficulties appear in the case of determining the concept of "legitimacy". It requires precise determination of this notion, because a rudimentary form of a legitimacy theory is always included in this meaning. It is the place where the problem appears, namely which understanding of the term 'legitimacy' is relevant to the question under discussion. Differences between occupied positions are fundamental.

I. The first and most popular understanding of legitimacy is preferred in connection of the two notions: "democracy" and "legitimacy," which give "democratic legitimacy" This suggests that "non-democratic legitimacy" is possible. Are both of these manners equal?
II. Legitimacy as a consequence of efficiency.
III. Legitimacy as synonym of legality.
IV. Legitimacy as a form of social acceptance.
V. Legitimacy as a form of social consent.

I did not reject any of the different abovementioned "ideas." Each of them has its "own truth" and is important in the recognition of socio-political phenomena: the basis of social relations. In my suggestion of legitimisation process analysis, I focus mainly on its dynamics. The principles of the proposed analytic model rely on the thesis that the legitimisation of the social object, or the social area in general, is related to the independent individuals who accept and justify the existing social reality from the viewpoint of their own autonomous orientation. Such autonomous orientation means a permanently renewed process of recognising the social reality, understanding, and sense attribution. The suggestion of research paradigm is derived from the following fundamental issue: whether, and in what conditions, the process of legitimisation is analytically possible. It is defined as a gradual legitimating situation. It is determined by the "normative minimum," which, at present, is usually law-based in nature. This normative minimum is the one that could be found in principles of democracy.

According to the proposed model, legitimisation is a kind of game played by a social agent with different aspects of the social and political system (first of all, political power) if he or she is able and interested to do so. We use well-known patterns in this game, such as what is moral, correct, legal, right, etc., but we do not have a prescription to tell us what is legitimate as a whole. On each level of a political and legal system, processes of legitimisation are still exercised.[19] Additionally, the dynamics of a political system is the reason why the problem of legitimacy is so complicated.

[in:] *Political Theory and the European Union. Legitimacy, Constitutional Choice and Citizenship*, eds. A. Weale and M. Nentwich, Routledge, London and New York 1998, pp. 16.

[19] T. Biernat, *Legitymizacja władzy politycznej. Elementy teorii, [Political Power Legitimisation. A Theoretical Approach]*, Wydawnictwo Adam Marszałek, Toruń 1999.

The effect of the legitimisation process is to stabilise justified and socially explained institutional and legal system solutions which are socially accepted and supported. In this context, searching for the sources of legitimisation is vital and can also refer to a constitution. What is also of utmost importance, I believe, is seeking such constitutional solutions which would be adequate for the whole system.

4. Adequate constitutional solutions in respect to the European system

Why do I consider the type of a constitution characterised above as a material constitution to be more adequate and why there is a bigger opportunity for it to gain legitimisation? The answer is in the characteristics of the system. The core of the issue is the distinctiveness of the European system. Since the very beginning, the European system was more legal than political, and developed as a "Community of Law."[20]

The formulation of the thesis that the European system has been based on law as its foundation, and that this basis constituted an original and unique solution in comparison to the previously known forms of social organisation, raises the following question: was the establishment of the Community an undertaking limited to the economic sphere, or was it expected from the very start to expand its scope of interest from a purely economic to a political one, and if so, how does this affect the process of legitimisation? It is, thus, a very specific kind of system-making process, which begins to develop and expand, comprising more and more spheres of economic, at first, and then social life from the very moment of its creation. This system, which escapes any sort of definite classification (it is neither a state, nor an international organisation), manifests a range of exclusive characteristics. Let us examine some of the fundamental issues pertaining to the above-mentioned unique features of the system.

Apart from the position of law as its basis, other significant features are the characteristics of the legal system itself, the legal sources that create this system and the law-making procedure. However, the most important quality results from the fact that the system is created not only by states but also by nations. Consequently, there is no central source of political authority. The system comprises a unique structure of institutions.

However, the essence of the problem is not only that the above-mentioned features of the system form a particular category of issues that require solution, or that are meant to be regulated on the level of the constitution. It refers,

[20]1 present this problem in my book *Community of Law. On Particularities oftheEuropean System*, Wydawnictwo Adam Marszalek, Torun 2002. The term 'Community of law' is often used as 'a polity under the rule of law.' "The EU's ability to establish itself as a 'Community of law,' i.e. as a polity under the rule of law, has been critically important for propping up its fledging legitimacy." V. Roben, *Constitutionalism of Inverse Hierarchy: the Case of the European Union.* I use the term 'Community of Law' in a broad sense, as a base of the polity.

above all, to the fact that the system, which has been developing for over fifty years, has worked out particular solutions, and created certain practices, which were the objects of the legitimacy or were under the pressure of legitimacy.

Considering the fact that the European system was for many years more an economic than a political form of organisation, it is possible to venture the thesis that it was much easier to reach legitimacy referred to its elements. Numerous contradictions appear in the frame of the political system, and it is more difficult to use proper arguments and measures. This system is 'open' and, as a consequence, transformed according to the extension of the political domain.

Changes in the European system, particularly its development and widening the field of the decisions which were taken, have resulted in a visible movement in the direction towards a political system, from economic to political community. It is worth emphasising that these changes were forced rather than planned and implemented according to the assumed plan. The process of enlarging the domain of community's authorities has been manifested in the regulations included in the treaties and has caused, or more strictly speaking, has made possible the discussion on the future and the European Union's Constitution. The events that were of a crucial effect were the political changes in the 80s and 90s. This was the time when two problems which have been the subject of heated academic discussion arose, that is "lack of a constitution" and a "democratic deficit".

The question whether the European Union has a constitution or not is very complex. First of all, it is a political problem. Jean Claude Piris, Legal Adviser of the intergovernmental conferences which negotiated and adopted the Treaty of Maastricht and the Treaty of Amsterdam, observes that "(...) the debate about a 'Constitution for Europe' is mainly a political one. To be or not to be in favour of such a Constitution often means to be or not to be in favour of the establishment of a Federal or a Confederal European State. This political debate is legitimate. Lawyers, however, should try to frame their reflections, as much as they can, on a more legal and institutional basis."[21] Differences between opinions represented by various scholars are significant. It is stressed, on the one hand, that the Communities already have a constitution. On the other hand, the lack of a proper European constitution is sometimes said to be an essential part of the legitimacy deficit of the Union.[22]

Another significant element is the phenomenon manifested in a deficit of EU citizens' participation in its political sphere of life. As a result,

[21] P. Jean-Claude, *Does the European Union have a Constitution?Does it need one?*

[22] A. J. Menéndez presents the following opinion: "The European Union already has a material constitution, both in a structural and a substantial sense, but it cannot be said to have a formal constitution or a democratic constitution", *op. cit.*, p. 14.

a problem appears of lack of sufficient legitimisation in regard to both the whole system as well as particular EU institutions. It is an essential feature of the system which not only characterises the system but which also determines the field of a clearly focused discussion concerning the mode of constitutional regulations, legitimisation of the system and its constitution. Its participants express the standpoint that special attention should be paid to the deliberative democratic conception of constitution, e.g. normative concept of the European constitution. The deliberative democratic concept is the most adequate theory in order to reconstruct most of the constitutional traditions of the member states of the EU and the Union itself. What is more, the fact which is emphasised and taken advantage of is that the deliberative-democratic concept of the constitution defines as constitutional such norms that have met the highest standards of democratic legitimacy. Thus, the democratic principle is clearly associated with the idea of the formation of a common political will in a way which is respectful for the autonomy of all citizens.[23]

In such an approach, similarly to the abovementioned issue of traditional understanding of a constitution, the concepts of a constitution and legitimisation visibly complement each other. The question whether a constitution needs legitimacy is not justified in this context because the outcome of a general will, expressed in conditions ideal for a political discourse and reflecting shared values, is legitimised by itself. Moreover, a constitution of such legitimisation force and reached in such a way constitutes the basis of the whole system of legitimacy and the system of making political decisions.

5. A false dilemma

This way of directing the discussions has determined the process of making particular attitudes common, both in the circle of politicians and in European society. These attitudes have caused a failure of the efficiency and legitimacy of the European Constitution. To simplify, the problem consisted in formulating alternative visions: either a constitution and then we deal with a certain threat like the European federal state and the loss of sovereignty of the member states, or rejecting the constitution irrespective of its content. The notion that the material constitution is relevant in the European system finds confirmation in the constitution-making process. The process of forming the European constitution was an act of adjusting fundamental legislative solutions to an already existing system; it was neither an act of creation, nor did it introduce changes as deep and significant as to be called an act of transformation. In a case like this, a constitutional act has more of a stabilis-

[23] *Ibidem*, p. 10.

ing or modifying than revolutionary function.[24] Stressing this feature, I am emphasising a particular dependence of the constitutional process on facts and on the existing reality, rather than on ideological or doctrinal choices. In consequence, the particular features of the current Communities and the existing legal solutions delimit the boundaries of the European systems changes. These features and solutions restrict provisions concerning the constitution, and, in doing so, they exert a predominant influence upon their content. Such dependence marks that the creation of the European constitution was rooted in the type of system which limits the European Constitution.[25] For that reason the thesis that legitimacy 'anchored' in a deep structure of the system can play a significant role in renewing the processes of legitimising new norms or institutions has a particular meaning in relation to the European Union. These legitimated elements of the system are a fundamental source of legitimacy of the European constitution.[26]

I am not carrying out here a detailed analysis of the content of the Treaty Establishing a Constitution for Europe from the point of view of the changes implemented to the European Unions legal order. However, the abovementioned opinion about a stabilising and modifying function has been manifested in the legal solutions included in the document submitted to the member states for ratification. It should be noted that a number of solutions, not perfect, but positively modifying the current state by its clarification, have appeared in this document. The examples of such solutions are, first of all, clarification and classification of the Union's powers, and simplification of the Union's legal instruments.

I refer to what took place in May 2005 as a legitimising paradox. On the one hand, we are dealing with an accepted system, developing naturally, in which a successful economic integration, turned systematically into more extensive unification that concerns political aspects of the social order, has become a self-constituting process. On the other hand, the attempt to create a legal basis of the existing system without implementing revolutionary changes is blocked in the French referendum.

[24] See Volker Rôben's opinion: "The Nice Declaration, the Laeken Mandate, and the Draft Constitutional treaty as it has emerged from the deliberations of the Convention are best read as aiming at reformation, not at revolution, of this model of constitutionalism." V. Roben, *Constitutionalism of Inverse Hierarchy: the Case of the European Union*, Jean Monnet Working Paper 8/03, NYU School of Law, (available at http://www.jeanmonnetprogram.org/papers/papers03.html).

[25] For more on this issue see: T. Biernat, *The Origins and the Limits of the European Constitution*, Archiwum Iuridicum Cracoviense, Vol. XXXV-XXXV1, 2002-2003.

[26] This is the reason why the problem of legitimising a constitution cannot come down to the way it is created. Neither convening the Convention nor its composition or course of activities was of importance in this context. Similarly, we cannot attach too much importance to the charges that the creation of the constitution did not meet democratic standards in the period of discussing the content of the created law. It is primarily the question of paradigms of constitutionality. See P. Policastro, *On the Reconstruction of the Legal Strength of the Constitution in a World in Transition. Multi-Level Constitutionalism Towards Multi-Level Democracy*, [in:] *Challenges of Multi-Level Constitutionalism*, ed. J. Nergelius, P. Policastro, K. Urata, Polpress Publisher, Kraków 2004, pp. 59-60.

An explanation of this paradox is possible in many ways. Discussing even just the crucial ones would require a separate monograph. Starting with such explanations that "the 'no' vote also had more to do with emotion than reason," and finishing with an opinion expressed by a constitutional expert that "this no' was about everything."[27] If we look at this problem from the perspective of "the conditions of legitimisation" one reason seems to be of utmost importance. This reason is a failure to perceive certain changes in the process of constitutionalisation. The Laeken Declaration was, beside the Declaration on the Future of Europe annexed to the Final Act of the Nice Intergovernmental Conference, a cornerstone of the constitution-making process. Justification of the assumed activities has been given the label: "Europe at the crossroads." The steps which were taken meant a proper choice of direction. The fact that the assumed goal has not been reached does not result merely from the strategies employed by the politicians of the member states. Some disorientation has appeared, partly as a result of the abovementioned misunderstandings. Debate about a constitution in the material sense, about legitimisation of the solutions which were adopted,[28] and about whether they can be popular in the European community, can contribute to finding a good solution.

[27] *Dilemma for Chirac as voters say No to everything*, Financial Times, Europe, Tuesday May 31, 2005.

[28] This problem has been pointed to from the very beginning in the documents of the Convention: "The first and most important condition is the legitimisation of the consensus that would need to be embodied in such a constitution regarding the form of the 'European Union' as a political entity or polity." Convention Bulletin Edition 09 - 13.06.02. Constitutional - convention.net.

Professor REINER ARNOLD, PhD - Regensburg University

European Constitutional Law as an Example of Contemporary Constitutionalism

My subject is more general: European Constitution Law as an example of contemporary constitutionalism Last week in Lisbon the Reform Treaty was accepted by the European Council. Can we go on to reflect on a European Constitution, or on European Constitutional Law? The Reform Treaty avoids the term "constitution" and makes believe that it is not a constitution, nor a constitutional treaty, but a simple treaty, similar to the Treaties of Nice, Amsterdam and Maastricht, something very usual, which does not need approval by the peoples. And this despite the fact that the Reform Treaty is perhaps a disguised constitution, as it takes over most of the contents of the former Constitution project. Analysing the substance of this Reform Treaty, we can nevertheless state that its basic concept is of a constitutional character. Yet, it is not a formal constitution, as it was planned before, but a document of substantive or functional constitutional law. I do not want to re-open the old debate on whether the terms "constitution" and "constitutional law" can be transferred from state to multi-state entities I think this is possible because an important shift of competencies, and with this implicitly, of the functions of a constitution from the State to the supranational level, to the European Communities and the European Union, has taken place. What I want to do very briefly is to compare some aspects of contemporary European constitutionalism[1] with this supranational constitutionalism.

Does the substantive constitutional law of the EC, as expressed by the Reform Treaty and existing even before as Community Law, correspond to modern European standards of constitutional law? Where can these standards of modern constitutional law be found? I think in the constitutional orders of the European countries, influenced by the European Convention on Human Rights, and exposed in many respects to EC and EU law. If we extend the term of constitutional law, there are three levels of constitutional law in Europe: firstly, the constitutions of the member states, not only of the European Communities but also of the Council of Europe; secondly, the EC law in its basic normative concepts; and thirdly, the European Convention on Human Rights.[2] Which are these standards, or maybe better: tendencies that have developed to some extent common standards in European constitutional law? First, I think it is the existence of effi-

[1] See R. Arnold, *Interdependenz im Europäischen Verfassungsrecht, Essays in Honour of Georgios I. Kassimatis*, Athens-Berlin-Brussels, pp. 733-751.

[2] See R. Arnold, *The Emergence of a European Constitutional Law, General Reports of the XVIIth Congress of the International Academy of Comparative Law*, ed. K. Boele-Woelki, S. van Erp, Brussels-Utrecht 2007, pp. 763-769.

cient, comprehensive fundamental rights protection, based on the respect of human dignity, mostly assured by constitutional jurisdiction. The most striking feature of the modern European state constitutionalism is what I would call the anthropocentric, human being-related approach of state power. This tendency common now in Europe can be called *individualisation,* the growing emancipation of the individual. I want to state that this is a common tendency in constitutional law, as interpreted by the constitutional courts in Europe, even in particular by the new member states of the EU. I am aware that these rights of course are not always observed. This however is not an obstacle to state that this anthropocentric approach is the most striking feature of contemporary European constitutionalism. As to the Reform Treaty, the Charter of Fundamental Rights to which the Treaty refers[3] and which will be accepted by all the member states, besides Great Britain and also Poland, is a clear sign for this approach. It is comprehensive, combining classic and modern, new rights, traditional liberties and social rights. The Charter disposes of safeguard mechanisms against excessive restriction by legislation, it introduces the principle of proportionality, and it is confirmed by references to the European Convention of Human Rights and to national constitutional traditions.[4] The scope of application of this Charter is wide, and it is binding for the European Communities and the EU as well as for the member states when they execute or apply Community Law. So I can state for this first point that this anthropocentric approach which is characteristic for the European state constitutionalism of today is clearly taken over also by the Reform Treaty. A second standard is the emergence of a modern value-oriented rule of law concept, closely linked to fundamental rights, which is based on legality and constitutionality often assured through constitutional courts. The European Court of Justice has developed a concept of the rule of law, *communauté de droit,*[5] which clearly corresponds to the concepts of the European states. In part rule of law aspects have been expressed in the mentioned Charter, which subjectivises such aspects, transforming them into fundamental rights. An example is the right of good administration, Article 41 of the Charter,[6] which is, in the understanding of German constitutionalism, an objective element of the *Rechststaat,* of the rule of law, but which is taken over, through the intermediary of the ECJ jurisprudence, also to the Charter. As to these two points, individualisation and the emergence of the modern concept of the rule of law, I would name this second tendency the *constitutionalisation of law.* A third characteristic can be stated: the *supranationalisation* and the *internationalisation* of constitutional law, which means that even national constitutions are more and more

[3] See Article 6 §1 of the EU Treaty.

[4] See Art. 52 of the Charter.

[5] See R. Geiger, *Commentary EU/EC Treaties,* Munich 2004, pp. 737-738.

[6] See K.-D. Classen, *Gute Verwaltung im Recht der Europäischen Union,* Berlin 2008.

filled up by supranational concepts, have to observe the primacy of EC law and extend their scope of protection more and more to supranational matters. The supranationalisation of constitutional law is rapidly growing and is completed by a second tendency in this context, internationalisation, which is expressed in the required conformity of national constitutional law to the European Convention on Human Rights.[7] This Convention is an international treaty, maybe it is also constitutional, but in its form it is international, so we can speak also of internationalisation in this respect. The fourth tendency is the *differentiation of power* in the vertical and horizontal sense. It is a tendency to introduce or to strengthen regionalism, maybe also to create federal systems, a common tendency with some certain exceptions in Europe. I think that this vertical power differentiation is clearly visible on the Community level. If you look at the Reform Treaty, taking over what had already been written in the constitutional project or even in the previous Community law, you will find the principle of subsidiarity, which shall be sharpened in its function. A political alarm system will be introduced to make this principle of subsidiarity more feasible.[8] You will also find a vertical competence distribution system.[9] This shows clearly the growing idea to introduce clearer differentiation of power between the EU and member states. And you will find a more detailed clause on a national identity guarantee. All this shows that an equilibrium should be realised between the supranational power and the power of the member states. This is important and indispensable for the stability of 27 and maybe even more member states in the future. The national identity guarantee embracing the constitutional core concepts of the country[10] has an important function also in this process of vertical differentiation of power, by strengthening the competencies and the functions of the member states. And the right to secession, to leave the EU, which is more theoretical than practical, has now been introduced, which is something unthinkable in former times: this is also an issue which shows clearly the idea and the concept of vertical differentiation. Four characteristics have been mentionedr: firstly, the individualisation, the emancipation of the human being, a very striking feature; secondly, the constitutionalisation with the emergence and confirmation of a modern rule of law concept where the constitution is recognised as supreme law; thirdly, the supranationalisation and internationalisation of law, especially of constitutional law; and the fourth feature - the differentiation of power. I would say that the EU Reform Treaty, or more generally speaking the EU constitutional law, clearly conforms to this modern constitutionalism in Europe and contributes itself to its development.

[7] See Fundamental Rights in Europe. The ECHR and its Member States, by R. Blackburn, J. Polakiewicz, Oxford 2001.

[8] See Article 6 of the Protocol on the Principles of Subsidiarity and Proportionality, as an annex to the EU Treaty.

[9] See Articles 2-6 of the Treaty on the Functioning of the EU.

[10] See Article 4 §2 of the EU Treaty.

Professor RYSZARD MALAJNY, PhD - University of Silesia

European Union and the Constitutions of the Member States

I. Government-level Background of the Problem

1. The "Hybrid" Nature of the Union

Let us start with an anecdote. One day two men approached a sage to settle their argument. The sage had heard one of them and said: “You are right” The second one protests: “But you still have not heard me!” The sage replied: “It does not matter. You are also right”. The men left dissatisfied. Then the sage’s disciple addresses him: “Both of them could not be right” The sage: “You are quite right”

This anecdote fully reflects the relationship between the law of the European Union and that of the member states.[1] Unfortunately, the founding treaties contain no collision norms. More to the point, the “hybrid” legal character of the Communities, especially that of the European Union, additionally contributes to those difficulties.[2] Is it a federation, confederation, international or supranational organization? In the literature of the subject there is an agreement that the Union is an unprecedented, unusual and novel solution.[3] The closest - which does not mean close - qualification of this structure seems to be a ’’transnational organization” provided that “transnationality” shall be conceived as “a common exercise of some functions by the states being a consequence of transferring some competences to the international organs”.[4] However, the European Union also shows some features of confederation. Nevertheless, there is still no adequate name either for the Communities, or for the Union.[5] This is the price of originality.

[1] When writing “European Union” I usually mean both the Union itself as well as the European Communities.

[2] This problem resembles controversies on the legal nature of the Holy See which in the light of truly Talmudic deliberations of the canonists is neither a state nor an international organisation.

[3] K. Michafowska-Gorywoda, *Podejmowanie decyzji w Unii Europejskiej,* Warszawa 2002, p. 40; J. Jaskiernia, *Wpływ integracji z Unią Europejską na funkcję ustawodawczą Sejmu RP,* “Studia Prawnicze” 2006, No. 3, p. 22.

[4] See R. Kwiecień, *Suwerenność państwa w Unii Europejskiej: aspekty prawnomiędzynarodowe,* "Państwo i Prawo” 2003, No. 2, p. 30. By the way, the French Constitutional Council found in 1976 that the European Communities are not a supranational but an international organisation like others, while the Communities’ law in substance is the international law (decision 76-71). A. Sulikowski, *Francuska koncepcja suwerenności i jej ewolucja w procesie integracji europejskiej,* „Państwo i Prawo” 2002, No. 8, pp. 81, 82. Yet, J. Kranz believes that regarding the European Communities supranationality denotes three characteristical features: a) independence of members of some organs (issuing valid legal decisions) from the member states; b) transfer of some competences made by the member states on behalf of an organisation (its organs); c) a direct binding effect and application of legal norms of an organisation toward the members states and their legal subjects (natural and legal persons), including primacy of those norms over the norms of a national law. *Suwerenność państwa i prawo międzynarodowe,* ed. J. Kranz, Warszawa 2001, pp. 112,113.

[5] P. Saganek, *Orzecznictwo sądów krajowych państw członkowskich dotyczące Wspólnot Europejskich,* [in:] *Wymiar sprawiedliwości w Unii Europejskiej,* ed. C. Mik, Toruń 2001, p. 175.

In general, a consequence of the fact that lawmaking is embodied within the competences transferred on behalf of a transnational organisation (whatever its name and legal nature) is the necessity to fix the rules of applying that law to the legal orders of the member states. An integrative character of the organisation established by the Union requires its law to be equally and uniformly applied upon its whole territory. Thus, from the Union perspective, the constitutional principles of the application of international law cannot be automatically transferred onto the European law, since the particular states accept different rules of application of this former law. As was already mentioned, a lack of relevant precepts in the very founding treaties makes this situation more difficult. These treaties contain no provision expressing their superiority over a national (internal) law. It could therefore be assumed that fixing a rank for the European law to incorporate it into a national legal order belongs to each particular state.[6] The problem is, however, that some national courts began to issue decisions that, in the case of conflict between an European and national norm, the one issued later ought to prevail. Such an approach offered the member states an opportunity to actually repeal the European acts through passing national provisions of higher or equal legal efficacy with European provisions. Nonetheless, no national court yet has declared a piece of Union secondary legislation invalid.[7]

The problem is that in the 1950s and 1960s the member states fretted that the European organs could remove those civil rights which had been granted before by the provisions of national laws. The courts of those states in the relevant cases sometimes followed the constitutional norms of their countries where the European provisions were inconsistent with the mentioned rights. This is quite clear in *Friedrich Stork and Co. v. High Authority* of 1958 and other cases where the European Court of Justice (ECJ) refused to examine the conformity of an organ's decision with the civil rights ensured by the German fundamental law of 1949 *(das Grundgesetz)* and dismissed the complaint.

In its opinion the ECJ took the position that its task does not consist in inquiring whether the Communities' acts are compatible with the internal law of any member state, including its constitution. Likewise the ECJ is entitled neither to interpret nor to apply the constitutional principles of those states during examination of the legality of the Communities' acts.[8]

[6] D. Mouton, C. Soulard, *Trybunał Sprawiedliwości Wspólnot Europejskich*, Lublin 2000, p. 101.

[7] A. Albi, *Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of "Co-operative Constitutionalism"*, "European Constitutional Law Review" 2007, No. 3, p. 30.

[8] In. al., in already quoted case Stork and in Präsident Ruhrkohlen- Verkaufsgesellschaft mbH v. High Authority, 40/59; J. Planavovä-Latanowicz, *Trybunał Sprawiedliwości Wspólnot Europejskich i ochrona praw podstawowych*, Warszawa 2000, pp. 28, 29, 64.

Nevertheless, at the end of the 1960s and start of the 1970s the ECJ was forced to change its position under the influence of the argumentation of the German courts[9] (see p. III.l).

2. The Principle of Primacy of the European Law

The ECJ quickly excluded an opportunity to "nullify" the European law by the member states. It did has done so particularly explicitly in such cases as *Algemene Transporten Expeditie Ondermining van Gend en Loos v. Nederlandse Administratie der Belästigen* of 1962 and *Costa v. ENEL* of 1964. It set up there the rule of primacy of the European law over the national one as well as the principle of direct effect of the European law upon the legal orders of the member states.[10] In its jurisdiction the Union (the Communities), while exercising its competences, can make commonly binding norms, general and abstract, invoking direct effects upon the legal orders of the member states without any action of the national parliaments; the regulations are acts of this sort. Moreover, in certain situations a direct effect may also be attributed to directives and decisions being addressed to the member states. The Union (the Communities) can also issue some individual acts (decisions) which bind natural and legal persons in the member states. It means that to make the European norms binding in the internal legal order of the member states neither transformation nor approbation of those norms is necessary. They automatically become effective in the member states in the moment of their adoption by an organ of the Union. Therefore, all organs of the aforesaid states are obliged to apply them likewise as their national norms. For the European law is a common law of the European countries. It regulates the legal situation of the citizens of the member states, and thereby it becomes their own law.[11] The con-

' It was the following cases: Stauder v. Stadt Ulm, 29/69 and Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel, 11/70.

[10] True, the first decision left major gaps within the principle of primacy of the European law over a national one, but they have been gradually filled up. A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford 2000, p. 4. Instead, in the second case the ECJ while construing the Treaty of Rome declared: "If the member states have set up the Community for an unlimited time, being equipped with its own institutions, legal personality and capacity, the capacity to international representation, and particularly equipped with real powers being an outcome of constraining or transferring the powers of the particular states, then they have also confined, though in some matters only, their sovereign rights, thereby creating the system of legal norms binding both their citizens and themselves" See also K. Wojtowicz, *Konstytucja Rzeczypospolitej Polskiej a członkostwo w Unii Europejskiej*, [in:] *Konstytucja dla rozszerzającej się Europy*, ed. E. Popławska, Warszawa 2000, p. 159; M. Drobysz, *Stanowienie prawa przez Europejski Trybunał Sprawiedliwości - studium zasady ogólnej*, [in:] *op. cit.*, ed. C. Mik, p. 70.

[11] L. Garlicki, *Członkostwo Polski w Unii Europejskiej a sądy*, [in:] *op. cit.*, ed. E. Popławska, p. 197; M. Mataczyński, *Kto jest ostatecznym arbitrem konstytucyjności w Europie?*, [in:] *op. cit.*, ed. C. Mik, pp. 122,123; S. Majkowska, *Rola sędziów w procesie integrowania prawa wspólnotowego z wewnętrznym porządkiem prawnym*, [in:] *op. cit.*, ed. C. Mik, p. 181; A. Whelan, *Specyficzne unormowania konstytucyjne Wspólnoty i ich wpływ na systemy konstytucyjne państw członkowskich*, [in:] *Zmiany konstytucyjne związane z członkostwem w Unii Europejskiej*, ed. K. Wojtowicz, Łódź 1998, p. 24.

sequence of that is the precept of uniformity of Union law. It denotes the necessity of identical understanding and application of its norms in all the member states. Hence follows a monopoly of the ECJ on its exegesis.

The aforementioned issues belong to constitutional matters; more to the point, they regard the exercise of sovereignty.[12] Small wonder that in *San Michele et al. v. High Authority of* 1962 the ECJ not only had underscored the autonomy of European law, but also confirmed its primacy even over the constitutional norms of the member states. This is one of the rules underlying the entire edifice of the European law. The same position was taken by the ECJ in *Walt Wilhelm v. Bundeskartellamt* of 1968. It was reiterated in the already familiar for us case *Internationale Handelsgesellschaft,*[ii] later in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* of 1977, and likewise in *Tanja Kreil v. Germany* of 2000. In this last case a citizen of Germany had sued her country for the refusal to employ her in the military forces. The said refusal was caused by the then Art. 12a(4) of the German fundamental law prohibiting women to serve in armed formations. This prohibition reiterated some legal acts of lower ranks, e.g. the law on the soldier's profession and the regulation on the service of professional soldiers.

Meanwhile, the European directive No. 76/207 had provided for the implementation of the principle of equal rights for women and men. This is why the ECJ declared all the above German legislation to be inconsistent with that principle. In response Germany changed its constitution the very same year. It was an unprecedented case because for the first time a constitutional norm of a member state had been treated this way.[14]

The ECJ stressed many times that the primacy of the European law is of an absolute character. What this means is that the said primacy depends neither upon the chronological sequence of provisions - i.e. a posterior national provision cannot nullify an European provision due to the maxim *lex posterior derogat legi priori* - nor upon their rank in the national legal orders. So a statute must give way not only to provisions of the founding treaties and to the other sources of the primary law, but also to each norm of the secondary law. To put it differently, a member state cannot justify an in-

[12] K. Wojtowicz, *op. cit.*, p. 161.

[13] In this case the ECJ stated, in. al.: "The validity of the Community's means and their efficiency within an internal law cannot be disproved by the statements that they are allegedly contrary to the fundamental rights having been formulated in the constitution of a member state or to the precepts of its constitutional structure" See also W. Czapliński, *Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości*, [in:] *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*, ed. M. Kruk, Warszawa 1997, p. 190-197, 201, 202; P. Winczorek, *Konstytucja RP a prawo wspólnotowe*, "Państwo i Prawo" 2004, No. 1, p. 10.

[14] L. Garlicki, *op. cit.*, p. 199.

fringement of the European law by some provisions of its internal law nor by the fact that another state also breaches its obligations.[15] This supremacy stems from the very nature of the Union, not from the constitutions of the member states.

Therefore the said states ought also to obey some general legal rules being recognised by the ECJ, so far as they interfere with European law. However, solely in such cases where they are under obligation to respect those rules.

The ECJ has no competence to interpret national law, and even less so to adjudge its validity (Art. 234 of the Treaty on the European Community). However, according to Art. 226 of the Treaty it is entitled to examine the conformity of this law with the European one. This is a control of "unfulfilling the obligations" stipulated in that treaty. It consists in a multistaged negotiating procedure with a member state and may result in a declaratory judgment finding an infringement of an obligation ensuing from the Treaty. Nevertheless, its implementation is entirely the responsibility of the member state (Art. 228.1). In the light of the ECJ jurisprudence, if a national law is not concurrent with the European one, it cannot be applied by the national courts. The sole exception is a situation where a member state is empowered to derogation, that being accepted by the very founding treaties for the sake of safety and public order as well as health protection. Such exceptions can be met among the provisions of various treaties; nonetheless, even they come under examination by the ECJ.[16] It still may be remarked that although the rules of application of the European law constitute a product of the ECJ jurisprudence, they are a part of the *acquis communautaire* and to date the states acceding the Union have treated those precepts as an inherent part of their own obligations.[17]

Some authors dealing with European law also point out that if the Union has no constitution, the ECJ cannot transform itself into a constitutional tribunal on its own. However, considering that this organ is to secure the uniformity of the system of European law, to watch over the competences of the particular Union organs and their distribution, as well as to contribute to moulding an autonomous and hierarchical legal order, it creates a constitutional system *sui generis.* In *Les Verts v. Parlament* of 1983 and other cases the ECJ had declared the founding treaties to be a "constitutional charter of the law Community"[18] Thus, as a genuine law community it undertakes to protect the fundamental rights of individual subjects. This denotes an observance of the hierarchy of norms by the

[15] J. Plańavova-Latanowicz, *op. cit.,* p. 149; D. Mouton, C. Soulard, *op. cit.*, p. 102.

[16] A. Whelan, *op. cit.,* p. 23; K. Dziatocha, *Podstawy prounijnej wykładni Konstytucji RP,* "Państwo i Prawo" 2004, No. 1, pp. 31, 32.

[17] K. Wojtowicz, *op. cit.,* pp. 169-171.

[18] D. Mouton, C. Soulard, *op. cit.,* p. 81, 82.

organs which, in turn, requires a norm of quasi-constitutional status. In this way for a number of years the gap mentioned at the very beginning, concerning a way to treat collisions between the law of the Union and that of its members, is being filled by the ECJ. But do the members states accept this state of affairs with no objections?

3. A Constitution - the Supreme Law

In the European states a tradition prevails that a constitution enjoys supremacy in the system of sources of law, or to put it with a note of pathos is the supreme law of the land. This principle is frequently expressed explicitly in statutes or rooted so deep in theory and constitutional practice so as to become an unshakable legal canon. The said canon is respected by constitutional jurisprudence and the courts, which obey and strengthen it. This particularly affects the Central and Eastern European states due to the newly regained sovereignty, that being closely connected with a peculiar reverence for their own fundamental laws.[19] A field of potential conflict arises here against the background of the current stage of integrative processes. Anyway, no fundamental law thus far voices the supremacy of the European norms over their own, at least *explicite*.

Referring to the national legal acts situated below a constitution in the hierarchy of norms, the problem of their accommodation to the European law arises in due course and the member states possess relatively efficient mechanisms to solve it. On the one hand, they are based upon the precept recognising the primacy of the European norms, and upon the fixed forms of their adaptation correspondingly to their character and the national system of sources of law, on the other.[20] Instead, within the scope of constitutional norms the issue is not always and not everywhere clear as witnessed, e.g., various difficulties connected with the ratification of the Maastricht Treaty; the question of its constitutionality have addressed, in. al., the German Federal Constitutional Court and the French Constitutional Council.

A factor of a less legal but more practical nature is the statement, banal in essence, that the European law potentially can encroach upon the sphere of matters being regulated by the national constitutions. Such a situation may occur at least for this reason that there is no distinct division of competences be-

[19] See W. Sokolewicz, *Nowa rola konstytucji w postsocjalistycznych państwach Europy*, "Państwo i Prawo" 2000, No. 10, pp. 21 ff. From the debates held by the Constitutional Committee of the Polish National Assembly ensues unequivocally that its participants have rejected the supremacy of the European law over the fundamental law - see R. Chruściak, *Miejsce umów międzynarodowych i prawa stanowionego przez organizacje międzynarodowe w krajowym porządku prawnym,* [in:J *Wymiar społeczny członkostwa Polski w Unii Europejskiej,* eds. T. Mołdawa, K. A. Wojtaszczyk, A. Szymański, Warszawa 2003, pp. 352-354; A. Albi, *op. cit.,* p. 32.

[20] M. Kruk, *Konstytucja narodowa a prawo europejskie: czy Konstytucja Rzeczypospolitej Polskiej wymaga zmiany?,* [in:] *op. cit.,* ed. E. Popławska, p. 175.

tween the Union (the Communities) and the member states. Likewise, both the minuteness and the depth of constitutional regulation in the particular countries know no limits. This is why the greater degree of minuteness of a national fundamental law, the easier an European norm can encroach upon its matters.[21]

//. Integrative Norms of the Constitutions of the Member States

1. Implicit Norms

Unlike the European founding acts, a basis to solve the competence conflicts is found in the norms contained in the member states' constitutions. These norms may be divided into two types. The first type are the norms which explicitly name the Communities and the Union; that emphasizes their specificity in contrast to a classical international legal order. The second type, in turn, are the implicit integrative norms, i.e. expressing an opportunity to join some undefined international organizations. To illustrate, the Italian constitution of 1947 comprises solely a general clause which, provided that the equality of states and peace safeguards are at stake, allows a limitation of the state sovereignty within an international organisation (Art. 11). Nevertheless, since the Constitutional Court's decision in *Granital* of 1984 this clause is being construed as a provision that opens Italy's fundamental law to European law. Since 1989 *(La Pergola* law) it is the cabinet which transposes the European directives into the internal law; the cabinet is authorised to do that each year by the so-called framework community laws. There is also the cabinet's statutory responsibility to inform the parliament in the matters of Union politics.

Likewise, one can read in the Greek constitution of 1975: "Greece may discretionarity agree, while passing statutes with an absolute majority of the votes of the common number of deputies, to the limitation of the national sovereignty to such an extent as it is required by an essential national interest; such measures can restrain neither human rights nor the foundations of democratic government and may be implemented upon the base of equality and on the condition of reciprocity" (Art. 28.3). Analogical formulas embrace the constitutions of Belgium, Denmark, Finland, the Netherlands[22] and the states admitted to the Union at the summit of Copenhagen in 2002, including Poland.

[21] *Ibidem*, p. 176.

[22] Oddly enough sounds Art. 91.3 of the Dutch fundamental law of 1983 which states: "Each provision of a treaty being contrary to the Constitution or leading to an inconsistency with it, can be confirmed by the Houses of Parliament with at least 2/3 majority of the votes". So also in this case - in spite of a general rule that the European law "comes into" a fundamental law, in other words, amends it, it is not being made automatically.

Referring to the proper provisions of the Polish constitution of 1997 it needs to be considered that the fundamental norms of the primary law of the Union are expressed in the form of international agreements, and Art. 188.1 requires their conformity with it. This obligation stems also from Art. 91.3, which reads: "If it results from an agreement constituting an international organisation, ratified by Republic of Poland, the law made by this organisation shall be applied directly, having primacy in case of collision with statutes" There is a mention of statutes only, not of the Constitution. Likewise, the European secondary law must also comply with this document. The accuracy of this inference may be additionally confirmed by the proceedings of the Polish Constitutional Committee of the National Assembly. At first the Committee proposed a provision stating the supremacy of European law "in case of collision with norms of the national law". The term "national law" obviously is broader than the notion "a statute" Nevertheless, the Committee had finally dropped this formula due to some fears of the supremacy of the fundamental law in the Polish legal order.[23]

2. *Explicit Norms*

The are some constitutions in force, however, which explicitly deal with the problems of the Union problems. Thus, the German fundamental law Art. 23 reads that "to create a united Europe, Federal Republic of Germany participates in the development of the European Union which respects the rules of democracy, legal, social, and federal state as well as observes the principle of subsidiarity and guarantees the protection of the fundamental rights which can be compared with the rights assured by this Fundamental Law. To achieve this purpose the Federation may transfer the sovereign rights by a statute confirmed by the Bundesrat. Art. 79 shall be applied accordingly to the creation of the European Union and to making changes in its treaty foundations or other comparable norms which change or supplement the content of the Fundamental Law or allow such changes or supplementations". What this means is to refer to the provisions concerning a change of the fundamental law, which require a stipulation that the constitutional provisions do not oppose the agreements at issue and provide that the precepts of federation will remain unchanged.

To the French Constitution of 1958 title XIV "On the Communities and the European Union" was inserted. It embraces, in. al., Art. 88, which allows them to exercise some competences of the government, while Art. 88.4 enlarges the enquiry and control powers of the parliament so as to strengthen its influence upon the European policy. Nonetheless, a relationship between the national

[23]L. Winczorek, *op. cit.*, p. 11.

and European was not clearly determined. The Constitutional Council, however, is authorised to control in advance the integration treaties. Provided that no inconsistencies have been found, the primacy of provisions included in the mentioned treaties cannot be objected to in the future.[24] Moreover, Art. 54 of the constitution unequivocally requires its change if it comes to a conflict with the content of the European treaties or their ratification.

In the Spanish constitution of 1978 Art. 93 permits in general transfered of the competences of the governmental organs to an international organisation or institution. It is a duty of the cabinet to safeguard the consistency of the national law with the European one. Nevertheless, Art. 95 provides: "1. To conclude an international treaty embracing provisions contrary to the Constitution, a prior change of the Constitution is necessary. 2. The cabinet or any House may demand the Constitutional Tribunal to take a position as to the possible existence of this contradiction" Hence it follows that in some matters the supremacy of the national law is presumed, while in others that of the European one is.

The Irish constitution of 1937 declares that this country can become a member of the European Communities, ratify the European treaties and transpose them into national law. It also points to the supremacy of the European law over the national one, which first of all is manifested by the duty to change the constitution so far as it conflicts with European law. It stipulates nothing, however, with regard to a transfer of sovereign rights to the Union.[25]

The Portuguese constitution of 1976 authorises the parliament to conclude agreements providing for the exercise of sovereign rights by the Union. At the same time (as with the German fundamental law) it includes the right to object on the basis of the principle of subsidiarity. It points to the "implementation of economic and social cohesion" as a condition of adoption of some further integrative agreements. In that country the primacy of European law over the national one is recognised, save the constitutional norms. Hence, in the event of a possible conflict a change of the fundamental law is necessary.

The Swedish constitution of 1974 - while regulating a suitable procedure in detail - permits a transfer of sovereign rights to the Union, provided that European law assures protection of fundamental rights. Art. 5 (Chapter X) of the *Instrument of Government* reads: "The Riksdag may transfer a right of decision-making which does not affect the principles of the form of government

[24] See A. Sulikowski, *op. cit.*, pp. 85-87.

[25] For Art. 29.4 (10) of the fundamental law of this country - added by the Amendment of June 8, 1972 - provides: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State"

within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. (...) No right of decision-making relating to the matters concerning the enactment or abrogation of fundamental law, the Riksdag Act or a law on elections for the Riksdag, or relating to the restriction of any of the rights and freedoms referred to in Chapter 2 may be thus transferred". In this document the integrative clause had been inserted prior to joining the Union, because its authors came to the conclusion that the previous norm concerning the participation in an international organisation is insufficient.

The most detailed in this respect is the Austrian constitution of 1920. It regulates precisely: the participation of the Austrian deputies in the European Parliament (Art. 23 a-b); the participation of this country in nominating the officers of the European organs (Art. 23 c) as well as in the pillar of "Common Foreign and Security Policy" (Art. 23 f); informing *Länder* about the Union's activity (Art. 23 d) and the federal parliament by the government (Art. 23 e); binding the government by the position of the parliament if a constitutional change were necessary to implement an European act (Art. 23 e); the situations required by an European act (Art. 50). By the way, Austria is likely to be a model country in terms of respecting European law. To prove it, one can invoke the term *Anwendungsvorrang,* denoting the primacy of application of the said system of law.

3. Other Norms

At present all the fundamental laws of the member states, except Finland, comprise special provisions regulating the status of the European law within the internal legal order of a given country. However, they can be accompanied by some reservations. They are frequently combined with formulas expressing an idea of partial transfer of sovereignty or other forms of its limitation, or transferring the competences of the national organs upon the European ones, or finally the exercise of the mentioned competences by the European organs. This mosaic of formulas prove the lack of a common, more uniform and satisfying concept of sovereignty embracing the structure of the Union, nonetheless, everywhere the same content is being found.[26] From those formulas one can infer that in fact a peculiar "core of sovereignty" may be isolated, untouched both at the moment of concluding an accession treaty and later, with the requirement of an earlier change of the fundamental law in a proper scope.

[26]M. Kruk, *op. cit.,* p. 178.

Moreover, some constitutions of the member states receive the rules effective in the Union. To these belong, in. al., granting the citizens of the member states suffrage in local elections or in elections to the European Parliament (Germany, Austria, Belgium, Spain, France), determination of the status of the central bank in the Economic and Currency Union (Germany, France), determination of the common foreign and security policy (Austria), or determination of the consequences of the Schengen agreement (France). Nevertheless, one may also find examples of silent recognition of some maxims of European law, for instance, of the Union electoral law in Italy. So one can see that an explicit declaration that the national constitutions are subordinated to European law is nowhere to be found.

III. The Jurisdiction of Constitutional Tribunals

1. Germany

On guard of the supremacy of the national constitutions stand the constitutional tribunals, and Germany is particularly vigilant in this respect. As already mentioned, according to the ECJ view the supremacy of the European law excludes the control of the European acts exercised by the constitutional tribunals of the member states under the angle of their conformity with their fundamental laws. This position met with a firm reaction of the Federal Constitutional Tribunal of Germany which in *Solange I* of 1974 stated, that "until the process of European integration reaches a stage where the Communities' law includes also a catalogue of the fundamental rights *{die Grundrechté)* -approved by the parliament, of stable efficiency and comparable with the catalogue of fundamental rights included in the German constitution - courts will be allowed to submit legal questions to the Federal Constitutional Tribunal"

It also pointed out that although the substance of an integration consists in transferring the sovereign rights, some limits cannot be transgressed. Particularly, "it does not open the way to change a fundamental structure of the constitution, underlying its identity".

This reservation was one of the reasons which had led the ECJ to revise its position. It had arrived at the conclusion that fundamental rights constitute a part of the general principles of law and that their observance is to be enforced by the ECJ. In order to determine their content it is inspired not only by constitutional traditions which are common for the laws of the member states, but also by international organs protecting human rights to which the Union states belong or cooperate. The ECJ could not grant the constitutional tribunals the power to apply the norms of the national constitutions over the European law. On the other hand, it could not allow that protection of the rights of the Union citizens was to be judged under a double standard. This is

why it has established a concept of the general precepts of the European law which contain the fundamental rights of an individual. This compromise had solved the problem of protection of those rights. At the same time, it did not breach the principle of primacy of the European law.[27]

The German Tribunal had taken it into account and as a consequence withdrawn its reservations in *Solange II* of 1986. It stated that Art. 24 of the German fundamental law made possible the opening of the German legal order for the European law, including all the consequences of this step. In view of that "so long as the European Community, and the jurisprudence of the ECJ in particular, secure an efficient protection of the fundamental rights - which can be regarded as identical with the minimum required by the constitution - and assure a substantial content of the fundamental rights, the Federal Constitutional Tribunal shall not make use of its competence to rule on the applicability of the secondary Communities' law and to inquire into the conformity of this law with the constitution's provisions regarding fundamental rights".

The Tribunal at issue reflects an evolution of the political system of the Communities and the ECJ jurisprudence. However, commentators have emphasised that as a matter of fact the Tribunal's position did not change much. For it was still pointing out that a "transfer of the sovereign rights on behalf of the supranational organizations cannot amount to an infringement of the identity of constitutional order of the Federal Republic of Germany and an encroachment upon the fundamental structures of this order". The constitutional limits still exist - especially with respect to individual rights - which cannot be trespassed by the Union organs. However, in the present state of affairs the Tribunal sees no need to deal with these questions.[28] Thus, this organ has not constantly quit its power to control the European acts as regards their conformity with the fundamental law. It has reserved for itself such power for the future, while simultaneously stating that it would not make use of it at the moment. This power, however, is still effective and allows intervention on the part of the Tribunal if it considers it necessary. So, the difference is important: the ECJ validates the primacy of the European law over a natio-

[27] In his brief in Societa IRCA v. Amministrazione delle Finanze dello Stato, 7/76 the spokesman General Warner made a point that fundamental rights recognized and secured by the constitution of any member state, must also be recognised and secured by the Communities' law. This point he founded upon the thesis taken from Costa v. ENEL concerning the core of the binding effect of the Communities' law which, according to the ECJ, came into being as a consequence of transferring some powers of the member states on behalf of the Community. Likewise, he also referred to the said point in Renato Manzoni Fonds National de Retraite des Ouvriers Mineurs, 112/76. He wrote that his position had to be right because no member state could transfer on behalf of the Community the power to make laws infringing rights protected by its own constitution - see J. Planavovâ-Latanowicz, *op. cit.,* p. 65.

[28] See L. Garlicki, *op. cit.,* pp. 206, 207; M. Mataczynski, *op. cit.,* pp. 129-131; D. Mouton, C. Soulard, *op. cit.,* pp. 105,106.

nal one just based upon the first law; while the German Tribunal - as well as the Italian Constitutional Tribunal - maintains that this operation of the European law stems from a national constitution.[29] One should also add that for the Federal Constitutional Tribunal it was no problem to accept the primacy of European law over a national constitutional law from the point of view of the further elaboration of the exegesis of constitutional provisions, so as to meet the requirements of the European law. Nevertheless, it stated that there are some boundaries which cannot be trespassed - the foundations upon which the constitution is built - and that it is the province of the national constitutional tribunals to decide about that.[30]

The next essential decision of the German Tribunal concerned the Maastricht Treaty. True, in its decision of 1993 the Tribunal approved its constitutionality, but also restated its opinion about the limits beyond which the European integration cannot proceed. It referred particularly to the problem of so-called implied powers of the Union and indicated that "if the European organs were to interpret and apply the Treaty provisions in a manner inconsistent with their letter, being for Germany the basis to accept them, such effects would not be covered by this Treaty and would not bind the German organs". Referring to *Solange II* decision the Tribunal declared that it exercises its power to adjudicate on the applicability of the secondary Communities' law in a "cooperation relationship" with the ECJ, which is to say that the ECJ guarantees protection of the fundamental rights in all individual cases within the domain of the Communities^ while the Federal Constitutional Tribunal may confine its role to general safeguard of the constitutional standards which cannot be abandoned. In the "cooperation relationship" so conceived, the last word ought to belong to the Tribunal.

In this decision the German judges have expressly emphasised their task to protect the German constitutional order against the European law. They defined themselves as guards standing on the bridge; the fundamental law is located on the one end, while the European law on the other. The European law must cross this bridge so as to get to the German territory. The guards control whether the "traffic" can reach their country according to Art. 23 of the constitution. Therefore, this act obliges the Tribunal to control whether the Union works in conformity with law. In other words, it has to see lest this organisation shall do more than permitted. It is the national legal order which ultimately determines what is permitted, since this is this order which has

[25] R. Hofmann, *Zmiany konstytucyjne związane z członkostwem w Unii Europejskiej - przykład Niemiec*, [in:] *op. cit.*, ed. K. Wojtowicz, pp. 47, 48.

[30] *Ibidem*, p. 65. Parenthetically, in 2006 the Czech Constitutional Tribunal has taken the same position - A. Albi, *op. cit.*, pp. 53, 54.

transferred a part of sovereignty upon the Union. In view of that this order may find whether the Union did not exceed its powers. To decide about that is the province of the national courts, not of the ECJ.[31] This position has been sustained on June 7, 2000. Yet, in its last decisions the German Tribunal had reserved for itself the right to challenge the precept of supremacy of the European law in case centralistic tendencies occur in the Union.[32]

2. Italy and Spain

The Italian Constitutional Tribunal stressed in 1973 that the state exercise of legislative, administrative and judicial powers can be restrained - on the condition of reciprocity and respect for Art. 11 of the constitution of Italy of 1947 - by the foundation of the Communities. However, such a delegation shall not result in an infringement of the "fundamental principles of constitutional order" or the "inalienable individual rights" by the Communities' organs. Therefore, the Tribunal reserved for itself the power to control the constitutionality of treaties concluded with the Communities *(Frontini v. Ministero delle Finanze).*

What happens however when a provision of the European law collides with the national constitution? In *Frontini* the Tribunal stated that it lacks jurisdiction concerning inquiries into the constitutionality of provisions of the secondary European law. It stressed that the norms of the Treaty of Rome are so precise as to exclude an opportunity to make laws based upon them colliding with the Italian constitution. Nonetheless, if it is proved that the provisions of this Treaty had served as a basis to issue regulations encroaching upon the "fundamental principles of constitutional order or inalienable human rights" it would have create a foundation to assess the constitutionality of the very Treaty. In practice what this meant was a declaration of non-interference, because to find the Treaty of Rome unconstitutional would be tantamount to leaving the European Economic Community. Such a step the Tribunal could dare to undertake solely in an extra-ordinary situation. The declaration at issue was slightly confined in 1984 *(Fragd v. Amministrazione delle Finanze),* where in fact an evaluation of the constitutionality of the ECJ position was allowed. Finally, however, the Italian Tribunal accepted the rule that the European norms can prevail over constitutional norms, except a catalogue of some inviolable fundamental principles.[33]

[31] R. Hofmann, *op. cit.,* pp. 52, 53.

[32] See D. Mouton, C. Soulard, *op. cit.,* p. 111; L. Garlicki, *op. cit.,* p. 208; K. Wojtowicz, *op. cit.,* p. 163; M. Mataczyński, *op. cit.,* pp. 131-135.

[33] M. Mataczyński, *op. cit.,* pp. 123-125; K. Wojtowicz, *op. cit.,* pp. 162, 163; L. Garlicki, *op. cit.,* pp. 202, 203; A. Albi, *op. cit.,* pp. 26, 27.

The Spanish Constitutional Tribunal, in turn, did not expressly formulate such a reservation. Nevertheless, from its decisions it follows that an integration within the Union cannot violate fundamental rights and fundamental governmental precepts embraced in the introductory title and Art. 10 of the Spanish constitution. Likewise, the Tribunal also stated that some situations may appear where a conflict between the European law and the Spanish constitutional law could not be solved merely with the help of friendly interpretation of the constitution. Especially, when the former infringed the fundamental constitutional and governmental principles of Spain, e.g. the rule of democracy or the legal state. In such event the Spanish constitution would have supremacy over the European law. Hence it follows that the role of an institution controlling the consistency of both those legal orders will be played by the Tribunal. In 2004 this organ made a distinction between the two notions: "supremacy" and "primacy". The second one regards the exercise of powers conferred upon the Communities, while the first one stems implicitly from the Spanish fundamental law.[34] The aforesaid distinction is to respond to the practice relying upon recognising the supremacy of a national constitution, however, without an open questioning of the superiority of the European law. By the way, the above distinction is also honoured by some Polish authors, though, to my mind it amounts only to tautology.

Parenthetically, the Irish Supreme Court likewise had not accepted the ECJ's *dictum* that the European law enjoys primacy also over the national constitutions. While commenting on the ECJ's thesis that it is supposed to make a final construction of the first branch of law, the Court said it is deprived of such a competence. However, it is its province to ultimately interpret the provisions of the Irish constitution.[35]

3. France

Another approach was elaborated by the French constitutional practice. The French Constitutional Council has formulated a test of constitutionality concerning the international obligations of the state. The said test took the form of the question whether those obligations "violate fundamental conditions of the exercise of national sovereignty". Having applied this test it appeared that the ratification by France of amendments in the founding treaties of the Communities or the Union would have infringed the constitution; in such event an essential condition of ratification is a prior amendment of the fundamental law. Consequently, before ratification of the Maastricht Treaty, Art. 88.2 had been added which made possible the transfer of competen-

[34] DTC 1/2004; *op. cit.*, ed. K. Wojtowicz, p. 87.

[35] *Ibidem*, p. 65.

ces indispensable to establish the European Economic and Currency Union, as well as to prescribe rules regarding crossing the external borders of members of the European Community. Another new provision was Art. 88.3, which granted the suffrage in municipal elections to the citizens of the Union inhabiting France. Likewise, in 1999 the constitution was amended before the ratification of the Amsterdam Treaty so as to supplement Art. 88.2 with an authorisation to transfer the powers "necessary to fix the rules referring to a free flow of persons and the precepts associated with it"[36] Thus, in France against the background of the ratification of the Maastricht Treaty the view has been ultimately accepted that in the case of conflict between the fundamental law and a newly made European act, the constitution is to be amended first. Otherwise, in this country the problem to adapt the fundamental law to the European law is simpler because the Constitutional Council exercises a preliminary judicial review, not a subsequent one.

4. Poland

Due to the short participation of Poland in the European Union, the jurisprudence of its Constitutional Tribunal is rather modest, but nonetheless interesting. Still before the accession the judges stated that an interpretation of the Polish laws "ought to pay respect to the constitutional principle of openess toward the process of European integration and cooperation between the states" They also declared that the "postulate to take advantage of the European law within the pre-accession period as an interpretative inspiration for the Constitutional Tribunal means first of all to apply this law to reconstruct a constitutional pattern while exercising judicial review" They used in this context the term "an exegesis favourable toward the European law"[37] They simultaneously emphasised that application of such a construction must be limited, since "in no circumstances it can lead to results contradictory to the explicit letter of constitutional norms, being unable to reconcile with the minimum of safeguarding functions implemented by the Constitution" An inconsistency between regulations of the European law and constitutional provisions may arise only unusually. However, "in the Polish legal system such an inconsistency can by no means be solved by admitting the supremacy of the Communities' norm over the constitutional one"[38] Parenthetically, in 2005 the Hungarian Constitutional Tribunal stated that the European act regulating the issue of sugar pile-ups is contradictory to the constitution of this country.[39]

[36] K. Wojtowicz, *op. cit.*, pp. 163, 164.

[37] See cases I< 15/97; K 2/02; I< 11/03; K 26/03; K 33/03; K 15/04. See also S. Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie - kilka refleksji,* "Państwo i Prawo" 2004, No. 1, pp. 19, 20.

[38] K 18/04; P 1/05.

[39] 17/2004 (V.25) AB.

IV. Practice v. Theory

1. Practical Aspect

From the above deliberations it follows that discrepancies between the European and constitutional laws in different countries are solved in a variety of ways. A common feature of those solutions is striving to avoid a conflict, i.e., to avoid a confrontation of a national constitution with the European law, especially with the primary law which constitutes a peculiar substantial constitution of the Union. This is a mechanism of adaptation of a national constitutional law to the European law still before it becomes effective, e. g. before a treaty ratification or entering into force of some norms of the secondary law. The point is that it is being done in order that the European law could consistently be declared constitutional. As already mentioned, in France, Germany, Belgium or Spain the decisions finding the Maastricht Treaty unconstitutional had forced prior changes of the fundamental laws. This prompted the idea of making them compatible with the Treaty before it had been ratified by those countries. So, an act already consistent with a constitution was ratified. Such action allows to avoid a situation where a fundamental law is being amended later, in a sense, under coercion - which is of an important psychological significance - or it simply remains unamended. It remains as such, however, with the presumption of primacy of the European norms as higher ones. This psychologically can be even more inconvenient and legally unclear.[40] Nonetheless, the phenomenon of "constitutional amorphousness"[41] may be tolerated solely in a limited scope.

Biernat, in turn, writes that the multi-centrism of legal order consisting of a national and the European law requires not to presume in advance a conflict of norms of both law subsystems and to try to minimise it through a suitable exegesis. *Ultima ratio*, however, is the maxim of primacy of the European law. It is not necessary to deduct the said primacy from the supremacy of European legal order, inasmuch as to deduct it from the common acceptance of the member states is more convincing. On this assumption a source of the primacy rule of the European law lies in the legal orders of the particular countries, if they were to embrace acts authorising them to transfer a part of the sovereign power on behalf of the Union. Such an approach would be easier to accept by the member states - particularly, by their constitutional tribunals - for political reasons. However, the ECJ represents the opinion that the primacy principle is an inherent feature of the European law, and its ex-

[40] M. Kruk, *op. cit.,* p. 178. The presumption of primacy of the European law also over the constitutions of the member states seems to support, in. al., C. Mik, *Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny*, "Państwo i Prawo" 1998, No. 1, pp. 18, 23, 38, 39.

[41] A. Albi, *op. cit.*, p. 67.

tent does not depend upon the national legal orders. If no major disputes in this matter have arisen to date, this is due to the pragmatic approach of both the ECJ and the constitutional tribunals expressing the will of cooperation.[42] It is proper to share the view that federalism offers the simplest and the most efficient way out of this dilemma; with its clear concept of distribution of powers, a hierarchy of legal norms made upon both levels and a *sui generis* hierarchy of the systems of organs - federal and that of the parts of a federation. All this allows for both systemic and incidental solving of similar conflicts.[43] Nonetheless, federalism - for the moment, at least - cannot constitute a basis for elimination of any disputes for all the member states, especially in a uniform manner. For this reason the proposals to establish an European constitutional tribunal are unrealistic (e.g. J. H. H. Weiler). For, to begin with, the Union would have to become a federation - thereby, the independence of national legal orders should be lost - or at least to adopt its own fundamental law. In such a case setting up such a tribunal would be more recommended.[44] This is why Allott in 1997 called attention to the fact that Europe faces the challenge to discover a "constitutional spirit" Calling the European Union into being denotes only a half of the revolution, while moulding it to a final shape will need a "return of constitutional imagination"[45]

One might say that such a return occurred in 2003 when the Constitutional Convention prepared a draft of the Treaty Establishing the Constitution for Europe. Nevertheless, as regards the collision problems this document made little progress. Its Art. 1-6 read: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States" Did the term "the law of the Member States" comprise also their constitutions? Such a question can hardly be answered unequivocally.[46] True, the treaty at issue has been rejected by the French and the Dutch referenda. The Reform Treaty, a substitute for the former one, signed in Lisbon, does not refer to this question at all. However, its authors implicitly assume the supremacy of the European law.[47]

[42] S. Biernat, *op. cit.*, p. 23.

[43] M. Kruk, *op. cit.*, p. 177.

[44] See R. Arnold, *Perspektywy prawne powstania konstytucji europejskiej*, "Państwo i Prawo" 2000, No. 7, p. 39.

[45] See J. Jaskiernia, *Polityczno-ustrojowe problemy Unii Europejskiej w dobie procesu postnicejskiego*, [in:] *Traktat z Nicei. Wnioski dla Polski*, eds. J. Barcz et al,, Warszawa 2001, p. 63.

[46] Particularly in the context of Art. 1-5 of the project of the Treaty establishing the Constitution for Europe: "1. The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. 2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution (...).

[47] J. Barcz, *Traktat reformujący UE - "mapa drogowa", forma traktatu, propozycje zasadniczych zmian instytucjonalnych*, [in:] *Traktat reformujący Unię Europejską (the materials from conference held in Warsaw on July 11, 2007)*, ed. J. Barcz, pp. 15, 16.

Another method to eliminate collisions is to make the norms of a fundamental law compatible with the European one without a constitutional amendment. An obligation to follow this interpretation can be for instance deduced from Art. 90 of the Polish constitution.[48] The formula of transferring competences being adopted in this act conforms to some solutions being applied by some member states: a national law is being adapted to the requirements of the Union. If this provision is to be read this way, a formal amendment to the constitution in order to secure in some matters the primacy of the European law over this act is not necessary. It is indispensable, instead, in the event of an obvious inconsistency of a primary norm of the European law with the document in question, i.e., being impossible to be eliminated by interpretation. This should be done before the ratification of a treaty.[49]

Another issue worth considering is that some fundamental laws contain a clause which protects solely their fundamental principles. Meanwhile, each constitution embraces also some detailed regulations which do not constitute the foundations of constitutional order. Thus Wojtowicz seems to suggest that the European law ought to have primacy over those regulations. Yet, in the case of encroachment by an European organ upon the fundamental rules of a constitution, a proper national organ could counteract, including by putting forward the initiative to begin a procedure to leave the Union by a given country.[50]

So, how should conflicts be solved between national constitutions and European acts? According to Kumm, first, judges have to be faithful to the content of their fundamental laws, because this is what the citizens of their countries expect them to do; moreover, they take an oath of allegiance to the constitution. Second, to express an equal respect towards the ideal of rule of law on the European level. The ECJ stressed many times that putting this ideal into practice requires a uniform application of the European law. In that case only, this law will be able to safeguard safety and certainty identified with that ideal.

[48] S. Biernat, *Czy konieczne są zmiany w Konstytucji przed przystąpieniem Polski do Unii Europejskiej?,* [in:] *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej,* ed. J. Barcz, Warszawa 2002, p. 52.

[49] A. Wyrozumska, *Ratyfikacja traktatu akcesyjnego w drodze referendum,* [in:] *ibidem,* p. 93.

[50] *Op. cit.,* ed. K. Wojtowicz, pp. 68, 118-120; A. Albi, *op. cit.,* p. 63, 64. It is noteworthy to quote J. Barcz's position who is an opponent of the individuation within the Polish constitution of a peculiar "core of sovereignty" which, in turn, ought to be inalienable. He thinks that the provisions of this act in their present reading properly meet a dynamics of the integration process and, at the same time, constitute a firm barrier regarding a transfer of competences. For all governmental power cannot be transferred; due to the accession to the European Union the Polish state cannot be liquidated. The height of the mentioned barrier should be treated flexibly; such flexibility, if necessary, may provide a jurisprudence of the Constitutional Tribunal - J. Barcz, *Członkostwo Polski w Unii Europejskiej a Konstytucja z 1997 r„* [in:] *Czy zmieniać...,* ed. J. Barcz, pp. 19, 20.

Third, always to pursue the implementation of democratic ideals, i.e. to respect the fundamental rights and to act within the powers granted to the Union by the member states, in particular.[51]

2. *Theoretical Aspect*

To date it has been the practical aspect which has dominated in our considerations. Various answers have been presented to the question about what was the scope of the European law and who should solve possible conflicts. If the answers at issue are wanting somehow, the reason is no other than insufficient respect for the theoretical aspect of the problem. Therefore, one needs to take into account the following theses:

The first thesis. The European law is a hierarchical and coherent system, built similarly to the systems of national law. It creates a specific legal order, existing next to the international law and a national law, or rather between them, governed by its own rules of binding and application. It must work alike in all the Union states. Its application belongs first of all to the tasks of the national organs, while its interpretation remains a province of the ECJ. Hence the necessity to recognise the jurisdictional exclusion of the ECJ in some areas, and by this to deny relevant powers to national organs. Had this function been exercised by the national supreme courts or constitutional tribunals, then a uniform understanding of this law would have not be preserved; this would be tantamount to undermining its integrative sense.[52]

The second thesis. The European Union is not a federation and the sovereign member states are not its parts; this is why their legal orders are independent. Furthermore, neither in the European primary law nor in the secondary one is there a mention of supremacy of this legal over a national one; consequently, there are no collision norms. The thesis of supremacy follows in the first place from the ECJ jurisprudence and practical reasons. Thus, it can be assumed that legislation of the member states is, in essence, of an autonomous character, save the fundamental laws as wholly independent from the European law.

The third thesis. The power to adjudicate on the constitutionality of the European law from the point of view of a constitution of a member state is equally legitimate as the power of the ECJ to assess the conformity of the acts of a national law with the European one. Neither are constitutional tribunals subordinated to the ECJ, nor vice versa, since they operate within different

[51] M. Kumm, *Who is the Final Arbiter of Constitutionality in Europe?*, "Harvard Jean Monnet Working Paper Series" 1998, No. 10, in: M. Mataczyński, *op. cit.*, p. 134, 135.

[52] L. Garlicki, *op. cit.*, pp. 195, 199; M. Safjan, *Konstytucja a członkostwo Polski w Unii Europejskiej*, "Państwo i Prawo" 2001, No. 3, p. 10.

legal orders. Those tribunals base their activity upon a fundamental law which imposes upon them an obligation to exercise judicial review of all legal acts remaining in effect on a state territory. A power to evaluate constitutionality of the European law from the point of view of the constitutional law of a member state is so natural, as a power of the ECJ to assess validity of the acts of European law. In other words, the acceptance of the interpretative autonomy of the Union's legal order and that of the system of a national law means, that neither the ECJ nor any constitutional tribunal can quit the power to adjudicate on its own jurisprudence. Accordingly, a possible dispute between the ECJ and a national constitutional tribunal is "normatively unsolvable" not because a solution is lacking but for the sake of the "*superfluum* of an answer" As a consequence a real nature of relationships between the national law and that of the European appeals to their dualism.[53]

The concept of normative multi- or polycentrism by Lçtowska assumes that instead of a coherent legal order based upon a hierarchical construction of the sources of law, a system is perceived where two or more subsystems appear coming from various "centres" The relationships between the particular subsystems within this order are being determined by cooperation, not by antagonism or revealing conflicts. A distribution of lawmaking powers among the particular sub-systems does not necessarily consist in granting exclusive competences contained in the first or the second subsystem. It relies upon the determination of non-colliding with each other means of the exercise of competences within a common scope of both sub-systems. A way of solving conflicts ought to be the "mutually friendly exegesis" on the part of the European institutions as well as national organs.[54] Nonetheless, in Winczorek s opinion, in the light of the said concept not infrequently it is hard to decide which norms would be superior. It is therefore doubtful whether it would bring reliable effects in every case.[55]

Some newly coined notions correspond with this concept, such as *multi-level constitutionalism* (Pernice), *constitutional pluralism* (Walker) or *intertwined constitutionalism.*[56] As Walker writes in the paper entitled *The Idea of Constitutional Pluralism,* today the pluralist concepts generally regard the national and the European law as no longer being the emanation of two independent legal orders, where the sovereign state is the ultimate source of and centre of authority. Instead, the relationship between those orders "is now horizontal rather

[53] R. Kwiecień, *op. cit.*, p. 38; A. Soltys, *Spór o zasadę supremacji,* "Studia z Prawa Unii Europejskiej" 2000, p. 22; J. Jaskiernia, *Członkostwo Polski w Unii Europejskiej a problem nowelizacji Konstytucji RP*, Warszawa 2004, pp. 80, 81.

[54] See S. Biernat, *op. cit.*, p. 21.

[55] P. Winczorek, *op. cit.*, p. 12.

[56] See A. Albi, J. Ziller, *The European Constitution and National Constitutions: Ratification and Beyond,* Kluwer 2007, p. 3.

than vertical - heterarchical rather than hierarchical" Both the ECJ and constitutional tribunals try to prevent conflicts through mutual interaction. If a conflict nonetheless occurs, it should be solved on the basis of certain principles. On occasion some political action may be necessary.[57]

The fourth thesis. In the event of collision of the European law with the constitution of a member state the primacy belong to the latter. The Polish fundamental law may serve as an adequate normative background for these reflections. Under Art. 8.1 of this act the Constitution is the supreme law of the Republic of Poland. In the case of inconsistency of an European provision with a Polish statutory norm the primacy belongs to the former; however, it does not relate to a constitutional norm (Art. 91.2). A binding effect of the European law in Poland finds direct legitimacy in the constitutional norms (Art. Art. 90 and 91), which prescribe the extent and procedure of transferring some powers - especially lawmaking ones - on behalf of an international organisation. If the European primary law is concerned, the conclusion is unambiguous: in any case international agreements are below constitutional norms, while the principle of supremacy of the mentioned law over statutes refers only to treaty norms ratified by a statute (Art. Art. 91.2 and 188.2). Moreover, an inalienable precept of the European law which is its independence from a national law would fall into some discrepancy if this feature is to be treated rigorously, since its status of the legal order being in force on the territory of a member state the European law derives from an sovereign act of the state power made upon the basis and within a constitution, thus, upon a national law. Consequently, an independence of the European law cannot be conceived absolutely. This is why to recognise its supremacy over a fundamental law is not possible.[58]

The fifth thesis. The supremacy of a constitution over the European law cannot be manifested in allowing the control of constitutionality of acts of the latter branch of law in compliance with the same rules this control is being exercised over all acts of a national law. It should be confined to a sovereign act of accession to the European Union, and in the future to an approval of a sovereign state to all changes made within the acts of the European primary law. Those acts still are subject to the control of constitutional tribunals. Yet, the secondary law under an accession treaty to the Union, as autonomous legal order, is then excluded from state control. This probably is the best understanding of the consequences of transferring the powers of national organs on behalf of the European ones. Thus, the supremacy of a constitution over the European law relates to the primary law directly, while to the secondary one indirectly.[59]

[57] See A. Albi, *op. cit.*, pp. 31, 65, 66.

[58] M. Safjan, *op. cit.*, pp. 9, 10.

[59] *Ibidem*, pp. 10,11 ff.

Let us also take into consideration that the character of relationships between the European and national laws may lead to conflicts, since the requirements imposed by the system of European law must cross a peculiar barrier set up with the help of constitutional instruments of a system of national laws. In addition, these requirements are subject to limits established just by the aforesaid constitutional system.[60]

V. Conclusion

In the light of the five theses we arrive at certain well-grounded conclusions. Settling conflicts between the norms of the European primary law and the norms of the constitutions of the member states, in the light of the principle of independence of both those legal systems and their jurisdictional autonomy, must rely upon mediation between the ECJ and the national constitutional tribunals (supreme courts). On their part the organs authorised to construe national law ought to take into account the ECJ decisions, pursuing the neutralisation of differences and elaborating a uniform exegesis of constitutional norms of the member states. They ought to interpret their constitutions favourably, the more so that against the background of the ECJ jurisprudence it is a duty of the mentioned organs to construe national law in line with the European one; the said duty results from the rule of loyal cooperation (Art. 10 of the Treaty on European Community). Self-restraint of constitutional tribunals would not be sufficient here.

Under the present legislation it is not possible to construct a symmetrical obligation of the ECJ and other European institutions to interpret the European law in a manner favourable toward national laws of the member states. True, the ECJ invokes some "constitutional traditions common for the member states" as a source of inspiration during the elaboration of the European concept of fundamental rights,[61] but it is not much. However, the ECJ in its last decisions seems to be more sensitive to the legal circumstances of the member states. It ought to go farther in the process of "judicial dialogue" towards a genuine exchange of opinions. References made by the ECJ to the national legal systems are perfunctory and haphazard, and no constitutional tribunal of the member state has ever been cited by it.[62] The Court should also foresee and take into account a relation toward constitutional norms of the member states, in which its decision would remain.

In other words, a settlement of the inconsistencies of both legal orders under analysis has to call attention to a perspective of both the European Ju-

[60] See *op. cit.*, ed. K. Wojtowicz, p. 65.

[61] S. Biernat, *op. cit.*, p. 22.

[62] See A. Albi, *op. cit.*, p. 64.

stices sitting in Luxembourg and the national justices sitting in the capitals of the member states. If despite such actions a conflict occurs between the ECJ and the constitutional tribunal of a member state, agreement should be found through political mediation.

It may occur that the mediation will bring no effects if both parties are unwilling to make concessions. In that case one or the other remains: either the procedure to suspend a “stubborn” state in the rights of a member of the Union is to start, or the state will leave it of its own initiative. It seems that *tertium non datur*. Thereby, neither European, nor constitutional (ditto: national) dictate comes is an option. As long the Union is not a federation, its members will preserve their sovereign rights. Likewise, so long both parties will be right, like those two men from the beginning of our deliberations.

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European Constitution and National Constitutions: How to Overcome the 'Democratic Deficit' in the European Union

According to the prevailing concept of "dual legitimacy", the European Parliament, as well as the national parliaments, constitutes a source of legitimacy in the European Communities (EC) and the European Union (EU).[1] [2] The importance of involving national parliaments in the legislative activities of the EC and EU is recognised in a protocol to the Treaty of Amsterdam and in the text of the European Constitution? Important rules are provided in this field by the national Constitution. So it is worth analysing what role the European Constitution and the national constitution may play in the process of creating the basis for legitimacy of those institutions and in reducing the so called "democratic deficit."[3]

1. The particular circumstances of the early post-war in Europe led to an institutional framework which was and is, in democratic terms, inadequate? Some authors argue that Jean Monnet established the European integration process with a particular character (marked by technocracy and elitism), and consequently the Commission has inherited a weak and fragile democratic legitimacy.[5] In the early years of the European Community, it was assumed that there was a widespread consensus about the future development of Europe, and that decisions by the Council of Ministers were broadly in line with public opinion. In recent years, the growth in the powers and responsibilities of European institutions has been considerable. The processes of representation and accountability have not kept pace with this expansion, producing a legitimacy crisis.[6]

An important phenomenon connected with the functioning of the European Union (European Communities) is known as a "democratic deficit."[7]

[1] See C. Harlow, *Accountability in the European Union,* Oxford: Oxford University Press, 2002, p. 36; A. Cygan, *Democracy and Accountability in the European Union: the View from the House of Commons,* "The Modern Law Review" 2003, No. 3, p. 399.

[2] D. Walsh, *Parliamentary Scrutiny of EU Criminal Law in Ireland,* "European Law Review" 2006, No. 1, p. 51.

[3] See B. Kohler-Koch, B. Rittberger, *Debating the Democratic Legitimacy of the European Union,* Lanham, MD - Plymouth, Rowman & Littlefield, 2007, p. 34.

[4] B. Boyce, *The Democratic Deficit of the European Community,* "Parliamentary Affairs" 1993, No. 4, p. 476.

[5] K. Featherstone, *Jean Monnet and the "Democratic Deficit'' in the European Community,* "Journal of Common Market Studies" 1994, No. 2, p. 151.

[6] P. Norris, *Representation and the Democratic Deficit,* "European Journal of Political Research" 1997, No. 2, p. 274.

[7] See D. Martin, *European Union and the Democratic Deficit,* Broxburn: John Wheatley Centre, 1990, p. 6; P. Rosanvallon, *Le déficit démocratique européen,* "Espirit" 2002, No. 288, s. 89; D. Ward, *The European*

It exposes the fact that the societies of the EU do not have appropriate influence on the development and functioning of the Union.[8] It is widely known that those processes are dominated by executives and European bureaucrats. The European Parliament (at EU level) and national parliaments (at state level),[9] being theoretically institutions of crucial importance in the process of representation of people, do not have an adequate legal position and powers to effectively counterbalance the influence of representatives of governments and bureaucrats.[10] The theory of the democratic deficit is based upon: standards based on analogy with national institutions, majoritarian standards, standards derived from democratic legitimacy of the member states, and social standards.[11]

The democratic problem is attributable, on the one hand, to institutional deficiencies of the electoral and party system; on the other hand, it refers to the absence of a common European identity that would be necessary for the acceptance of an at last partially majoritarian system.[12] A significant proportion of citizens do not manifest confidence in many basic institutions. Such a deficit of trust is attested by a wealth of empirical data.[13] The cost and benefits to the EU's perceived legitimacy are examined in the scientific studies with the argument that the putative benefits of consensual decision-making not obtain are in the EU and that the institution of consensus - the lack of voting and thus accountability - actually contributes to the perception of a democratic deficit in the Council.[14] Some authors argue however that the European Union is suffering not just from the "democratic deficit", but a "community deficit". The level and scope of its integration activities far exceeded the degree of community that it sustains.[15] This raises a question

Union Democratic Deficit and the Public Sphere: an Evaluation ofEUMedia Policy, Amsterdam 2004, p. 11; M. Milev, *A "Democratic Deficit" in the European Union,* "L'Europe en formation" 2004, No. 3, p. 31; M. Giuliani, *Il deficit democrático dell'Unione,* "II Mulino" 2004, No. 2, p. 342.

[8] See D.M. Farrell, R. Scully, *Representing Europe's Citizens? Electoral Institutions and the Failure of Parliamentary Representation,* Oxford, Oxford University Press, 2007, p. 46.

[9] See *The influence of National Parliaments on European Policies: an Overview,* Brussels, EP, 2002, s. 107.

[10] See R.S. Katz, B. Wessels, *The European Parliament, the National Parliaments, and the European Integration,* Oxford 1999, p. 45.

[11] G. Majone, *Europe's 'Democracy Deficit': the Question of Standards,* "European Law Journal" 1998, No. l.p. 7.

[12] F. Decker, *Governance Beyond the Nation-State: Reflections on the Democratic Deficit of the European Union,* "Journal of the European Public Policy" 2002, No. 2, p. 269.

[13] M. Dogan, *Dissatisfaction and Mistrust in Western European Democracies,* "European Review" 2002, No. 1, p. 94.

[14] D. Heinserberg, *The Institution of "Consensus" in the European Union: Formal Versus Informal Decision-Making in the Council,* "European Journal of Political Research" 2005, No. 1, p. 89.

[15] See A. Etzioni, *The Community Deficit,* "Journal of Common Market Studies" 2007, No. 1.

of effectiveness of democratic accountability and proposals for redefining the impact of parliamentary scrutiny on EU affairs.[16] So it is important to evaluate what steps should be taken to change this situation.[17]

In this context, some analysts offer a new conceptualisation of the role of national parliaments in the EU system of governance[18] and in the EU constitution-building process.[19] Although the idea of the national parliaments playing a more active role in the EU attracts considerable support, perceptions of what this role should be differ considerably.[20] They stress that the only way to overcome the "democratic deficit" that is compatible with the principle of subsidiarity is to strengthen the role of the parliaments of Member States. Since democratic legitimacy is a European public good, it is necessary to incorporate the national parliaments in the European legislative process.[21] European officials discuss the ways of enhancing parliamentary control over the European Commission and the Member States.[22]

Among several proposals, crucial are those connected with the strengthening of the role of the European Parliament in EU decision making processes[23] and those suggesting that national parliaments should play a bigger role in the process of influencing the decisions of the Committee of Ministers (national government) connected with the creation of law of the EU and European Communities.

2. Various attempts have been made to increase the involvement of national parliaments in the European law-making process and reduce the "democratic deficit", especially since publication of the *White Paper on the Single European Market* in 1985. There has been however resistance from the

[16] K. Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in Ell Affairs,* [in:] *Accountability in EU Multilevel Governance,* eds. A. Benz, C. Harlow, Y. Papadopoulos, "European Law Journal" 2007, No. 4, s. 487.

[17] P.C. Schmitter, *How to Democratise the European Union... and Why Bother?,* Lanham, MD, Rowman & Littlefield, 2000, p. 36.

[18] M. MacCarthaig, *Conceptualising the Role of National Parliaments in theEU System of Governance,* "Administration" 2006, No. 3, p. 70.

[19] P. Kiiver, *The National Parliaments in the European Union: a Critical View on EU Constitution-Building,* The Hague: Kluwer Law International, 2006, p. 198.

[20] P. Norton, *Addressing the Democratic Deficit,* "Journal of Legislative Studies" 1995, No. 3, p. 191.

[21] R. Vaubel, *The Constitutional Reform of the European Union,* "European Economic Review" 1997, No. 3-5, s. 446.

[22] T. Beukers, *The Barosso Drama: Enhancing Parliamentary Control over the European Commission and the Member States: Constitutional Development through Practice,* "European Constitutional Law Review" 2006, No. 2, p. 161.

[23] K. Zajączkowski, *Role and Position of the European Parliament in the Institutional System of the European Union,* "The Polish Quarterly of International Affairs" 2004, No. 2, p. 79.

European Parliament towards such a tendency.[24] Additionally attempts to strengthen parliaments individually have failed due to constitutional, procedural, ideological and cultural constrains.[25]

Reforms introduced in the Treaty on the European Union (Treaty of Maastricht) have reduced but not eliminated the democratic deficit in the European Union. The Treaty introduced certain reforms that gave the European Parliament a legislative function and strengthen its control over the executive. The most important of the new powers was the so-called codecision procedure and the formalisation of Parliament's role in the appointment of the Commission. At that same time, the Treaty left unchanged the composition as well as the legislative and executive powers of the Council.[26]

The role of the national parliaments should be seen, one would think, in close relation with the role that executive bodies play in the Communities' decision-making processes. We are dealing here with the principle of exclusivity of national executive bodies in adopting Community decisions. For, in the light of the EU system, it is assumed that the bodies of the executive branch are legitimate to represent the citizens of their respective states on the EU forum. Consequently, it is presumed that the position adopted by national executive bodies on particular matters corresponds to state policy adopted at the national level by competent authorities, including parliamentary bodies. In this system, the role of the national parliaments is limited to decisions on the national level and does not cover EU actions as such.[27]

After drafting the Treaty of Maastricht an attempt was made to change that system, but the idea of amending the Treaty of Maastricht was eventually abandoned. Finally, two protocols regulating these issues were adopted. "Declaration No. 13 on the Role of National Parliaments in the European Union" recognises the primary importance of including national parliaments in the functioning of the Union. In particular, it stresses the importance of intensifying the exchange of information between the national parliaments and the European parliaments, and the significance of providing conditions for regular meetings between national and European parliamentarians interested in similar issues. The governments of Member States were obliged to

[24] J. Marszałek-Kawa, *Parlament Europejski a parlamenty narodowe w państwach Unii Europejskiej (pozycja ustrojowa, kompetencje, organizacja wewnętrzna)*, Toruń, MADO 2005, p. 343.

[25] P. Norton, *National Parliaments and the European Union*, "Talking Politics" 1995, No. 3, p. 169.

[26] See P. Raworth, *A Timid Step Forwards: Maastricht and the Démocratisation of the European Community*, "European Law Review" 1994, No. 1, p. 32.

[27] See J. Jaskiernia, *Political and Institutional Problems of the European Union's Political System in the Post-Nice Process*, [in:] *The Treaty of Nice: Conclusions for Poland*, eds. J. Barcz, R. Kuźniar, H. Machińska, M. Popowski, Warsaw, The Ministry of Foreign Affairs, Information Centre on the Council of Europe, The Centre for Europe of Warsaw University 2002, p. 73.

submit the European Commission's legislative proposals to national parliaments in advance, so they could familiarise themselves and possibly adopt a position with respect to such initiatives.

"Declaration No. 14 on the Conference of Parliaments" contained an invitation for the European Parliament and the national parliaments to jointly set up the Conference of Parliaments which would be responsible for consultations regarding the major directions of EU actions, notwithstanding the nature of the appropriate competences of such parliaments. The President of the Commission would address reports about the state of the Union to the forum of such a conference. Thus, it would correspond to the European Council, play a consultative role and be empowered to adopt positions on matters relating to the major directions of EU actions.

Such declarations were intended to be a factor enhancing the role of national parliaments. The fact that the Treaty was not amended gave a signal that the proposed solutions were not yet mature for such a level of institutionalisation that would qualify as permanent systemic constructions. In any case, the provisions of Declaration No. 13 have been implemented only partially. We should note that the European Parliament maintains institutionalised contacts with national parliaments which involve, among others, information exchange (particularly, on the forum of COSAC conference). However, the provisions of this declaration on advance notification and review of the Commission's legislative proposals have been implemented only partially. In practice, the Commission's proposals are sent to parliamentary bodies, but only in certain countries this refers to issues relating to the second and third pillar. In addition, countries whose parliaments are informed by governments about the follow-up of legislative actions based on the presented projects are an exception rather than a rule. Although the practice of having parliaments review the Commission's legislative initiatives has become widespread, only some parliaments have the possibility of delaying the adoption of the Commission's proposal on account of it being reviewed by national parliamentary bodies. Sometimes, it is the European Commission that makes this task difficult because it sends proposals to governments so late in the process that their thorough analysis in the national parliament is not possible.[28]

Declaration No. 14 on the establishment of a Conference of Parliaments was not implemented because attempts to organise a meeting of the European Parliament and national parliaments turned out to be unproductive, and the function of this forum is in part fulfilled by the COSAC conference. Problems with the implementations of Declarations Nos. 13 and 14 are worth stressing.

[28] E. Popławska, *Organy i procedura stanowienia prawa wspólnotowego oraz udział w niej państw członkowskich,* [in:] *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym,* ed. M. Kruk, Warszawa, Wydawnictwo Sejmowe 1997, pp. 182-183.

It showed, on the one hand, there was no doubt that the “democratic deficit” observed in the EU could not be overcome only by way of enhancing the European Parliament, particularly since there were misgivings whether the "social not-representation” that characterises this body could be eliminated in the foreseeable future.[29] On the other hand, members of the European Parliament are not always well disposed towards the idea of enhancing the role of national parliaments since it may lead to the weakening of the role of the European Parliament as the basic instrument of the political legitimacy of the European Union.[30]

The important step forward was made in the Treaty of Amsterdam. Protocol on the role of national parliaments in the European Union - according to art. 311 of the Treaty on European Communities - is an integral part of the treaty. This Protocol specifies conditions which enable the national parliaments to monitor legislative processes on the Community level. The European Commission was obliged to deliver to national parliaments such documents as: green papers, white papers, communications (not including the area of foreign policy and security). The European Commission’s legislative projects should be submitted in such a time which would enable the national parliaments to analyse the projects dealing with the III pillar (judicial and police cooperation in criminal cases) and they should have at last six weeks for consultation before the projects reaching the agenda of the Council.[31]

Experience connected with the implementation of the Treaty of Amsterdam indicates that European integration, at its current stage, has become both more complex and more flexible and, as result, open to the need to react to those impulses of EU practice which encourage systemic changes wherever the current model needs adjustments, in order to make the Community more efficient and, at the same time, capable of reducing the “democratic deficit” more effectively.[32]

However, the greatest importance will be attached to solving the systemic issue whether, in the context of the Union’s operations, the role of the national parliaments should boil down to internal (domestic) political legitimacy, or whether there is political will to go beyond this established pat-

[29] See P. Norris, M. Franklin, *Social Representation,* “European Journal of Political Research” 1997, No. 2, p. 185.

[30] P.P. Craig, *Democracy and Rule-Making within the EC: An Empirical and Normative Assessment,* ’’European Law Journal” 1997, No. 2, p. 108.

[31] See E. Popławska, *Formy współpracy parlamentów w Unii Europejskiej*, [in:] *Parlamenty a integracja europejska,* eds M. Kruk, E. Popławska, Warszawa, Wydawnictwo Sejmowe 2002, p. 210.

[32] J. Smith, *Destination Unknown,* “World Today” 2000, No. 1, p. 20.

tern.[33] Although it is true that national parliaments influence the decision-making process with regard to European integration at home (though *de facto* the scope of this impact is not satisfactory), only representatives of the executive power participate in the Union decision-making processes by presenting their countries' positions.[34] This may create an external impression that what we have been observing is an exclusion of the national legislative power. This condition gives rise to a sense of a "democratic deficit" on the psychological level,[35] which is not always representative of actual decision-making processes where national parliamentarians play quite a big role.[36]

No doubt, the cooperation of The European Parliament with national parliaments can be an important factor creating the Community political legitimacy[37]. This has been interpreted as a tendency to develop Community "parliamentarianism" in which the European Parliament and national parliaments are to become a systemic institution, where national parliaments play a "full-fledged role of parliamentary performers in the European Union."[38] One reason for this cooperation is that the European Parliament has been playing an increasingly important role in influencing the directions of institutional reforms in the Union[39] pursued by successive intergovernmental conferences.[40] Without cooperation with national parliaments, it will not be possible to ensure that these changes have political legitimacy.[41]

The most important premise of cooperation between the European Parliament and national parliaments is that the moment a state accedes to the

[33] D. Obradovic, *Policy Legitimacy and the European Union*, "Journal of Common Market Studies" 1996, vol. 34, p. 307.

[34] See J.H. Matlary, *Democratic Legitimacy and the Role of the Commission* [in:] *Democracy and the European Union*, Berlin-Heidelberg 1998, p. 71.

[35] K.-H. Neunreither, *The Democratic Deficit of the European Union: Towards Closer Cooperation Between the European Parliament and the National Parliaments*, "Government and Opposition" 1994, No. 4, p. 581.

[36] M.A. Pollack, *Representing Diffuse Interests in EC Policy Making*, "Journal of European Public Policy" 1997, No. 4, p. 581.

[37] See G. Scoffoni, *Les Relations entre le Parlament européen et les parlements nationaux et le renforcement de la légitimité de la Communauté*, "Cahiers de Droit Européen" 1992, Nos. 1-2, p. 22.

[38] M. Kruk, *Parlament Europejski: traktaty i praktyka*, "Biuletyn Informacyjny Biura Stosunków Międzynarodowych Kancelarii Sejmu" 1997, folio 1, p. 44.

[39] See F. Jacobs, R. Corbett, M. Shackleton, *Parlament Europejski*, Rzeszów, Wyższa Szkoła Pedagogiczna 1996, p. 321.

[40] See *The European Parliament's Position on EU Institutional Reform*, "Europe Documents" Nos. 2188-2189, 28 April 2000, p. 1.

[41] See M.-C. Bonnamour, *Les relations Parlament Européen at Parlements Nationaux a la veille de la Conférence Intergouvernmentale de 1996*, "Revue du Marche de l'Union Européenne" 1995, No. 393, p. 642.

EU it transfers a substantial part of its legislative powers to the Union (Community). Estimates indicate that as much as two-thirds of the legislative competences of the parliaments of Member States are handed over[42]. To lessen the democratic deficit, the process of marginalisation of national parliaments in their legislative function has to go hand in hand with the European Parliament's increased influence over the legislative processes in the Union and the extension of the controlling function of national parliaments with the process of lawmaking in the EU.[43] A substantial limitation of the influence of national parliaments on European legislation does not mean that they should be deprived of the possibility of influencing its construction.[44] This approach was unequivocally confirmed in a resolution of the European Parliament concerning this issue[45] and in a resolution of the European Parliament adopted following the Conference of the Parliaments of the Community.[46] Without such institutionalised control by the national parliaments, it will not be possible to overcome the "democratic deficit" connected with the declining influence of national parliaments on Community lawmaking.[47]

In aiming to increase their influence on the legislative process in the Union, national parliaments are facing two basic options. On the one hand, they may opt for the "Danish way" which involves guaranteeing the national parliament the greatest possible control over the European policy of its government. It refers to the system existing in Denmark, under which the competent minister presents orally on the forum of the Commission for European Affairs, one week in advance, the position of the government on matters which are on the agenda of the next of the Council of the European Union. This position is then debated and the minister is given a mandate which empowers him to participate in and negotiate all decisions taken by the Council.[48]

This model is aimed at optimizing the impact of the national parliament at a stage where the government's mandate is being worked out prior to the com-

[42] J. Barcz, *Parlament a Unia Europejska. Analiza prawna na przykładzie doświadczeń Austrii (including source materiał)*, Warszawa, Wydawnictwo Sejmowe, 1999, p. 11.

[43] D. Quinty, G. Joly, *Le rôle des parlements européens et nationaux dans la fonction legislative*, "Revue du Droit Public et de la Science Politique et a l'Etranger" 1991, No. 2, p. 393.

[44] See P. Pandraud, *IAssemble nationale et l'Europe. Quelle influence sur la législation communautaire*, "Assemblée nationale. Délégation pour l'Union européenne", No. 2459, 20 décembre 1995, p. 5.

[45] See Résolution sur les relations entre les parlements nationaux et le Parlament européen (Doc. A2-3488/88).

[46] See Résolution sur les relations du Parlament européen avec les Parlements nationaux après la Conférence des parlements de la Communauté (A3-220/91).

[47] P. Moreau Defarges, *Le déficit démocratique*, "Defense nationale" 2000, No. 12, p. 135

[48] B. Jackiewicz, *Folketing a Unia Europejska. Rola i kompetencje Komisji Spraw Zagranicznych w duńskim parlamencie*, Warszawa, Zespół Integracji Europejskiej Biura Studiów i Ekspertyz Kancelarii Sejmu, marzec 2000, Report No. 174, p. 5.

mencement of dialogue and formation of a position on the forum of Community institutions.

On the other hand, actions can be taken to step up the presence of representatives of national parliaments in the place where the Union's most important decisions are taken. Some national parliaments, in particular the French National Assembly (the proposals of the Senate are especially worth noting here) would be prepared to have a presence in Brussels through the intermediary of an additional institution representing the parliaments of member states.[49] However, it is estimated that "such a mechanism would complicate the decision-making process so much that it is difficult to find any justification for it."[50]

Notwithstanding those options and searches, the importance of the existing forum of national parliaments should be emphasised. It is the Conference of European Community Affairs Committees of the Parliaments of EU Member States and European Parliament which is referred to by its abbreviated name COSAC (acronym of the Conference's French name: Conférence des Organes Spécialisés (en) aux Affaires Communautaires). COSAC is a horizontal structure constituting a forum of cooperation between national parliaments of EU member states set up in Paris on November 16-17, 1989. It consists of 6-person delegations of the European committees from member states as well as, on equal rights, a 6-person delegation of the European Parliament. Since 1997, representatives of the relevant committees on European communities of the parliaments of associated countries have been invited as observers. Under the Treaty of Amsterdam, COSAC was incorporated into the Treaty on the European Union. A protocol annexed to the Treaty of Amsterdam "encourages national parliaments to become more involved in the work of the European Union". It further provides that COSAC "can send the EU institutions any contribution it thinks appropriate, especially concerning proposed acts which representatives of the national governments may jointly decide to forward to it in view of the subject matter involved", but these positions "should not in any way bind the national parliaments or determine their positions". In connection with such a carefully worded formula, it has been noted that these provisions accommodated only half-way the expectations of national parliaments willing to get actively involved in the process of control over the proper application of the principle of subsidiarity. Despite the limited nature of COSAC's powers, it has become associated with the "logic of compensation for the weakness of the European Parliament by means of in-

[49] See M. Pezet, *Raport d'information sur le rôle du Parlamentfrançais dans le processus de décision communautaire*, "Assemblé nationale. Délégation pour les Communautés européennes" 1992, No. 2804, p. 98.

[50] K.-H. Neunreither, *Zasada subsydiarności a Parlament Europejski*, [in:] *Subsydiarność*, ed. D. Mielczarek, Warszawa, Centrum Europejskie Uniwersytetu Warszawskiego 1998, p. 98.

corporating national legislative bodies in European activities in the areas of "sensitive" relations between the Union and Member States."[51]

No doubt, COSAC is an important forum for exchanging views between parliaments from national parliaments and members of the European Union, in the presence of senior Union representatives. The provision of the Treaty of Amsterdam indicates that is not only an informal dialogue that is at stake, but an important institutional level of cooperation of parliamentarians on Community matters. However, the powers of this forum are apparently limited. It is not by any means a decision-making body of the Union, but only an advisory and consultative body. These functions comprise the right "to send in contributions" in order to draw the attention of the Union's institutions. This may be interpreted as a manifestation of signalling competences, because *de iure* it is not even a right to initiative (e.g. legislative initiative) which - if it originates from an empowered entity - imposes an obligation to review it.

It is also characteristic that against the background of the Treaty of Amsterdam, the legal position of COSAC in the Union's decision-making processes was not enhanced and, moreover, a disclaimer was provided that the positions worked out by COSAC should not bind national parliaments and decide their positions. This may signal that not only the institutions of the Union are afraid of building-up the formal competences of COSAC (for one reason - out of concern for the declining role of European Parliament as a source of political legitimacy in the EU), but also that national parliaments may be unwilling to see a body of international cooperation comprising representatives of national parliaments imposing its views on national parliaments and speaking on their behalf.

Among the important issues postponed until the post-Nice process was the role of national parliaments. In the course of drafting the Treaty of Nice this issue created a major problem reflective of the long-lasting dialogue that had been going on - without producing satisfactory results - since the time of drafting the Treaty of Maastricht.[52] Some authors challenge, however, the opinion that national parliaments are commonly held to have "failed" in their dealings with European institutions and in their impact upon the Community's legislative process.

[51] E. Popławska, *Zasada subsydiarności w traktatach z Maastricht i Amsterdamu*, Warszawa, Wydawnictwo Naukowe Scholar 2000, pp. 107-108.

[52] J.-V. Louis, *La réforme des institutions de l'Union européenne*, "Revue du Marche Commun et de l'Union Européenne" 2000, No. 4, p. 683.

On the other hand they emphasised existence of a "dual democratic deficit" within the Union because national parliaments within their own states also exert limited control over their own national executives.[53]

Objectively, it is not easy to find solutions that would not collide with the existing philosophy of the Community decision-making process and at the same time broaden the powers of representatives of national parliaments fundamentally, not only through symbolic adjustments. It appears that progress in this area will depend on resolving the following dilemmas: 1) Will the Union be ready, even to a limited extent, to depart from the model in which the decision-making process is *par excellence* an intergovernmental cooperation and issues are resolved by officials? 2) Will the Union be prepared to depart, albeit partially, from the application of the principle that national representatives of the executive branch of government are entitled to represent their respective states, and the role of national parliaments is reduced to a domestic mechanism of influencing this mandate? 3) Is the European Union ready to indicate areas where the role of forums of cooperation of national parliaments and European Parliament, particularly COSAC, will take more commanding forms of impacting the decision-making processes? 4) Is the Union ready to modify its decision-making procedure so that the proposals from the European Commission are submitted to Member States within such a time-frame as to enable them not only to adopt the position by their governments but also to hold appropriate consultations in parliaments, particularly in the respective European affairs committees?

3. In this theoretical context we may analyse the role of European Constitution in overcoming the "democratic deficit" in this sphere. We may note a suggestion that national parliaments within the enlarged European Union should change the position from "victims" of integration process to "competitive actors" in decision-making fields.[54] They have a role in the process of improving scrutiny of the limits of EU action.[55] Several studies are concentrating on this issue, e.g. demonstrating a bottom-up approach to European constitutionalism.[56]

The "democratic deficit" in the European Union has provoked many ambitious proposals for institutional reform in order to bestow greater legiti-

[53] D. Judge, *The Failure of National Parliaments*, "West European Politics" 1995, No. 3, s. 98.

[54] See *National Parliaments within the Enlarged Union: from "Victims" of Integration to Competitive actors?*, eds. J. O'Brennan, T. Raunio, London, Routledge 2007.

[55] S. Weatherill, *UsingNational Parliaments to Improve Scrutiny of the Limits ofEU Action*, "European Law Review" 2003, No. 6, p. 911.

[54] See *National Parliaments and European Democracy: a Bottoms Up Approach to European Constitutionalism*, eds. O. Trans, C. Zoethour, J. Peters, Groningen, Europa Law 2007.

macy on European governance.[57] For the first time in the history of the European Union, it was decided in 1999 that a convention, rather than usual Intergovernmental Conference (IGC) would be set up to deal with the Union's constitutional matters, namely the drafting of a Charter on Fundamental Rights. In December 2001, another convention with the same kind of make-up was mandated to draw up proposals for the revision of the treaties. The question was asked whether choosing the "convention method" could contribute to solving the Union's democratic deficit?[58]

The European Constitution, in the form of the Constitutional Treaty, not only strengthened the European Parliament in the decision-making process of the Union (Community),[59] but also strengthened means and ways of influencing national parliaments in that process.[60]

The 2004 Constitutional Treaty features an "early warning system" (EWS) in which national parliaments will scrutinise European legislative proposals to assess whether they comply with the principle of subsidiarity. In constructivist terms, this procedure effectively sets up the Commission and the national parliaments as interlocutors in an argument over when and how the EU should legislate. At the minimum, this system - which should be expanded to include proportionality - will alleviate the "democratic deficit" by enhancing the parliamentary scrutiny of EU legislation. If it works well, it will improve the subsidiarity compliance of EU legislation and produce a clearer substantive definition of the principle.[61]

New arrangements involving national parliaments could serve as a better response to identified problems if the specifically legal context crafted hitherto in EC law were taken more carefully into account.[62] In particular, monitoring use of the "flexible" provision authorising legislative authority which will succeed the current Art. 308 should be supplemented by monitoring of the similarly functionally broad competence to harmonise laws.

[57] See M. Hôreth, *No Way Out for the Beast? The Unsolved Legitimacy Problem of European Governance*, "Journal of European Public Policy" 1999, No. 2, p. 251.

[58] A. Manzella, *The Convention as a Way of Bridging the Ell's Democratic Deficit*, "The International Spectator" 2002, No. 1, p. 57.

[55] C. Pinelli, *The Powers of the European Parliament in the New Constitutional Treaty*, "The International Spectator" 2004, No. 3, p. 87.

[60] See K.F. Kock, *Europan Parliament and National Parliaments in the Draft Constitution for Europe*, [in:] *Parlament Europejski i parlamenty narodowe*, ed. B. Banaszak, Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego, p. 38.

[61] I. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, "Journal of Common Market Studies" 2006, No. 2, p. 301.

[62] See C. Lebeck, *Art. 308 EC-Treaty, From a Democratic to a Constitutional Deficit? Implied Powers, Accountability and the Structure of European Community*, "Europarâttslig Tidskrift" 2007, No. 2, p. 407.

Subsidiarity monitoring should be supplemented by its close relative, proportionality monitoring.[63]

Some authors suggest however that national parliamentarians are ill-suited to play any role at the supranational level, both because they are collectively a microcosm of fragmentation and diversity of opinion often rooted in both national and ideological divisions and, for this reason, unlikely to reach agreement on key issues, and because of the fact of executive dominance. These factors must be addressed in fostering as real contribution by national parliaments at EU level in reducing the much lamented "democratic deficit"[64]

The issue of parliamentary scrutiny of comitology - the system of implementation committee that controls the Commission in the execution of delegated powers - has been contested for some time by the political forces involved. The European Parliament in particular has become increasingly dissatisfied with the exclusive arrangement for Member State representatives controlling the Commission. Because of the changes to the legislative process brought-about by co-decision, the EP has demanded greater involvement in the process. The Comitology Decisions of 1987 and 1999, and the inter-institutional arrangements that have been concluded around them, addresses these concerns in various ways, but they appear not to have settled the matter conclusively.[65]

On 13 June 2006 an agreement was reached between the Commission, the European Parliament and the Council on a comitology procedure whereby MEPs would be permitted to block implementation decisions taken by the Commission. In addition, such decisions would be made available in all the official languages of the Community and the time available for parliamentary scrutiny was extended. The Parliament finally endorsed these proposals. The new decision is an important step towards greater parliamentary scrutiny, although this clearly will not be the last word on this issue, since *inter alia* the new arrangements do not go so far as the earlier draft Constitutional Treaty. Whilst Parliament has now been put on an equal legislative footing with the Commission, areas of disagreement still remain. However, aside from the political power struggle, one must consider how the arrangements will work in practice. Although Parliament did not use its existing powers to any great extent, this may have been a reflection of their limited effectiveness.

[63] S. Weatherill, *Better Competence Monitoring,* "European Law Review" 2005, No. 1, p. 38.

[64] G. Beck, *The British Parliament and the Convention of the Future of Europe,* "European Law Review" 2005, No. 5, p. 755.

[65] T. Christiansen, B. Vaccari, *The 2006 Reform of Comitology: Problem Solved or Dispute Postponed?,* "EIPAscope" 2006, No. 3, p. 11.

Whilst Parliament may now have greater powers, the requirement for an absolute majority for blocking a decision may prove to be a new hurdle.[66]

Some analysts suggest that the problem of "democratic deficit" maybe solved through creation of a European Senate (second chamber of the European Parliament), treated as the representation of national parliaments in the European Union.[67] Eventually COSAC should be a base for such a second chamber.[68] However realisation of such a proposal in the near future seems to be unrealistic. The "democratic deficit" can and should be overcome rather through a gradual "politisation" of the EU processes without major institutional reforms.[69]

4. The national Constitutions should provide, if they have not done so yet, mechanisms of effective influencing by the national parliament of the decision of the Committee of Ministers (national government) connected with the procedures of creation of law of the EU and the European Communities. A crucial role may be played by the parliamentary committee on European Union (known as a Grand Committee) which acts in the name of the national parliaments. Their effectiveness will be decisive while answering the question whether national parliaments, losing approximately 2/3 of their legislative competences after accession of the state to EU, retained adequate influence on the creation of law in the processes of European integration.

Although scholars examining the impact of the EU on national parliaments have concluded that the European integration undermines domestic legislatures, some of them call for more nuanced analysis.[70] They turn to the EU's new forms of governance, especially the Open Method of Coordination (OMC). Their analysis reveals a complex picture. On the one hand, with regard to participation, by empowering governments through executive federalism the OMC risks further marginalisation of national parliaments. On the other hand, when considering its output, the OMC provides national legislators with opportunities that the traditional Community method cannot offer. First of all, the OMC gives national legislators access to insights and tools for producing successful laws. Second, the OMC gives those legislatures grounds for criticising the policies of government officials. The empirical re-

[66] D. Pocklington, *Comitology under Greater Scrutiny,* "European Environmental Law Review" 2006, No. 11, p. 309.

[67] G. van der Schyff, G.-J. Leenkgnecht, *The Case for a European Senate: a Model for the Representation of National Parliaments in the European Union,* "Zeitschrift für öffentliches Recht" 2007, No. 2, p. 241.

[68] R. Grzeszczak, *Parlamenty państw członkowskich w Unii Europejskiej,* Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego 2004, p. 205.

[69] S. Bartolini, *Mass Politics in Brussels: How Benign Could it be,* "Zeitschrift für Staats- und Europawissenschaften" 2006, No. 1, p. 31.

[70] P. Kiiver, *The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement,* "European Constitutional Law Review" 2006, No. 2, p. 231.

cord suggests that some of these contradictory effects are already at work.[71] Reinforcing parliamentary scrutiny and control of the national representatives in the Council of Ministers contributes to a more democratic Europe. However, if parliaments tie the hands of their governments when they negotiate at the European level, effectiveness of policy-making is jeopardised and national interests may be defeated. Realising this dilemma, members of national parliaments develop strategies to deal with conflicting requirements of national party politics and European policy-making. These strategies and their implications for democracy are influenced by the path-dependent institutional changes in parliamentary systems. They, therefore, vary considerably between member states.[72] So it is necessary to perceive the "European role" of the national parliaments in the different member states.[73]

The case of the German Bundestag shows that in reaction to the process of European integration the Bundestag acquired a set of comparatively strong participation and scrutiny rights in EU politics. It therefore seems rather astonishing that German members of parliament make only very little use of these rights. Different explanations have been put forward in the literature for this phenomenon, such as the complicated decision-making system of the EU and the government's gate-keeper position within it, institutional flows of the German scrutiny system as well as the overall consensus on European integration and the low electoral silence of EU issues. Some authors suggest in that context that the formal instruments of scrutiny in EU affairs are incompatible with both the overall logic of a parliamentary system as well as challenges of policy-making in the EU multilevel system. On the other hand they argue that the exclusive focus on the use of formal parliamentary scrutiny rights leads us to overlook more informal means of parliamentary influence and, therefore, to underestimate the involvement of German parliamentarians in EU affairs. Thus, in order to fully access processes of parliamentary Europeanisation, it is necessary to take forms of informal or strategic Europeanisation into account.[74]

The Austrian Parliament has at its disposal the strongest participation rights enabling it to influence European Union affairs. The original intention of providing that parliament with the strongest instrument to contribute to the EU decision-making processes has been shattered by party-dominated

[71] F. Duina, T. Uranio, *The Open Method of Coordination and National Parliaments: Further Marginalisation or New Opportunities*, "Journal of European Public Policy" 2007, No. 4, p. 503.

[72] A. Benz, *Path-Dependent Institutions and Strategic Veto Players: National Parliaments in the European Union*, "West European Politics" 2004, No. 5, p. 877.

[73] See H. Haentel (rap.), *Devolution du rôle européen du Parlementfrançais*, Paris, Sénat 2005, p. 25.

[74] K. Auel, *The Europeanisation of the German Bundestag: Institutional Change and Informal Adaptation*, "German Politics" 2006, No. 3, p. 253.

parliamentary life. After a promising start, the use of this device has decreased significantly. Today, the instrument is mainly used by the opposition parties to obtain information and - to a limited extent - to control the government.[75]

Dealing with the Polish experience it is worth recalling that the European Treaty establishing an association between the Republic of Poland, on one part, and the European Communities and their Member States, signed on 16 December 1991,[76] contained, *inter alia*, important provisions on the approximation of legal systems. Upon that requirement, the Polish Sejm introduced a procedure for approximating Polish law to the law of the European Union (European Communities).[77] Successful realisation of this goal had a crucial meaning for the accession of Poland to the EU on 1 May 2004. The legal requirements concerning the influence of the national parliament on the creation of law within the EU (EC) was included in the statute of 11 March 2004 on cooperation between Council of Ministers with Sejm and Senate on issues connected with the membership of Poland in the European Union.[78] It states for example that the Council of Ministers immediately submits the EU's documents, which are due to consultation with member states, to parliament (especially: white papers, green papers, communication of European Commission, positions of organs and institution of the EU). Parliamentary opinions should be included in the process of building the governments' position. Formally such an opinion is not binding, but if the government disagrees with a parliamentary opinion, it should explain its position to appropriate organs (art. 9 and 10 of statute).[79] The parliamentary practice in this field since 2004 has shown that generally such cooperation on European matters between government and parliament is going well; however, the Commission of European Integration produced only a very limited number of opinions critical to government's proposals and only in few instances did the government accept that critical viewpoint.[80]

There are, as we may see, characteristic similarities in the parliamentary practice of Austria, Germany and Poland. It shows that it is not enough to in-

[75] J. Polak, P. Slominski, *Influencing EU Politics?: The Case of the Austrian Parliament,* "Journal of Common Market Studies" 2003, No. 4, p. 727.

[76] Dziennik Ustaw of 1994, No. 11, item 38.

[77] J. Jaskiernia, *Polish Sejm's Procedure for Approximating Polish Law to the Law of the European Union,* "Polish Contemporary Law" 2000-2001, No. 1-4, p. 65.

[78] Dziennik Ustaw No. 52, item 515.

[79] See J. Jaskiernia, *Parlament i procesy integracyjne*, [in:] *Parlament: Model konstytucyjny a praktyka ustrojowa*, ed. Z. Jarosz, Warszawa, Wydawnictwo Sejmowe 2006, p. 187.

[80] See D. Lis-Staranowicz, *Komisja śledcza i Komisja do Spraw Unii Europejskiej w systemie organów Sejmu* [in:] *Zagadnienia prawa parlamentarnego,* ed. M. Granat, Warszawa, Wydawnictwo Sejmowe 2007, p. 238.

troduce formai institutions of parliamentary influence on European integration issues. The real effects of such an influence, quite important to reduce the "democratic deficit," depend on several other factors, such as: political culture of society and their representatives, general effectiveness of a scrutiny process in parliament, common understanding of European integration issues, importance of an European integration issues among other problems of parliamentary activity. Such an observation does not diminish the importance of the national constitutions which should offer appropriate constructions for the national parliament's influence on European Issues. It is *condictio sine qua non* for creating the basis for effective national parliament influence. However, it does not guarantee *perse* that the real strong involvement of national parliaments in the EU's decision making process of creating the law will take a place.

This analysis leaves no doubt that the European Constitution, if ratified in any form, as well as the national constitutions, have great significance for creating the legal provisions of the legitimacy process, which could lessen the phenomenon of the "democratic deficit" in the European Union. However, it is important to understand that the "democratic deficit" is a broader problem than the competences of the European Parliament and the national parliaments. Therefore, it is necessary to seek also other solutions to effectively cope with this important issue.

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Unresolved Issues of the Constitution - The Future of the EURATOM Treaty

List of Abbreviations Used

CT	Constitutional Treaty
DG TREN	Directorate General of the European Commission with responsibility for Transport and Energy
EAEC	European Atomic Energy Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
ECJ	European Court of Justice
EP	European Parliament
EPE	Energy Policy for Europe
EPR	European Pressurised Water Reactor
EREF	European Renewable Energies Federation
ESA	EURATOM Supplies Agency
ESC	Economic and Social Committee
ESO	EURATOM Safeguards Office
EU	European Union
EU 6	Six founding signatory states
EU15	EU Member States (1995 accession)
EU25	EU Member States (2004 accession)
EU27	EU Member States (2007 accession)
FP7	Seventh Framework Programme for Research and Technology Development
IAEA	International Atomic Energy Agency
IGC	Inter-governmental Conference
ITER	International Thermonuclear Reactor
NATO	North Atlantic Treaty Organization
PWR	Pressurised Water Reactor
QMV	Qualified Majority Voting
RBMK	Graphite Moderated Light Water Reactor
RT	Reform Treaty as proposed, July 2007.

RTD	Research and Technology Development Programmes
STC	Scientific and Technical Committee
TEC	Treaty establishing the European Community
TECSC	Treaty establishing the European Coal and Steel Community
TFU	Treaty on the Functioning of the Union (as proposed in the Reform Treaty).
TEU	Treaty on European Union

Introduction

Amongst the most urgent environmental and energy related challenges which the Member States of the European Union are facing are those relating to climate change and energy supply. The legal and constitutional framework for action in these two areas is based on not one but two of the Treaties of the European Union. Both of these Treaties were signed in Rome in March 1957 by the governments of France, Germany, Italy, the Netherlands, Belgium and Luxembourg. One established the European Economic Community (EEC) and the other, the EURATOM Treaty, established the European Atomic Energy Community (EAEC). The Treaty establishing the European Community has been subject to significant substantive changes in its fifty-year history. The EURATOM Treaty on the other hand has remained unaltered apart from some institutional and procedural changes.

The objective of the EAEC was to support the peaceful use of nuclear technology to produce much needed electricity. By creating the conditions for speedy establishment and growth in the nuclear sector the governments of the signatory states sought to re-invigorate the European economies and re-energise the process of European integration. At the time the regulatory environment for all forms of power generation was one dominated by public bodies, and high levels of long term state investment and provision of subsidies. The underlying paradigm on which the EURATOM Treaty was based maintained this approach and the terms of the Treaty provided for elements of substantial state support and subsidy for the electronuclear industry. The EEC Treaty on the other hand was more expansive in its proposals and based on a paradigm of market functionality, providing the legal and constitutional framework for the customs union and increased market liberalisation.

The regulatory environment of the modern energy sector has altered and is characterised now by increasing market liberalisation. The use of nuclear electricity has led to much controversy at national level and the development of highly divergent national nuclear energy policies within the EU27 has followed. The economics of the electro-nuclear industry have changed. From a new techno-

logy which required massive amounts of investment, producing electricity by nuclear technology appears to be more competitive. It is supported by some of the EU s governments as a means of achieving carbon-free generation of electricity in order to slow the process of climate change. The result is economic and political environments, which suggests that there is no longer a need for the legal and constitutional framework outlined in the EURATOM Treaty. However, despite recent debates about changes to the frameworks on which the EU is now established, no firm proposals have been made to repeal or to introduce significant amendments to the EURATOM Treaty.

In the light of this reluctance of the national governments of the EU 27 to initiate reforms to the EURATOM Treaty this article analyses its terms to determine if there are any aspects of the legal and constitutional framework which may remain relevant fifty years after the Treaty was adopted. Is the Treaty as some assert "...undemocratic, out-dated and biased towards the electro-nuclear industry,"[1] carrying "...the stigma of an undemocratic, outdated alien in the world of the liberalised market..."[2] or is it "...a remarkable document that expresses the essential commitments of the parties in a flexible and forward-looking language..."[3]

The birth of an 'undemocratic, outdated alien'

The EURATOM Treaty was not time-dated when it was introduced in 1957 and continues to form an element of the *energy acquis* which all states adopt on their accession to membership of the European Union.[4] Following the Messina Conference of 1955 the foreign ministers of Germany, France, Italy, the Netherlands, Luxembourg and Belgium, the six signatory states of the European Coal and Steel Community (ECSC) had concluded that co-operation on the new nuclear technology provided a viable project to increase European integration, particularly as co-operation in the political and defence spheres was not possible.[5] It was also seen as a mechanism to provide an energy resource, which was fundamental to the progress of the European economies and "Before long, the development of nuclear energy for peace-

[1] European Parliament (2002,2), *The EP and the EURATOM Treaty: Past, Present and Future*, "Energy and Research Paper ENER" 114, European Parliament.

[2] D. Fouquet (2005), *The Legal Perspective: the EURATOM Treaty and the new Constitution*, presentation to Energy Intelligence for Europe conference, 23 September, Copenhagen 2003, http://www.energyintelligence for Europe.dk.

[3] CEC, *High Level Expert Group Review of the EURATOM Safeguards Office*, (2002, 7). Report by a High Level Expert Group, Brussels 15th February.

[4] The 1951 Treaty establishing the European Coal and Steel Community on the other hand had been time-dated and expired in 2002.

[5] An idea outlined in the report of the committee established under the chairmanship of Paul-Henri Spaak.

ful purposes will open up prospects of a new industrial revolution far beyond anything achieved during the past one hundred years".[6] The negotiations for the EURATOM Treaty were however more complex than anticipated by the original planners of the EAEC, including Jean Monnet.

The plan for the EAEC was based on solidarity of action in the development of the new technology and transference of competence for action from the national to the supranational level. It was envisaged that the management of the sector would be undertaken by the Commission in the role of a *benevolent technocracy* acting on behalf of the whole community.[7] However nuclear energy co-operation was not the depoliticised policy arena that Monnet sought in order to provide a successful project of European integration. By the early 1950s national policies for the peaceful use of nuclear energy had already begun to diverge. For France and Belgium there were clearly perceived preferences to protect and promote national interests in the electronuclear industry. On the other hand the German and Italian governments were concerned to improve their links with the United States for both reactor technology and cheap supplies of enriched uranium. As a result the proposals for the EAEC were seen by some as a French *Trojan horse* intended to promote the development of the French nuclear industry.

The outcome of the Treaty negotiations which continued through 1956 led to a Treaty based on a traditional model of intergovernmental agreement between states. As the electricity utilities were predominantly state-owned in the 1950s facilitating investment in the electronuclear industry was in effect to agree to a considerable degree of state aid to the developing industry. It conformed to the prevailing regulatory environment for the energy sector of the period. Sharing the burden of the costs of the resources required, including financial, materials, technical and expertise, between the signatory states of the EAEC would ensure the conditions for the growth of nuclear energy.

Two aspects of the Treaty underlie much of the current criticisms. Firstly, the amount of financial support for the electronuclear industry, both through the provision of state aid by the national governments but also in the provision of funding for research and technology developments (Article 7 EURATOM). Initially the EURATOM Treaty was the only one of the founding Treaties of the EU which made such a provision for research funding - it was not part of the ECSC or the EEC Treaties. Although the budgetary lines for nuc-

[6] Resolution adopted by the Ministers of Foreign Affairs of the ECSC Member States at their meeting at Messina on June l/2nd 1955 paragraph 3. Signatory states France, Germany, Italy, Belgium, the Netherlands and Luxembourg.

[7] Following the model of the ECSC and the EEC, the EAEC entrusted the tasks of the Community to four institutions - an Assembly, a Council, a Commission and a Court of Justice (Article 3 EURATOM).

lear research have been included in the EU's more wide-ranging Programmes for Research and Technology Development since the 1980s, funding for nuclear research remains subject to the institutional and procedural rules of the EURATOM Treaty. The budget is not forwarded to the European Parliament (EP) for scrutiny in the same way as other elements of the budget for research and technology developments.

The other major criticism of the Treaty is that it is undemocratic. Under the provisions of the EURATOM Treaty the Qualified Majority Voting (QMV) procedures for decision-making are used by the Council of Ministers, but this does not include the provisions for co-decision on legislation for the European Parliament. The Council of Ministers are required to do no more than formally consult the EP on substantive issues. The unelected European Economic and Social Committee (EESC) and the Scientific and Technical Committee (STC) (with a membership nominated by national governments) have similar formal rights of consultation as the European Parliament in the EAEC's decision-making procedures. In addition, unlike the competences given to the EP under the terms of the EEC Treaty, Article 101 EURATOM excludes the EP from involvement in international agreements.

Whilst the Commission was given a great deal of power to act autonomously on behalf of the EAEC the areas over which this competence could be exercised were circumscribed. Exclusive competence focussed on eight main areas of action, outlined in Article 2 EURATOM with prominence being given to safety of the workers in the industry and the public in those areas surrounding the nuclear power plants.[8] What was missed from the list of competences however was that of ensuring the safety of the installations themselves, this was retained as a competence for the national governments and authorities.

In the light of an American monopoly in the procurement of uranium in the 1950s the terms of the EURATOM Treaty supported the creation of a com-

[8] In order to perform its task, the Community shall, as provided in this Treaty: a. promote research and ensure the dissemination of technical information;
b. establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied;
c. facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community;
d. ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;
e. make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;
f. exercise the right of ownership conferred upon it with respect to special fissile materials;
g. ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialised materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community.
h. establish with other countries and international organizations such relations as will foster progress in the peaceful uses of nuclear energy. (Article 2 EURATOM)

mon market in the trade of nuclear ores and materials to ensure that sufficient materials would be available to the members of the EAEC. Competence was conferred on the EAEC for the sole rights of option and ownership of all fissile material used for civilian purposes (Chapter IV, EURATOM). The EURATOM Supplies Agency (ESA) was established in 1961 with the statutory responsibility for managing this competence.[9] However the Supply Agency has never taken on its intended role[10] and is a mere shadow of what was intended[11] with 17 employees in 2007.[12] (As concerns are growing about the availability of uranium as the basic raw material for the electronuclear industry the role of this agency in monitoring imports could arguably be of more relevance in the future). Management of this competence also required a role for the Commission to be able to conclude international agreements on the common supply of the raw materials for the industry on behalf of the EAEC[13]. The EAEC was as a result "...to establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy."[14]

The EAEC was established as a response to peaceful collaboration amongst the states of Europe. It was not intended to be a commitment by the signatory states to co-operation on the military use of nuclear technology. The EURATOM Treaty therefore contained measures to ensure that the fissile materials being used in the nuclear reactors of the EAEC were only being used for peaceful purposes. The EURATOM Safeguards Office (ESO) was established to deal with the measures to ensure all EU states did not divert or acquire materials away from their intended and declared uses (Chapter VII, EURATOM). The ESO is now based under the supervision of the Commission (DG TREN)[15] with more robust mechanisms in place and a much clearer current

[9] The EURATOM Supplies Agency (ESA) was established on June 1st 1960 to ensure the equitable and regular supplies of nuclear ores and fuels for the EU's nuclear utilities (Chapter IV EURATOM Treaty). The Agency is a common supply agency for ores, source materials and special fissile materials and under the supervision of the European Commission. Currently this is within DG TREN.

[10] Secretariat of the European Convention (2002), Contribution made by Mr Klaus Hansch, *The Future of the EURATOM Treaty* CONTRIB 121, CONV 344/02, Brussels, 14th October. In 2006 the ESA had merely 17 employees.

[11] "The Supplies Agency exists, but is a mere shadow of what was intended" (European Parliament, *The EP and the EURATOM Treaty: past, present andfuture,* (2002, xiii) Energy and Research Paper ENER 114, European Parliament.

[12] EURATOM Supply Agency (2007), *Annual report 2006, ESA Luxemburg.*

[13] This proviso of the Treaty has enabled agreements to be signed with the main suppliers in the field - USA, Canada, Australia, Argentina, Uzbekistan, Ukraine, Japan, Kazakhstan.

[14] Article 2 para h. EURATOM.

[15] DG TREN was formed in 1999 by a merger of the former DG VII (Transport) with DG XVII (Energy) and the unit for Nuclear Safety of DG XI (Environment, Nuclear Safety and Civil Protection). In the Euro-

role and mandate than the ESA. The range of safeguards which are monitored by the ESO include measures applied to power stations, fuel fabrication and re-processing plants. The type of safeguard measures applied will vary, depending on the nature of the nuclear facility but may include audits of material use, analysis of the use of materials, surveillance and on-site inspections. For example a power station where there is on-site spent fuel storage will be subject to audits of materials, containment and surveillance measures, including closed circuit TV monitoring, and random re-verification procedures to ensure that the identified stocks of materials are still present on site. By 2006 the number of Community inspectors involved in this work had risen to 180.[16] They have 24/7 access to data and personnel who deal with materials, equipment or installations subject to the safeguards. As a result of the levels of co-operation which have been established between the regulatory bodies of the Member States, the Commission and the International Atomic Energy Agency a high level of nuclear safety has been developed within the EU.[17] This is arguably the most successful outcome of the EURATOM Treaty as it has resulted in the development of very comprehensive systems which now apply across all the EU's 27 Member States.

A 'resilient alien'

Throughout the history of the European Union the use of nuclear power has caused much controversy at national level and widely divergent national nuclear energy policies have emerged. Whilst the technology provides both an important product for export throughout the European energy market for France, and a considerable share of the electricity required in the UK, Sweden, Germany and Belgium, in other states there is staunch opposition its use. Some of this opposition has its foundation in what is perceived as an unacceptable linkage of the military with the peaceful use of the technology. Other opposition comes from concerns about the safe use of nuclear power for electricity generation. This concern was significantly increased by the catastrophic fire and explosion at the Chernobyl nuclear power reactor in the Ukraine in April 1986, details of which continue to be contested more than 20 years since the disaster occurred.

Some governments in the Member States of the EU responded to public pressure in the late 1980s and licensing for the construction of new reactors

pean Commission 2004-2009 two Commissioners held the portfolios for Transport, Jacques Barrot, and Energy Andris Piebalgs. (The two directorates responsible for nuclear policy, nuclear safeguards and radiation protection within DG TREN are not based in Brusssels but in Luxemburg).

[16] CEC *Fifty Years of the EURATOM Treaty*, COM (2007, 6), 124 final, Brussels, 20.03.2007.

[17] For fuller discussion see P. M. Barnes (2003), *Nuclear Safety for Nuclear Electricity: The Search for a Solid Legal Basis for Nuclear Safety in an Enlarged EU,* "Managerial Law" Vol. 45, No. 5/6, pages 115-143.

declined and units were closed. This was certainly the case in Italy and also in Austria, where the use of nuclear energy continues to be vehemently opposed, "The use of nuclear energy is not an option for Austria in the future. That choice has now been endorsed as a result of the consensus among the Member States."[18] Since the 2004/07 enlargement of the EU the divergence of national nuclear policies has increased. Those states formerly part of the Soviet Empire (FSU) have adopted an approach leading to support for the nuclear sector as their governments have sought alternatives to high levels of dependency on Russian energy resources.

During the 1990s the European electronuclear industry was faced by a somewhat paradoxical situation. The low costs of alternative sources of energy, the high capital costs of new reactor construction and closures of reactors meant that the economics of the electronuclear industry did not appear to be viable. For some opposing the nuclear sector it appeared that the market was operating and would ensure the *death* of the industry and thus end the need for the EAEC and the legal framework of the EURATOM Treaty. As a Treaty supporting a declining industry it appeared to be of little consequence for most Member States during the decade, apart from France. But at the same time newer technology developments and increased operating licenses in the remaining reactors led to improved efficiency levels. Globally the capacity of the nuclear power plants to provide for volume base-load demand improved by ten points on average during the decade. Nuclear plants in Europe were able to achieve levels of over 90% operating capacity, 5% above that considered to render nuclear power most competitive.[19] By the early 2000s the electronuclear industry was able to provide one-third of the electricity being used within the EU15.

More recently the economic environment for the sector has further improved. Unlike other major producers of electricity, coal and natural gas, nuclear prices are not determined by fluctuations in price of the basic raw materials. The price of nuclear electricity is mainly from the capital costs needed for the nuclear power plants. An advantage of the electronuclear electricity for the consumer is the stability of price and availability which may be assured. The costs of the renewable and other alternative sources of low carbon energy remain high. In combination these factors have led to a significant growth in support for the nuclear sector, which is further enhanced by concerns about the rising price for oil and natural gas. The nuclear option is considered by many national governments as the way forward to meet their national energy demands.

[18] M. Bartenstein (2006), Austrian Energy Minister, speech following Extraordinary Energy Council meeting held on March 14lh, Brussels.

[19] World Nuclear Association (WNA), The New Economics of Nuclear Power, (2005,10), WNA, London.

The new competitive environment for the electronuclear industry has brought new questions about the use of state subsidy. In the viewpoint of representatives of the electronuclear industry it has been "...demonstrated that nuclear power does not, over the long term, require subsidy"[20]

Many of the energy utilities in Europe are no longer state-owned enterprises so maintaining elements of state involvement in the energy industry does undermine the market and provide an unfair advantage for the industry in comparison with fossil fuel generators of electricity.

This is a situation increasingly acknowledged by the Commission "...if you would like to build a nuclear power station it is an investment-based decision without any state aid. We are not in a situation where we should provide state aid for the nuclear industry... Now you can make a very profitable decision to invest in building new nuclear power stations but you need to be sure that is clear acceptance because this is an investment for 100 years"[21].

By 2005 the EU25 had become the world's largest nuclear electricity generating region.[22] In 2007 following the accession of Bulgaria and Romania, fifteen of the EU's states produced nuclear electricity from 152 nuclear reactors (c.f. Table 1).

Levels of dependency on the technology varied from 4% of electricity generated in the Netherlands, 31% the Czech Republic, 57% in Slovakia, 72% in Lithuania and 78% in France (summer 2007) with an overall average contribution of 30% of electricity generated within the EU. The changing economic environment for the industry suggests that it is competitive without state support. Given the highly divergent national nuclear policies which have developed in the EU *T1* it appears there is a strong case to repeal the EURATOM Treaty and *re-nationalise* nuclear energy policy.

[20] Note 23 above, 8.

[21] A. Piebalgs (2006, q456), House of Lords Select Committee on the EU, sub-committee D, uncorrected evidence on the Management of Radioactive Waste and the Safety of Nuclear Installations, given on Monday 20th March 2006, Brussels.

[22] CEC, *Nuclear Illustrative Programme*, (2006, 3), COM (2006) 844 final, Brussels.

Table 1. Number of reactors, EU-Global comparison to autumn 2007.

	Number of operable reactors	Reactors under construction	Reactors planned and proposed
EU 27 + candidates	152	2	11
World (4)	442	28	204 (68 of which are in China)

Source: various European Commission and IAEA.

The future of EURATOM - an unresolved issue of the Constitution?

The most recent opportunity to debate changes to the Treaties of the European Union began with the adoption of the Laeken Declaration by the European Council in December 2001.[23] As one of the founding Treaties of the European Union, the EURATOM Treaty was included the list of Treaties to be reviewed during the Convention on the Future of Europe which began its deliberations in 2002. Discussion of the EURATOM Treaty was limited within the context of the Convention's debates. The Praesidium of the Convention regarded the Treaty as a distinct, complex and technical subject which it was not appropriate for the Convention to consider.[24] This view went unchallenged by most members of the Convention. As Andrew Duff, a Convention member, concluded: "Given the essentially controversial nature of nuclear power but also because of lack of time the Convention was unable to reach consensus on whether to repeal, assimilate or amend the EURATOM Treaty".[25]

Instead it was decided to incorporate any changes which were required for the EURATOM Treaty into a Protocol annexed to the Constitutional Treaty[26]. These changes were minimal and related mainly to the adaptation of the Treaty to the new rules for institutional and financial arrangements. The Treaty's legal 'personality' was to remain unchanged. The limited role of the EP in the decision-making process was also unaltered. On behalf of the States of Germany, Ireland, Hungary, Austria and Sweden however a Declaration was appended

[23] European Council Presidency Conclusions, 14th-IS01 December 2001, Annex 1, *Laeken Declaration on the future of Europe* "The Union needs to become more democratic, more transparent and efficient. It has to resolve three basic challenges: how to bring citizens, and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and model in the new, multi-polar world".

[24] Secretariat of the European Convention, *Suggested Approach for the EURATOM Treaty*, (2003), CONV 621/03, Brussels, 14th March.

[25] A. Duff (2006,167), *The Struggle for Europe's Constitution*, Federal Trust.

[26] Protocol amending the EURATOM Treaty CONV 850/03, 236.

to the Constitutional Treaty noting that the EURATOM provisions had not been altered since 1957 and supporting the idea of an inter-governmental conference to review it as soon as possible.[27] During the IGC which followed under the Italian and Irish presidencies it was evident that deliberations about the EURATOM Treaty would not be included in the debates. "...At the IGC, while Ireland and some other Member States proposed a more extensive debate on EURATOM it was clear that there was no consensus in support of this."[28]

Failure by all the Member States of the EU to ratify the Constitutional Treaty created a difficult period of reflection and then negotiation on alternatives which concluded with the introduction of a draft Reform Treaty by the German presidency in 2007. The EU has also been engaged in a search for an Energy Strategy that would ensure a secure, competitive and sustainable energy policy.[29] This commitment is included in a more explicit manner in the Reform Treaty proposals than it has been to date in any of the Treaties.[30] It appears however that the Reform Treaty will bring little change to the legal and constitutional framework for energy policy development and measures in the EU. Decisions which significantly affect a Member State's energy choices and the general structure of energy supply remain subject to unanimity vote. The Reform Treaty proposals leave the EURATOM Treaty with a separate legal personality as one of the founding Treaties of the EU. In effect they preserve the current 'legal status quo' and do not address the criticisms that this Treaty is undemocratic and based on an outdated economic paradigm.

The EURATOM Treaty - 'a remarkable and flexible document'?

The national governments of the EU have decided to continue *to jealously guard* their rights to choose their national energy resources. There is little room for bargaining and consensus-building between the national governments to transfer more competences over energy developments to the supra-

[27] Declaration 44 annexed to the Constitutional Treaty.

[28] Irish Government (2005, 92), *The European Constitution - White Paper,* Dept of Foreign Affairs, June.

[29] CEC (2007) *An Energy Policy for Europe,* COM (2007) 1 final, Brussels, 10.01.2007.

[30] "Annex II point 4
Insertion of amendments agreed during the 2004 IGC and replace the last indent of article 174 by the following '...promoting measures at international level to deal with regional or worldwide environmental problems and *in particular combating climate change',* and
Annex II point 5
Insertion of a new title on energy, as agreed in 2004 IGC, with the replacement of the introductory sentence in paragraph 1 of the Article (III—256) by the following 'In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, *Union policy on energy shall aim, in a spirit of solidarity between Member States* (to)..European Council Summit, Brussels 21/22nd June, Presidency Conclusions.

national level. It would appear to be unrealistic to expect to reach agreement on a new legal and constitutional framework for nuclear energy technology in the current political environment. What then is the role for the EURATOM Treaty in the current political and economic environment?

The energy reality would suggest that without nuclear energy the countries of the EU cannot balance their growing energy demands in a manner which would be both competitive and sustainable. Public disquiet about nuclear energy suggests that a strong regulatory framework for safety in the industry is required. From a practical perspective the impact of failures to ensure safe operation of the industry in the geographical area of the EU could result in major environmental consequences including damage to human health and life. Politically it would be unacceptable for the decisions made about one State's energy policy to carry with it the potential to significantly affect its fellow EU Member States. Aspects of safety and disposal of waste from the electronuclear industry were included in the EURATOM Treaty. But their significance was not as apparent at it has become after fifty years of operation of the industry.

Furthermore "Public opinion surveys conducted by the Commission show that while they know little about radioactive waste... (they are) concerned about it and have very little trust in the nuclear industry' and '...ninety percent of respondents thought that the lack of a decision on how to dispose of high level waste had a negative effect on the image of nuclear energy."[31] Other public opinion surveys show that 53% of the Europeans perceive nuclear power as more of a risk than an advantage with lack of confidence in the safe disposal of radioactive waste, the protection of radioactive materials against misuse and fear of terrorist attacks on nuclear facilities featuring amongst a high proportion of respondents concerns.[32] For many people the safe operation of the installations and safe disposal of the radioactive waste are apparently the major concerns. It is for these issues that the Treaty retains its importance as a legal framework for co-operative and co-ordinated action as there is no alternative under discussion.

The urgency in 2007 is to address the challenge of developing a secure, competitive and sustainable energy policy for the EU 27. This urgency is greater in 2007 than it was for the EU 6 in 1957 as the EU 27 is operating in a very different geo-political and geo-economic world. Solidarity amongst the Member States on energy measures appears to offer the most effective way forward to meet the challenges the EU 27 faces, but the rhetoric of the national governments does not match their action and protection of national interests continues as a constraint to proposed strategies. The commitment to energy soli-

[31] D. M. Taylor, *The Management of Radioactive Waste in the EU: Opinions, Situation and Proposals for Changes*, "Practice Periodical of Hazardous, Toxic and Radioactive Waste Management" 2005, January.

[32] CEC, *Europeans and Nuclear Safety*, Special Eurobarometer Report 271, February 2007.

darity in the Reform Treaty may be nothing more than a political statement in response to the concerns of the Polish government and the governments of the Baltic States which are heavily reliant on Russian co-operation for energy resources.[33] The EURATOM Treaty includes a commitment to "...joint effort undertaken without delay..." (Treaty Preamble) and thus confirms a commitment (which has not been repealed) to *energy solidarity* albeit on aspects of developments relating to the nuclear sector. Not rhetoric but action, establishing a precedent for burden sharing of resources, technology and expertise.

The EURATOM Treaty framework has enabled the EU to adopt a number of legislative acts on safety-related issues which have put into place arrangements to guarantee the most effective control of nuclear materials in the world.[34] Two events were the catalyst for more emphasis to be put onto safety issues surrounding the nuclear sector within the EU in the early 1990s. Firstly the Chernobyl disaster and secondly the prospect of enlargement to FSU states where similar technology was also used. A mandate was given to the Commission, based on the EURATOM Treaty, that enabled the officials of DG TREN to play a unique lead role in the investigation, analysis and monitoring of the various reactors in the candidate states. Working with the International Atomic Energy Agency and following acceptance of the energy *acquis* of the EURATOM Treaty in the candidate states, it was possible for recommendations to be made by the Commission officials which led to closure of some reactors and the introduction of radical measures to improve safety in others. These closures have been the subject of much heated controversy amongst and between all the EU's member states, old and new, those in which there is support for the industry and those where there is opposition to its use. However closure programmes have been carried out, supported by EU funding.

In 2002 the Commission introduced a Nuclear Safety Strategy including a series of legislative measures targeting safety at nuclear installations and also national arrangements for funding to de-commission reactors. It was recommended that this legislation should be in place before the New Member States acceded in 2004.[35] The legal basis for these proposals came from several articles of the EURATOM Treaty. Article 2b) EURATOM stipulates that the Community should establish uniform safety standards to protect the health of

[33] S. Taylor, *Securing EU Energy and Tackling Climate Change - what the Reform Treaty will do to Help*, "European Voice" 2-29th August 2007, p. 6.

[34] CEC (2002) *Nuclear Safety in theEU*, COM (2002), 605, Brussels, November.

[35] The nuclear 'package) proposed 06.11.2003 by the Commission comprised:
-Framework Dir. on safety of nuclear installations, (not adopted at time of writing)
-Dir. on radioactive waste, (not adopted)
-Decision authorising the Commission to negotiate an agreement with Russia on trade in nuclear materials (adopted European Council, 06.11.2002).

workers and the general public and have the competence to ensure that they are applied. Article 30 EURATOM gives greater clarity and definition of what the expression standards means. Article 31 EURATOM provides for the scrutiny of the legislation by a group of scientific experts appointed by the Member States and consultation of the European Parliament. Article 32 EURATOM provides for revision of the basis of the safety standards.

These articles do not include the safety of the installations themselves as the competence, for this aspect of safety remained a national concern under the EURATOM Treaty. However a ruling by the European Court of Justice (ECJ) in December 2002 had confirmed that the technical competence of national authorities to deal with the safety of nuclear installations did not preclude the EU from legislating on the issue.[36] In the opinion of the ECJ, it was not appropriate for the safety of the workers and the public to be seen in some way as separate to the issue of safety of the installations themselves.

Whilst all the EU's governments are concerned about the safe operation of the industry, strong opposition to the proposed legislative measures came from a number of Member States including the British, Finnish and Swedish, and they remain un-adopted in autumn 2007. Based as they were on the EURATOM Treaty the legislative proposals do demonstrate how the Treaty may be used to raise issues for debate amongst the EU's 27 Member States. In the UK the House of Lords Select Committee on the EU concluded that an important role did exist for the EU to take a lead in safe management and disposal of radioactive waste because of "...grave concerns that Member States are failing to educate citizens about the use of nuclear power, how the safety of nuclear installations is maintained and of the action taken and options available to Member States to manage the radioactive waste produced."[37]

After fifty years of operation of the nuclear industry there is a considerable amount of these materials in intermediate storage facilities to be dealt with. As EU states de-commission older reactors or respond to the concerns of their populations for phasing-out of the nuclear capacity appropriate management of spent nuclear fuels and other forms of radioactive waste has become of vital importance. Low-level waste is disposed of in shallow burial facilities; some waste is stored in ponds in order to reduce its temperature before storage. How to deal with the long-term management of the most dangerous, albeit relatively small, amounts of high-level and long lived intermediate waste have still to be addressed.

[36] ECJ Case C-29/99, December 10th, (2002).

[37] House of Lords, *Managing nuclear safety and waste: the role of the EU,* (2006, para. 110), EU Committee 37th Report 2005-2006, July 6th.

Despite media speculation early in 2004[38] that the UK government was considering shooting high-level waste at the sun, the scientific evidence favours the more earthbound concept of deep geological disposal. Discussion of the development of regional facilities which may be used by more than one Member State has begun. Whilst there appear to be no technical difficulties to geological disposal the identification of appropriate sites has not yet been made.

Despite its limitations the EURATOM Treaty does appear to provide the legal basis for the EU "...to develop further, in conformity with Community law, the most advanced framework for nuclear energy in those Member States that choose nuclear power, meeting the highest standards of safety, security and non-proliferation as required by the EURATOM Treaty..."[39] and for "... the Commission to investigate the development of nuclear energy in Member States, taking account of both the benefits of that technology (low volatility of production costs and no CO2 emissions) and the risks linked to the existence of nuclear power stations (failures and waste disposal)."[40] To support initiatives on safety the European Council has proposed an EU High Level Group on Nuclear Safety and Security and enhanced co-operation with the International Atomic Energy Agency (IAEA)[41] to discuss issues such as non proliferation and nuclear safety and security. The governments of the Czech Republic and Slovakia have agreed to establish the EU Nuclear Energy Forum (ENEF) which will meet twice a year, alternatively in Bratislava and Prague, beginning at the end of September 2007 or the beginning of October. The aim of the ENEF is to give all the stake-holders an opportunity to engage in an open and transparent debate about the risks and the benefits of future use of nuclear energy.

Nuclear energy - '...a source of energy in doubt... tainted by the original sin of dual usage - civil and military...'[42]

The European Atomic Energy Community was established as a response to peaceful collaboration amongst the states of Europe. It was not intended to be a commitment by the signatory states to co-operation on the military use of the technology. This continues to be the commitment of the EAEC and in addition nuclear non-proliferation now forms a major element of the

[38] P. Brown, *Shoot it at the Sun*, (2004, 3), The Guardian, April 14th.

[39] Council of the EU, Presidency Conclusions (2007, para 32), Brussels European Council 8/9th March.

[40] CEC, *An Energy Policy for Europe* (2007,18), COM (2007) 1 final, Brussels, 10.01.2007.

[41] The International Atomic Energy Agency (IAEA) is an independent international organization reporting to the General Assembly and the Security Council of the United Nations on issues surrounding the compliance of states with their obligations with regard to nuclear safeguards. It was established in 1957.

[42] CEC, *Towards a European Strategy for the Security of Energy Supply - Green Paper* COM (2000, 31-32) 769 final, Brussels, November.

EU's evolving Security and Defense Policy. The EURATOM Treaty is one of the two treaties which have an impact on the approach to nuclear non proliferation which the EU States may adopt — the Nuclear Non-Proliferation Treaty (1st July 1968) (NPT) being the other.[43] Both Treaties contain measures and statutes on safeguards of materials to ensure that those designated for peaceful use are not used for military purposes. For some of the supporters of the EURATOM Treaty this may be seen as the main success of the Treaty through time - i.e. that the Treaty created a "...firewall against proliferation of nuclear weapons (through the elements of ownership of fissile material and nuclear safeguards)".[44]

Similar types of technologies are involved in both civilian and military use of the nuclear materials. Pressure on the availability of high-grade ore[45] for both types of developments will lead to more emphasis on recovery and reprocessing in turn leading to expansion of capabilities in the states which are currently users of nuclear electricity. There is growing global disquiet about the access to weapons of mass destruction in some politically unstable states and the possibility of terrorist groups gaining access to nuclear materials. India, Pakistan and Israel are known to have nuclear weapons and have not signed the NPT and North Korea has withdrawn. France and the UK, of the 188 signatory states of the NPT are declared Nuclear Weapons States (the others being the USA, Russia and China). Some NATO countries, the EU Member States of Germany, the Netherlands, Belgium, Italy, Greece and the applicant state of Turkey, have forces which are trained to use US nuclear weapons. All the NPT signatory states (those which are nuclear weapons states and those which have agreed to exclusively peaceful uses of the technology) have voluntary agreements and protocols with the IAEA for inspection to ensure that nuclear materials are not being diverted to military use.

There is overlap in the work of the IAEA and the European Commission on nuclear safeguards. The safety regime which has been adopted within the EU is based on the 25 safety principles of the IAEA and the International Convention on Nuclear Safety. In instances of duplication of effort the IAEA procedures are invoked to verify that those of the EURATOM Treaty have been adhered to. As the EURATOM Treaty is part of the *acquis* for all EU Member States the measures which are in place are supported through ru-

[43] The Nuclear Non-Proliferation Treaty has 188 signatory states and is the major international Treaty dealing with use of nuclear weapons. However the states of Israel, Pakistan and India where nuclear weapons have been developed since the 1970s are not signatory states.

[44] R. Linkohr, *Assessing EURATOM - 50 Years of European Nuclear Policy* (2007), Presentation given at Public Hearing, European Parliament Committee on Industry, Research and Energy, European Parliament, Brussels, 01.02.2007.

[45] The price of uranium ore tripled in 2007 as a result of increased demand.

lings of the European Court of Justice and a range of implementation mechanisms. Whilst nuclear materials needed for defence are excluded from the verification procedures of the EURATOM Treaty, the EU states have in place a more comprehensive and effectively monitored review of those materials which are being used in the civilian nuclear reactors than that of the IAEA. Within the EU DG TREN, acting on behalf of the EAEC, is the central contact point with the IAEA. For the IAEA, monitoring, through inspection of nuclear power plants to identify instances of possible non-compliance with the terms of the NPT is harder in other regions of the world.[46]

EURATOM - an alien in the liberalised energy market

The EURATOM Treaty is based on the paradigm of a high level of state support for the development of the new technologies because of the high costs entailed. As such the Treaty supports what is deemed an out-dated concept in EU energy policy where the paradigm of market functionality appears to have replaced it. But both the EURATOM Treaty and the TEC may be used in dealing with questions relating to state aid to the electronuclear industry as shown in some recent European Court rulings. In 2002 state aid was agreed for British Energy (BE) (the UK's privately owned nuclear generator), which had been experiencing financial difficulties. The UK government provided BE with a credit facility of £410 million and produced a re-structuring plan for the company. The re-structuring plan transferred BE's nuclear waste liabilities to the UK government, a series of measures worth approaching £6 billion of what was in effect state aid. Following an investigation of the re-structuring proposals the measure was approved by the European Commission. It was agreed by the Commission as appropriate to address the objectives outlined and on the basis of the EURATOM Treaty articles relevant to worker safety and public protection.[47]

The TEC was the basis for the 2006 ruling of the Court of First Instance (CFI) in the case of a German tax exemption scheme as applied to nuclear power plants.[48] Provisions in German law require nuclear power plants to set up reserves to cover the costs of disposing of irradiated fuel and radioactive waste and closure of plants. These reserves may be counted amongst the liabilities of the undertakings and are subject to a reduction in the tax burden. In 1999 three German utilities requested that the European Commission should

[46] For example in Japan monitoring is done at national level, in Canada there are no national or regional structures in place, monitoring compliance with the NPT is done by the IAEA through its routine verification procedures.

[47] CEC, Decision on State Aid which the UI< government is planning to implement for BE Pic. COM (2004), 3474 final.

[48] Case T-92/02 Stadtwerke Schwäbisch Hall GmbH et al. v the European Commission, 26th January 2006.

investigate the tax exemption scheme which was being applied to those reserves. In presenting its findings the CFI concluded that there was an advantage from lower taxes to the nuclear power plants but that it did not grant the specific advantage inherent to the idea of state aid.

Following the licensing by the Finnish government of the construction of an advanced Generation III European Pressurised Water Reactor (EPR) at the Olkiluoto site in Finland the European Renewable Energies Federation (EREF) filed an action with DG Competition of the European Commission. The complaint was brought using the TEC and calling for an investigation of the new reactor development on the grounds of infractions of EU state aid requirements, export credits, public procurement legislation and safety. The Commission launched an investigation of competition in the electricity sector as a whole in 2006. The overall objective of the sector enquiry was to address a number of matters impeding the development of a functioning, open and competitive EU wide energy market by 1st July 2007. Whilst the specific complaint of the EREF was not addressed, it is evident that in any investigation of state investment, loans at special rates, or support for the export of materials the case will not be based on difficulties which the electronuclear industry faces in the market. The findings of the Commission will be based on the overall impact on the European energy market of the production of electricity from the new reactor development.

EURATOM - undemocratic and in need of a 'spring clean'

This criticism primarily relates to the unchanged nature of the Treaty adopted in 1957, prior to the introduction of direct elections to the EP in 1979. As a result there is no requirement for the Council of Ministers to do anything more than formally consult the EP on substantive issues. As there are a number of safety related issues considered to be of importance to the public it is the view of the EU that "(I)t can be plausibly argued that it is precisely in those areas ... relating to safety that the public most feels the need for rigorous democratic scrutiny, control and accountability."[49]

In an attempt to address this inconsistency of the role of the EP between the EURATOM Treaty and the TEC a proposal for an amendment to the Treaty was made to the Convention on the Future of Europe by the European Commission. The proposal was to ensure that the "Parliament is restored to the institutional system, as it is given the power to adopt with the Council, 'laws' for basic standards whereas at present it is very much outside the decision making process."[50] A view which continues to receive support from the

[49] EP, *The European Parliament and the EURATOM Treaty: past, present andfuture.* (2002, 2) Energy and Research Paper ENER 114 European Parliament.

[50] Proposal for an Additional Act to be added to the Constitution on the peaceful use of Atomic Energy

Commission but as the national governments have decided to leave the Treaty substantively unaltered the EP continues with few formal powers in EAEC decision-making.

Support for new developments -something for everyone?

The work of the EAEC began in the 1950s when the new nuclear technology was regarded as an important way to meet growing energy demand. The requirements of the 1950s were for investment in the state-owned utilities to encourage energy developments and stimulate economic growth. As part of that investment and support funding for research into fission technology developments was included in the EURATOM Treaty (Article 7 EURATOM). Since the 1980s, the EU has developed a successive series of Research and Technology Development (RTD) programmes, which now include the EURATOM programmes. Funding for the EURATOM Research programme was included in the most recent of these the Seventh Framework RTD programme (FP7) proposed by the Commission (2007-2013). However the EURATOM budget was not forwarded for scrutiny to the European Parliament with the other elements of the FP7 Budget, as this is not a requirement under the terms of the Treaty.

Agreement on the EURATOM research budget for the EURATOM was difficult to achieve in the Council of Ministers because of the divergent views of the national governments about further developments in nuclear fission technology. Interest has grown in fusion technology as it is perceived as a less hazardous technology than fission as it does not produce as much radioactive waste and in using a variety of more abundant fuels reduces dependency on uranium.

The Austrian government exercised its veto on the funding for nuclear fission technology, other than that associated with decommissioning reactors and safe disposal of radioactive waste.[51] Agreement was eventually reached in the Council of Ministers on July 24th 2006 with the bulk of available funding being directed to new fusion technology developments.[52] As a result 2.1 billion euros of the EURATOM budget are to be allocated to fusion research and in particular the development of the International Thermonuclear Experimental Reactor (ITER) under the auspices of the International Atomic

(the 'Penelope Paper(prepared by the Commission task force led by Francois Lamoureux, Director-General DG TREN).

[51] Nuclear fission - is the process of splitting molecules of uranium-235 in order to produce energy and is the basis of the nuclear technology currently used.

[52] Nuclear fusion - is the process of fusing two hydrogen atoms to form a single atom of helium. One gramme of the fuel produced can develop the same energy as 45 barrels of oil. However the process requires extremely high temperatures which it is not yet possible to achieve in a reactor.

Energy Agency (IAEA). The agreement for the ITER development in Cadarache, France, was signed in June 2006 and will include input from partners in Japan, China, India, Russia, South Korea and the United States. The ITER development is regarded by many as having the potential to make a major contribution to sustainable and secure energy supplies in Europe but is unlikely to be at the stage of commercial production before 2050 because of the difficulties of achieving and maintaining the high temperatures needed for the reaction to take place.

Conclusions

It appears unlikely that the EURATOM Treaty which established the European Atomic Energy Community will be repealed or amended in the foreseeable future. It is a Treaty adopted in 1957 and as such has "...at times an old-world air."[53] But as the analysis of this article has concluded it does have the capacity to deal with a number of issues which are highly relevant in the context of the contemporary European Union. It is a Treaty in which the signatory States have agreed to confer a limited competence for supranational action. But in some areas of the limited action the Treaty may be considered to be a success. In the light of the reluctance of the national governments in the most recent debates about Treaty change to repeal or significantly amend the EURATOM Treaty this article has concentrated on analysing where it retains value and as a result may make an effective contribution to the energy challenges facing the EU.

The lack of action by the national governments to make changes to the EURATOM Treaty means that the role for the European Parliament remains unaltered in the decision making process of the European Atomic Energy Community. Thus the criticism that the Treaty continues to be undemocratic and lacking in accountability may be upheld. However a number of categories of risk have been identified in association with the nuclear sector. They include the cost of the technology and in particular de-commissioning of the large number of now-ageing European reactors, safety (including safe operation of reactors, prevention of accidents, safety in the context of terrorism attack at nuclear power plants), waste disposal, in particular long-term management of waste and the possibilities of nuclear weapons proliferation if the use of nuclear technology is increased. There is a danger that if the competence for action in the nuclear sector was to be re-nationalised it would be considerably more difficult in a Union of *T1* states with diverse national nuclear policies for co-operative and collabora-

[53] Secretariat of the European Convention, Contribution by Mr. Klaus Hansch *The Future of the EURATOM Treaty*, (2002, 4) CONTRIB 121, CONV 344/02, Brussels, 14th October.

tive action on these aspects of safety to be developed. It is for these issues that the EURATOM Treaty retains its importance as the legal and constitutional framework for the nuclear sector and an essential component of the energy *acquis* within the European Union.

DISCUSSION

- Professor Manfred Weiss, PhD - Frankfurt University

I have a question for Professor Arnold. I fully agree with your concept of substantial or functional constitution, my problem is only that I have a feeling that this constitution is a little bit contradictory. On the one hand, in a situation where it has become extremely difficult to legislate, we are facilitating now the legislative process by facilitating majority voting. On the other hand, and here I think we have a disagreement, the subsidiarity principle is strengthened in a way, which nobody knows exactly, but I have a suspicion, will make it extremely difficult to legislate on European level. Do you think that this is a contradiction, and do you think that it would have been better perhaps to weaken the subsidiarity principle instead of strengthening it?

- Professor Rolf Grawert, PhD - University of Bochum

A question to Mr Arnold: I agree with your concept of a constitution. I would say, that is a question actually, is it not a concept for the Court? Because the Court of Justice declares that the Treaties are the functional constitution. Is it not nowadays a concept for the Court to do what the member states did not want to do? To explain and to develop something that we may call a functional constitution?

- Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski University College of Economics and Administration in Kielce*

I have a question with reference to the excellent speech by Professor Arnold. The question refers to the principle of subsidiarity and its place among those tendencies of contemporary constitutionalism that you have presented so clearly. I have not managed in a any direct way to find room for this principle which in my opinion seems to be one of the most basic and characteristic rules of contemporary constitutionalism. Maybe you believe it is situated

* Professor emeritus of the University of Wroclaw, Judge of the Constitutional Tribunal from 1985 to 1993.

among the four you mentioned: anthropocentrism, rule of law, differentiation of power, and internationalisation of law? I do not know where, but I would feel some regret if we missed this principle which is typical also for the part of Europe in which we are debating today, namely for the post-communist countries of Central and South-Eastern Europe. All constitutions of these countries have adopted, to a greater or lesser extent, the principle of subsidiarity. The 1997 Constitution of the Republic of Poland is very strongly rooted in this principle. We were worried in the last 2 years that there were attempts to undermine this principle, by acting in the spirit of etatist attitudes and centralism. Yet one could always say: these practices contradict the constitution, the subsidiarity principle, on which the Polish constitution is based. But I perceive it differently. We know that it is also the fundament of the legal order of the EU, so it seems to me that it needs to be taken into account somewhere, either among the four principles or tendencies that you mentioned, or possibly in its own positions, taking it to be one of the pillars of contemporary constitutionalism, and at the same time an underlying principle of the legal order of the EU.

• Professor Reiner Arnold, PhD - Regensburg University

Let me begin with subsidiarity, because this is, well, in a certain contrasting way mentioned by you, Professor Weiss, and by Professor Dzialocha. In my system, so to say, subsidiarity is important of course, in this main element of vertical differentiation of power. In the state orders subsidiarity is often not named. It is indeed expressly, explicitly named in the Polish constitution, not in the German one, for example - well, now with Article 23, but in fact it was Article 72 until our federalism reform, which was maybe the heart of subsidiarity. At the state level, I think regionalism, this means distributing central power is an expression of subsidiarity, I think both in the community and in the members states it is clear that political and constitutional stability cannot be fully maintained and assured by centralised systems. Because the autonomy of the parts of the community and the state is also a community, the autonomy and the responsibility and the consciousness to have the power to decide I think is very important, and stability can only really be assured by such a decentralisation, and I think it is the origin of this principle of subsidiarity it is taken from the individual, form the personality, that it is important that the individual has rights a place to develop his responsibility, and this is by nature something that belongs to a human being. But also in other systems, which are not legal person systems, like state or community, this distributing of power and responsibility is very important. So I would say it is important.

The other question is, does this principle in the new form hinder too much, because of course each principle can be abused or over-accentuated, so if the decent realisation would go so far that there is no longer realistic central power, this would be a contrasting effect. I think, as to the protocol which is here, what is important is that parliaments are now involved, they are the addressees of the competencies which are exercised by the communities, and I think they can take the first step. But of course there must be a certain number of parliaments, so that it is relative. If it is clear within Europe that this is a violation of subsidiarity, then this political alarm process goes on. As a whole I would not say that this hinders too much, the way it is conceived. I was always wondering why this principle existing in a written from since the Maastricht Treaty has not been much used until now, maybe it can be that the Community now refrains more from legislating too much, this is maybe an effect. But the ECJ has never annulled a legal act for being contrary to subsidiarity. On the other hand in Germany the Bundesraat, the federal council, often referred to this, but it was nevertheless maybe in result not so efficient. So I would say subsidiarity is something very important. Exaggeration is not good, this is clear, but I do not see at the moment that it could be abused, so I would say.

Professor Grawert, yes, indeed, I think it was first the German Constitutional Court which called community law constitutional. It was forgotten and rediscovered. It was in some decision of the ECJ which first called it, at a supra-national level, constitutional. And this is closely connected to the idea of Costa v. ENEL, because here the specificity of community law was explained. I think it is not a big step to say “this is something which we could also name constitutional law”. The Union is not a state, but nevertheless many mechanisms are state-like or very close to the state mechanisms, and so the step is not so difficult to take with this constitutional concept. It is the peoples who are not aware of this, or the states, the Netherlands and France, or Great Britain even, but you have also nice books on European constitutional law, so it is also entering into British, English consciousness, and so it is maybe a process that peoples or the academic elites are more and more convinced that we can use this word.

On the other hand, the peoples rejected a formal constitution, or some peoples, it is a very small margin, the refusal is not so high in comparison to the people who through their parliaments for example consented to this term of formal constitution. Personally I regret that the term is no longer used, or for a while not used. It is for pragmatic reasons, it is indispensable I suppose, but the difference is that it is more political integration, politics would have been supported and developed and strengthened by this word, it is more psychological, better for creating an identity. Maybe also to some extent legal, but

I think if it is called basic treaty, or constitution, or basic law, it is maybe not decisive. If this reform treaty was called fundamental treaty, we could reflect on whether it is a formal constitution or not. Some say that it is not a constitution because it is no longer one document. I am not sure. Maybe juridically it cannot be proved in a clear way what is and what is not a constitution, we have intermediate phenomena, and I think the terminology is made by the society, this means by a convention, this means it is not a legal definition but the term is accepted by a part of the academics or the politicians, while others refuse it. Those who think there is no formal constitution are currently in the majority, this is a new approach, it is clear that it would be very courageous to say now "this is not a treaty in substance, it is a constitution". Myself I say it is constitutional law, but in the form of a treaty. So what I want to say is to great extent matter of name, the substance is important, it is clear, but nevertheless I regret that it is omitted.

- Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski University College of Economics and Administration in Kielce

I would like to say that the participants of this conference were very surprised today to hear about certain changes in the future concept of the Treaty. The question arises then what is the legal situation at present in this aspect. From what we have heard, Article 10 section 1 part 2 of the draft European Constitution, which said clearly that the Constitution and the legislation adopted by the institutions of the EU have supremacy over member states legislation, has been abandoned. What is the situation now, then? Is this principle still only visible in the rulings of the Court of Justice (i.e. the previous situation has been maintained), or is there -1 may not have heard clearly - there is a new place for this principle, but not in the Reform Treaty? That was the point I was going to raise in my question. I will give up asking it, because I had the intention of entering into a dispute with the speaker on this issue.

The second point is: What does Mr Klich think of the suspension of the validity of the Charter of Fundamental Rights towards Poland? We have been told by the press and the politicians about it. I'd like to put forward a point for discussion: what is the justification of this position? Other than ideological and political, which I can understand, given who makes these statements. But what is the legal justification for this course of action? Given that we are a party to the Convention on Human Rights, and moreover, and before that, the UN Covenant on Economic, Social and Cultural Rights, a party to the Social Charter, etc., and our constitution is not afraid, so to say, of positions that we are afraid of now just because they are included in the Charter of Fundamental Rights. This matter requires an explanation, because everything we deny when we refuse to adopt the Charter, we already have in our legislation. Maybe not *expres-*

sis verbis, but the legal system is of such a nature that all the elements which are being questioned today are already binding upon us.

• Professor Rolf Grawert, PhD - University of Bochum

I will not discuss the several lectures but I will look forward. We must discuss and decide, decide and discuss, if the Constitution should say only what is the stage of the society nowadays, or if it should be a programme. In the history it has been both, and we should decide what it should become for Europe. Secondly, the democratic deficit. I think we must discuss not only the deficit but also how we should develop democracy, for instance common elections: nobody discusses common elections, only by nationality. We must strengthen European marketing by media and all the universities and so on, and we lawyers must develop something that I would call European dogmatic: how we understand European laws, what principles we follow for interpretation. We have to develop a common mentality for European jurists. Thirdly, the problem of the federation of the community of Europe. A federation is, like sovereignty, a fluid concept (that is a very good expression!): a federation is marked by an open process that stems from the Treaty on the European Community. In a federation the laws of the several states influence one another, and I think we are in the process of influencing one another, even if we do not want to know this. Between the constitution, the normal process of cooperation, even between the Court of Justice, Bundesverfassungsgericht (the Constitutional Court of Germany), developed the process of cooperation with the Court of Justice in Luxembourg. But I am a little bit afraid. In former times, the Constitutional Court of Germany developed its jurisprudence. Afterwards they said we have a state of laws that is sufficient. But in the newest decisions it goes a little bit to nationalism, and I am afraid. Perhaps the court is afraid about the extending competencies, made by the Court of Justice in Luxembourg, but the Court of Justice is the real constitutional institution in Europe, so it has it its hands the functional constitution of the European Constitution. But the Court of Justice is less democratic than the other institutions — they are only lawyers! And finally, the concept of sovereignty, that is a great problem in Poland. I know it. In Germany, we do not have this problem because after World War II we got our sovereignty at the same time when we gave it back to Europe. That’s our mentality after the war. We got our sovereignty back from the USA and we gave it back to Europe. Therefore, we do not have this problem, even if nationalism now is re-emerging in Germany, but I think if we take the concept of sovereignty as a fluid concept, than we can work with this. Go step by step forward, not only look back.

- Professor Manfred Weiss, PhD - Frankfurt University

I think all the presentations were extremely impressive. But they left out one dimension which I think is of utmost importance. We can talk at length about, let us say, facilitating majority votes and I do not know what else, with the new Treaty. But neither the former Constitutional Treaty, which couldn't be ratified, nor the new Reform Treaty are giving us an answer on where we are going. What do I mean by this? The Treaty we had so far, with all its amendments, never resolved a basic question. The basic question in my view is: what is the relationship between the so-called market freedoms, which are stemming from the original treaty, which was the Treaty on the European Community, Economic Community at that time, and the social dimension. And here we have an open area, and it is pretty clear that there is a predominance of the so-called market freedoms. And the poor Court of Justice, whom you called undemocratic, always has the task to make corrections. At the moment we have quite a few pending cases where everybody expects from this poor Court to make decisions, make judgements, against the spirit of the Treaty. And I would say: as long as we do not change the Treaty in this respect, and take seriously what we have embedded in the Charter, as long as we do not do this, we should not be talking of all these formalities. They are useless.

- Professor Jo Carby-Hall, PhD - The University of Hull

I just want to be extremely brief and answer the question, the very first question the learned professor has asked, in the place of the member of the European Parliament who is not with us. I should be very brief. There is absolutely no doubt, and I shall qualify this statement in a minute, that there is supremacy of European law over national laws. There is no doubt at all about that. This is not found in any Treaty, not found in any Treaty whatsoever, but it is the development of the European Court of Justice. And it is this development that has brought out the supremacy of European law over national laws. And the reason for that is that in certain spheres European law, not national laws, European law must predominate if we are to have a European groups of states, member states. And that is the *raison d'etre,* the reasoning behind this concept.

The second part of your question, I will just answer very briefly again. The Constitutional Treaty is, as I suggested earlier on, dead, but it will appear in a declaration attached to the Reform Treaty. A declaration which will talk about the supremacy of European law. And if you want my personal opinion, I think that it is not necessary. It is not necessary to put that in the Treaty, it is not even necessary to put it in a declaration. Because it is a *fait accompli,* it is well known, that the Court of Justice has pronounced on this in a num-

ber of cases, which the MEP, the Polish MEP talked about, *Costa v ENEL* being the most important.

• Ewa Popławska, PhD — Polish Academy of Sciences, Warsaw

I would like to express a remark connected with the paper by Professor Jaskiernia, and ask one question to the professor. It may be surprising, but in the Reform Treaty I read, at least fragments of the draft of the 5th of October, so we may assume that it is the text which was agreed upon the few days ago, in the protocol on using subsidiary and proportionality principles, the provisions about the early warning system were very much expanded. Moreover, the period for issuing positions of national parliaments with regard to proposed EU legislation was extended from 6 (in the Constitution) to 8 weeks as well, in light of the subsidiary principle. I can see a common characteristic of this phenomenon with basic changes introduced by the Reform Treaty, as compared to the Treaty Establishing a Constitution for Europe. In my opinion, it is a reflection of the same line of thought which resulted in the removal of the quasi-national, quasi-federal symbols of the Union. This is another step towards satisfying the national level, particularly the national parliaments, which should play a significant role in struggling with the democratic deficit. I believe this is an action of a symbolic nature, not to say that it is just a small detail aimed at distorting the view of the actual character of the EU decision-making processes. Why do I have the impression that this boost for the national parliaments is mostly of a symbolic nature? This is what Professor Jaskiernia raised when he spoke of the low level of activity of the national parliaments, and how the opportunities are wasted that these parliaments have even now, under the current regulations, to influence European legislation. The second argument which the character of this regulation regarding national parliaments is symbolic is that the question remains open as to how the European law-making institutions will react to a protest of a majority of parliaments claiming that a draft law violates the subsidiary principle. These institutions may still uphold their draft. They may change it too, but upholding to is definitely an option. Options include an amendment, a withdrawal, but they also include upholding the draft.

Moving on to my question now. I understand that this extension of the decision period for national parliaments for up to 8 weeks is connected with the conclusions worded in the papers of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC). COSAC has been advocating an increase in the role of national parliaments in the decision-making process and has been working to improve the quality of communication and the flow of information between national parliaments. I would be very interested to hear the position of Professor Jaskier-

nia with regard to this matter. On the one hand, we see activism of some parliaments, but on the other hand there is inertia of others who seem to have little interest in the opportunities provided for them to influence European legislation. I would therefore like to ask, in the light of the intensification of contacts between parliaments, is it not likely a tendency will appear for parliaments to try to seek unanimity in their opinion on the proposed legislation? Is there a risk that parliaments who are stronger will take a certain position while others, having paid little attention to the matter at hand, will automatically copy their decisions? While I believe that it is good that parliaments try to coordinate their activities, I also realise that, given the imbalance of power between parliaments, it is possible that some parliaments will dominate while others will adopt a passive approach.

• Professor Jerzy Jaskiernia, PhD - Świętokrzyski Academy

A number of questions have been asked, and I believe it is the duty of speakers to provide some kind of answer - otherwise there would be the impression that they are running away from the problems raised. Professor Grawert asked whether we should speak of a democratic deficit or rather of a need to build democracy. I understand the allusion: there is the opinion that the deficiencies are exaggerated while positive aspects are being overlooked. Myself I see no contradiction here. When we speak of a democratic deficit, we note that it is being lessened. We speak of many flaws, but if we compare the Maastricht Treaty with the Amsterdam Treaty with the Nice Treaty and finally with the European Constitution, and the Reform Treaty, we notice constant progress. It is small but steady. Of course, one may ask: should not more be done in terms of positive solutions? Professor Grawert suggested common elections, a common electoral law for parliamentary elections. I believe today it is too early to do so, and I will support this view by quoting the controversies surrounding the elections to the European Parliament. This seems to be the obvious area of seeking common solutions. One might say that the national parliaments are burdened with their specifics, traditions, historical circumstances — this is difficult to harmonise. The European Parliament is free from such burdens, but even in this case it has been very difficult to find approval for common solutions. That said, it is necessary that common values exist in the area of the quality and freedom of elections, and I would like to add here that these considerations cannot take place in separation from other institutions. We keep talking here of the European Union, but it is the Council of Europe that by definition is supposed to encourage progress in the area of democracy and human rights, and the Council has truly done a lot of work in this respect. Secondly, the Organisation for Security and Cooperation in Europe. This is the chief organisation which monitors elections.

In Poland recently we had an incident related to attempts to bar the presence of observers. Fortunately now the situation has been resolved. It seems to me therefore that the problem of the quality of elections is not one that the European Union is to handle alone. I do however share Professor Grawert's point that it would be desirable to undertake efforts to unify electoral procedures across member states.

Let me now move on to the second problem that was raised. Should we discuss formalities? I think we should rather address the fundamental dispute between free market economy and the social aspect. I believe both are necessary. The suggestion is legitimate, of course, that a great dilemma resides there, but the dilemma cannot be overcome until the public opinion is unified on the subject matter. Right now in Europe we have the Christian-democratic approach, the social democratic approach, and the liberal approach. It would be wrong to say that the entire Europe is unified in understanding of what market freedom is, and even more what the social dimension should ideally constitute, i.e. social cohesion. There is great differentiation in this aspect. This is very well visible in Great Britain, where Tony Blair, Gordon Brown and Margaret Thatcher all presented differing views on this issue. Thus even within one state the electorate decided which of these aspects were preferred. Nonetheless, one must realise that the formal questions create a situation which is conducive to considering these problems and to seeking a shared policy. I believe there is no need to put these two concepts in opposition.

Finally, let me move to the matter raised by Dr Popławska regarding the early warning system. First of all, it appears to me that the extension of the period is a very good idea, because this makes the mechanism more realistic. It had been a clear signal from COSAC that the period had been too short. The key problem in my opinion is that the final step has not been taken: what happens now to criticism expressed within the early warning system? I think this is quite typical for the European approach to national parliaments: it always gives them something, but it stops short of going the whole way. It reaches out with a carrot, but the carrot is never big enough. This actually stems from the approach of governments. It is the governments who believe that they themselves represent the member states. The governments are ready to listen to what the parliaments have to say, but they want to retain their final decision-making powers. The message to the parliaments is as follows: yes, you are titled to speak up, to express you opinion, to study the documents, to have your say. But the decision belongs to the governments. As long as this matter is not resolved, until we have a system where the co-deciding by members of governments and parliaments is more realistic - until then, as long as the governments prevail, the final step will not have been taken.

Dr Poplawska's comment is accurate, there is a crack in the reasoning behind the regulations. I suppose this has been made on purpose. Is there a risk that some parliaments will choose a tactical approach? We have been observing this mechanism in many aspects, not only with regard to the cooperation between national parliaments, but also in the fact that certain countries, which I will not name in order not to politicise the discussion, in the process of European integration also had adopted the kind of approach where they remained silent just in case, or voiced their objections very quietly and in a manner ensuring that nobody gets nervous. Germany, France and other key players were looked up to. Poland in this respect tended to be the naughty boy, which not everybody approved of.

I believe the chief question is this: since the parliament is the representative of the will of the nation, and since this system has finally been introduced and there is a degree of coordination, this strengthens COSAC. Let me say here that I believe it is not realistic for COSAC to become the second chamber of the European Parliament.

I believe the Union will choose to evolve gradually rather than to take the radical step of establishing a second chamber. I think it is too early now to speak of such solutions, which are not necessarily useful right now. First the decision must be made to use the existing instruments. The time to build new structures will come later. New structures mean new costs, new bureaucrats, and new threats to the democratic deficit. I would be very careful here.

• Diane Ryland - University of Lincoln

A little bit of bias here, but I would like to congratulate my colleague Pamela Barnes for an excellent paper. And it is Pamela that I would like to address my questions to. I will make it in the form of comments, but I have three points that I would like to add to your excellent paper on the "alien dinosaur" and why it will not go away and what we can do about it. The problem of the democratic deficit in the EURATOM Treaty. And I have three points. Nuclear waste is now being legislated upon under the European Community Treaties, soon to be the Treaty on the Functioning of the European Union. The institution agreement between the Commission and the European Parliament that Pamela Barnes mentioned had emerged under the EURATOM Treaty. Could this progress to a protocol eventually, which is what happened to what was the Inter-Institutional Agreement on the Application of Subsidiary and Proportionality? A third point I would like to make is a question I would like to put forward for consideration: as more and more competencies are being given to the Treaty on the Functioning of the European Union, energy, autonomy, climate change, could this make the EURATOM Treaty - I would like to say progressively obsolete? But maybe the term "extinct" would be more appropriate?

• Pamela Barnes - University of Lincoln

To my colleague's comments: Could this progress to being a protocol in the Treaty? Or should we be thinking about getting rid of the EURATOM Treaty? I think you are getting to the point where you could have too many protocols. And I think by far the most efficient way of dealing with this would be to actually repeal the EURATOM Treaty and assimilate certain aspects of it into the main body of the Treaty, rather than leaving it, because as I said I think there are far too many protocols. And yes, I agree with you that there are other mechanisms by which you can deal with nuclear waste, and this of course is where the Treaty does have some relevance but still does not have in other areas, it can be used as a more flexible instrument. But as I said: I think the most efficient and the most effective way would be to repeal it and assimilate articles from it into the main body of the Treaty.

Part 2

Professor DIETER KUGELMANN, PhD - Harz University of Applied Sciences

The Future of the Common Foreign and Security Policy: Reform of the EU-Treaty

1. Structures and issues of the CFSP

1.1. Developments and Structures

The Common Foreign and Security Policy (CFSP) is one of the fastest growing issues in European law. In order to strengthen the security of the Union and its member states, the cooperation in this field has accelerated within the last few years. The Balkan wars have shown that the European states have to fight for peace not only in Africa or Palestine but in Europe itself. They failed to enforce peace and security in the Balkan wars of the 1990s and tried to learn from their mistakes. This was the starting point for an intensified cooperation within the European Union aiming at a Common Foreign and Security Policy, establishing a European Security and Defence Policy (ESDP).

The Treaty of Maastricht in 1993 implemented the CFSP as part of the Treaty on the European Union.[1] In the Treaty of Amsterdam in 1999, the position of the High Representative for the CFSP was created.[2] Step by step, the European Union built up political structures to allow the realisation of this treaty law. The progress depended on the interests and on the will of the member states. Germany, France, Belgium or Spain promoted a strong CFSP and a strong common ESDP including the facilities for military op-

[1] *Fink-Hooijer*, The Common Foreign and Security Policy of the European Union, EJIL 5 (1994) 173.

[2] *Regelsberger/Schmalz*, The common foreign and security policy of the Amsterdam treaty: towards an improved EU identity on the international scene, in: Monar/Wessels (ed.), The European Union after the Treaty of Amsterdam, 2001, p. 249.

erations. The United Kingdom and Denmark were reluctant and aimed at strengthening the European Union, because they did not want to endanger NATO and the relationship to the United States of America. In 1995, Austria, Finland and Sweden joined the EU and together with Ireland formed a group of states which have to defend their status of neutrality.[3] The enlargement of 2004 brought Eastern European states like Poland in the EU which had fought hard to join the NATO. These states were sure that NATO could guarantee their security and therefore were reluctant towards the CFSP, because it was not evident that this policy could guarantee security as certainly as NATO was perceived to be able to do.

The debate about the future of the CFSP is identical to the debate about the future of the European Union. The CFSP does not fall under the system of the Community law, the Community method is not applicable. The European Parliament has a certain political influence but it does not have powers of decision apart from budgetary aspects (Article 21 EU-Treaty). The European Commission is associated with the CFSP but de facto its influence and importance is limited (Article 27 EU-Treaty). According to Article 46 EU-Treaty, the European Court of Justice has no competence for Title V, meaning for the CFSP. The most important institution is the Council, which can decide on Joint Actions (Article 14 EU-Treaty) and Common Positions (Article 15 EU-Treaty). The Council acts unanimously (Article 23 para. 1 EU-Treaty).[4] Progress for the structure of the CFSP in the EU-Treaty depends on the modifications of the organisational and procedural framework.

The CFSP is a cooperation of member states' governments according to the provisions of the EU Treaty. Therefore, the structure of the CFSP is closely linked to the fundamental question of national sovereignty in the EU and the division of competences. The EU is not a federal state, but a special kind of organisation of states. Who acts on the international level, the member states or the EU? Who guarantees security, the member states or the EU? The answers have to take into account that no European state is able to guarantee security without other states. In the European Defence and Security Policy, the relationship to NATO and the relationship to the United Nations are the big political questions. In the field of foreign policy, the EU may fulfil certain tasks but cannot and will not replace the member states. The fundamental question is what kind of role the EU can play in the world.

[3] Cf. *Lysen*, Some Views on Neutrality and Membership of the European Communities: The Case of Sweden, CMLRev. 1992, 229; *Hummer*, Österreichs Neutralität und die GASP bzw. ESVP in der EU, SZIER 2001, 443.

[4] See in detail *Regelsberger/Kugelmann*, in: Streinz (Hrsg.), EUV/EGV, Commentary, 1st edition 2003, Art. 23 EU.

British, Polish or German views on those problems may be different. Even the view of the government, the parliament, the majority of citizens and the academics in a state may be different. First of all, the Foreign and Security Policy serves to realise the interests of a state. Defining these interests is an ongoing process. Interests may change. But a treaty is concluded at a certain point in time. The European Reform Treaty is supposed to be concluded 2007. The provisions on the CFSP will be altered and the future of the CFSP depends on the answers to some crucial questions which have to be given at least partly by the concrete provisions. These key issues have to be analysed. The compromise on the contents of the Reform Treaty was reached by the heads of states and governments on 23 June 2007. However, there may occur changes in details.

7.2. *Key issues*

There are some key issues which are of principal importance for the future development of the CFSP. The basis of the actual European policy is the European Security Strategy of December 8, 2003 (ESS).[5] It states that the European Union "is inevitably a global player". As a consequence, the EU is active in crisis management and preventive diplomacy throughout the world. Since 2002, the EU implements military missions within the framework of the Common Security and Defence Policy. But the stress of the EU activities as a whole lies on measures of non-military character.

However, the Common Security and Defence Policy is crucial because nothing else in the CFSP touches national sovereignty as much as the question of a European army.[6] According to Article 17 par. 1 EU-Treaty, the CFSP shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence. Since the Heads of State and Government have taken crucial decisions at the Cologne summit in 1999, the development of the CSDP has led to a cooperation of unexpected intensity. The European Council restated in Helsinki 2002 the common European headline goal of installing a Rapid Deployment Force of 60.000 soldiers. One or two battle groups of about 2000 soldiers each shall be ready to be deployed within 24 hours in a situation of crisis or conflict. These goals have been realised, and most of the forces are ready to operate.

[5] A secure Europe in a better world - European Security Strategy, Dok 15895/03 (PESC 787) of 8 December 2003, accessible at the website of the High Representative on www.europa.eu.

[6] Cf. *Bonnen*, Towards A Common European Security and Defence Policy, 2003; *v. Wogau*, The Path to European Defence, 2004.

Concerning the Common Security and Defence Policy, the relationship to NATO was a fundamental issue of conflict between the EU member states. The relationship to the United Nations has become more and more interesting because the EU implements missions which are decided by the Security Council of the UN under Chapter VI and VII of the UN Charter.

In the general context of the Common Foreign and Security Policy, the relationship to the system of the European Community describes the character of the CFSP. It may be closer to the principles of general international law ruled by the sovereignty of states or it may be closer to the Community method with a division of powers and a network system between member states and the institutions of the EC. The contents of the policy are decided by the member states in the national context and then within the framework of the European Council and the Council. But the procedures which are applied in this frame are laid down in the EU Treaty. As the contents of foreign policy are necessarily highly flexible and the necessary measures barely to foresee, the procedures and institutions play an eminent role. Therefore, the position and competences of the High Representative for the CFSP are an important anchor for the structure of the CFSP.

2. Relationship to NATO

As a consequence of a stronger CFSP including a stronger European Security and Defence Policy, the relationship to NATO had to be clarified.[7] In 1998, the United States Secretary of State Madeleine Albright declared that the future development has to take into account “three Ds”: no decoupling, no duplication, no discrimination. European decisions must not be decoupled from decisions within NATO. Structures and facilities of NATO must not be duplicated in the EU. Member states of NATO which are not member states of the EU must not be discriminated in operations of the EU.

As early as June 3,1996, the Council of NATO decided in Berlin to implement a European Security and Defence Identity within the framework of the NATO.[8] However, this decision did not entail far-reaching practical consequences. As part of the general modification of the NATO after the end of the cold war, European security was taken into account. The new strategic concept of the Alliance of April 24,1999 approved the implementation of a European Security and Defence Identity within the framework of NATO.[9] The idea

[7] *Cornish/Edwards*, Beyond the EU/NATO dichotomy: the beginning of a European strategic culture, International Affairs 77 (2001), 587.

[8] Cf. www.nato.int/docu/pr/1996/p96-063e.htm.

[9] The Alliance's Strategic Concept approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 23rd and 24th April 1999, no. 18, see www.nato.int/docu/pr/1999/p99-065e.htm.

as to strengthen the European elements within the NATO.[10] But the United States underestimated the EU. The CFSP was developed with high speed and the European Security and Defence Policy was developed even faster. Therefore, the European pillar within NATO has not gained any real importance. The specific European element in NATO is the cooperation with the EU. As a consequence, the cooperation needed a reliable fundament. This fundament was created with the Berlin Plus Arrangement.[11]

A lot of fundamental problems on the operational level have been solved by the Berlin Plus Arrangement of December 16, 2002.[12] It constitutes the link between the EU and NATO in terms of military operations. The Berlin Plus Agreement provides for the use of NATO facilities by the EU After the conclusion of the Berlin Plus Agreement and some practical experiences with the operations *Concordia* in Macedonia and *Althea* in Bosnia-Herzegovina, the cooperation between the EU and NATO seems to work well.

3. The European Security and Defence Policy (ESDP) and crisis management for the United Nations

The EU is active in crisis management and preventive diplomacy throughout the world. Nevertheless, the EU concentrates on certain regions in order to realise an effective policy approach. In the ESDP, there are restrictions for military and police missions, because the given military and police capacities are limited.

3.1. International security

According to Article 11 of the EU-Treaty, the objectives of the CFSP are not only to safeguard the common values and the fundamental interests of the Union, to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms, but also to strengthen the security of the Union in all its ways and to preserve peace and strengthen international security in accordance with the principles of the United Nations.

The relationship to the United Nations is mainly governed by the provisions of the UN Charter. The role of the EU in peace-keeping and peace-enforcing operations is growing. Since 2002, the EU has implemented military missions under the auspices of the United Nations and mostly in cooperation with NATO.

The EU took over the NATO-mission “Amber Fox” in Macedonia. In Bosnia-Herzegovina, the European Union Police Mission (EUPM), which was ap-

[10] *Croft,* Guaranteeing Europe's Security? Enlarging NATO again, International Affairs 78 (2002) 97.

[11] *Graf von Kielmannsegg,* Die Verteidigungspolitik der Europäischen Union, 2005, p. 338 et seq; *Dietrich,* Europäische Sicherheits- und Verteidigungspolitik, 2006, p. 376 et seq.

[12] The Agreement is not published, see the information at www.nato.int/issues/nato-eu/index .htm.

proved by the Security Council of the UN[13], is the decisive pillar of the peace-keeping structures.[14] The operation *Artemis* in the Republic of Congo, which ended on September 1, 2003, was the first case of peace-enforcing by EU military forces without preparation by NATO and out of Europe.[15]

The EU is ready to take over international responsibility including military operations. In this context, the CFSP requires close cooperation with the United Nations. The main objective of the United Nations, laid down in Article 1 UN Charter, is to preserve peace and international security. But the UN needs support because it does not have own military or police capacities for concrete operations. At this point, the activities of the EU may strengthen its role on the international level.

3.2. Non-military actions and preventive measures

The strategic concept of the European Security Strategy aims at the prevention of crisis and conflicts and stresses the civilian power of the EU. Defending the common values of the EU means to support the realisation of these values all over the world. Of course, the EU has to concentrate on certain regions. Nevertheless, the non-military actions are often smaller and cheaper than military actions and can be implemented in a greater number of regions.

The EU has implemented missions to strengthen the rule of law in Georgia (EUJUST THEMIS)[16] and in Iraq (EUJUST LEX).[17] In 2007, a police mission in the Republic of Congo is realised (EUPOL Kinshasa).[18] Another operation, which has started on June 8, 2005, concerns the reform of the security sector in the Repubic of Congo (EUSEC RD Congo).[19] The EU BAM Rafah is supposed to support the Palestinian Autonomy Administration in the controls at Rafah.[20] It started on 25 November 2005 and is continued. Aiming at

[13] Res. 1396 (2002).

[14] Council Joint Action 2002/210/GASP of 11 March 2002, OJ 2002 L 70/1 of 13 March 2002.

[15] Council Joint Action 2003/92/GASP of 27 January 2003, OJ L 34/1 of 11 February 2003.

[16] Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS, OJ L 228 of 29 June 2004, p. 21.

[17] Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX, OJ No. L 62 of 9 March 2005, p. 37.

[18] Council Joint Action 2004/847/CFSP of 9 December 2004 on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL Kinshasa), OJ No. L 367 of 14 December 2004, p. 30.

[19] Council Joint Action 2005/355/CFSP of 2 May 2005 on the European mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), OJ No. L 112 of 3 May 2005, p. 20.

[20] Council Joint Action 2005/889/CFSP of 12 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah), OJ No. L 327 of 14 December 2005, p. 28.

consulting and supporting the Palestinian Police, on 1 January 2006 the EU implemented the police mission EUPOL COPPS.[21]

At its core, the European Union is a civilian power, not a military one. This does not exclude common military operations in order to fight for the common values. The improvement of the international reputation of the EU as political and not only an economical global player depends from the ability to implement peace-keeping missions in cooperation with the United Nations. According to the draft text, the Reform Treaty will lay down that the Union may use the CSDP for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The European Union may be engaged in military operations, but the main field of activity shall be peace-keeping and preventive action.

4. Developments and the Reform Treaty

The Reform Treaty will have to take into account that the European Union law provides for a procedural framework of policy-making in the CFSP which has to be adapted to future challenges. The Treaty on the European Constitution would have integrated the CFSP into the general framework of European Union law and in principle would have finished with the intergovernmental character.[22] The Reform Treaty will be more restrictive with the application of Community law and the Community method to the CFSP.

Whereas the range of the Community method will be extended to big parts of the area of freedom, security and justice policies, the Common Foreign and Security Policy will keep most of its special characteristics like the unanimous decision-taking. As a consequence of the Reform Treaty, the pillar construction of the EU will be altered into a single construction of a European Union possessing legal personality. However, there are a lot of exemptions especially for the CFSP, which attribute to this area of policy a specific character. The most visible element of this character is the decision-making procedure, staying as complicated as it is. The CFSP will keep most of its intergovernmental character.

There will be no European Foreign Minister. But the situation of the High Representative will be changed. The position of a High Representative of the

[21] Council Joint Action 2005/797/CFSP of 14 November 2005 on establishing a European Union Coordination Office for Palestinian Police Support (EUPOL COPPS), OJ No. L 300 of 17 November 2005, p. 65.

[22] See *H.-J. Cremer*, Article 1-28, Article 1-40 and Article 1-41, in: Calliess/Ruffert (ed.), Verfassung der Europäischen Union, Kommentar der Grundlagenbestimmungen (Teil I), 2006; *Kadelbach*, Die Gemeinsame Außenpolitik nach dem Verfassungsvertrag, in Hofmann/Zimmermann (ed.), Eine Verfassung für Europa, 2004, p. 145; *Stein*, Sicherheits- und Verteidigungspolitik nach der geplanten EU-Verfassung - nur virtuell? in Hofmann/Zimmermann (ed.), Eine Verfassung für Europa, 2004, p. 179.

Union for Foreign Affairs and Security Policy is created who will also be vice-president of the Commission. The High Representative will wear a "double hat". His task will be to increase the coherence and visibility of the EU's external action. Representative functions will have to be shared with the President of the European Council. An European External Action Service will support the High Representative. This construction seems to be not too far away from the construction of a European Foreign Minister, only the name has changed. The influence of the Commission as an institution will be restricted.[23] This is a consequence of the position of the High Representative as vice-president of the Commission. It will be his or her task to guarantee the coherence of foreign activities. However, it should be borne in mind that decisions in the Commission are taken by a majority.

The Political and Security Committee (Article 25 EU-Treaty) is of enormous practical importance. It monitors the international situation and delivers opinions to the Council. On the operational level, there is a chance of progress for the CFSP by formally and also practically upgrading the role of the Committee.

In the Common Security and Defence Policy, specific decision-making procedures will be applied. It should be seen as a success that the way shall be paved for an easier reinforced cooperation amongst a smaller group of states. The existing possibilities of enhanced cooperation (Article 27a et seq EU-Treaty) have not yet been used. They are too formal and complicated. However, if there is no consensus reached in the Council, an enhanced cooperation of the willing may allow effective contributions to crisis management. The Treaty on the European Constitution would have provided for a structured cooperation of some member states. The Reform Treaty will probably bring similar structures. In the process of reform, the member states should open the door for actions by groups of member states. This does not weaken the EU, but strengthens its capacity of acting.

5. Conclusion

In all member states, foreign policy and security policy are issues of limited influence of the parliaments and a dominant position of the governments. The margin of appreciation of the government is wide. According to the constitutional order of the states, there are only a few organisational or procedural limits, if any. This basic structure also shapes the European Foreign and Security Policy. The influence of the law of the EU is restricted to a general frame. As a consequence, the member State Governments play an eminent role in the CFSP. However, the legal framework of European Union

[23] *H.-J. Cremer,* in: Calliess/Ruffert (ed.), EUV/EGV, Commentary, 2007, Art. 27 EUV, No. 3.

law is more detailed than in some member states. It is not only a loose co-operation of governments under international law but an intergovernmental cooperation within a procedural framework which is influenced by institutions of the European Union, especially the High Representative and the Commission.

The Reform Treaty will have to take into account that the European Union law provides for a procedural framework of policy-making which has to be adapted to future challenges. The member states will keep their essential role in the CFSP, especially concerning the contents of the political decisions. However, the European element has to be strengthened in order to allow the CFSP to work in a Union of 27 states. Coherence must be established by strengthening the role of the European institutions within the CFSP. This concerns the High Representative but also the European Commission, both defining and expressing the European interests. The reform of the mechanisms of enhanced cooperation should allow for effective implementation of measures by a group of member states. A coalition of the willing should be able to take joint actions. The majority of the actions should be of civilian character, in order to strengthen the role of the EU in peace-keeping and to minimise possible conflicts with its member states. Finally, the crux is the unanimous decision-making. As long as every member state is able to prevent the EU from acting, there is a sign of the prevailing of member states interests. The Common Foreign and Security Policy will always be a story of failure and success. But an ever closer Union should be put in the situation to go through failures of its own and to achieve its own success stories.

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EU System of Competences in the Light of the Treaty Establishing a Constitution for Europe: an Attempt at an Analysis of Terms

If we applied the formula *The King is dead. Long live the King!* to the process of building constitutional unity in Europe, we should cry out, now that the French and the Dutch have rejected in their national referenda the Treaty Establishing a Constitution for Europe: *Long live the Reform Treaty!*

The problem is that the Reform Treaty is "dead" too, rejected this time by the Irish. We may well set aside the analysis of the reasons for this unexpected "death".

However, we cannot set aside an attempt to study carefully the solutions that were proposed in the Constitutional Treaty, since this will allow us to gain better understanding of why, even through the Reform Treaty was supposed to be shorter, it was, in fact, in the version that was signed, ten thousand words longer that the Constitutional Treaty.

7. *Division of law-making competencies between the EU and the member states*

The law-making competencies of the European Union and of the Communities (the European Economic Community and the Euroatom) have been the subject of much debate, both legal and political, well documented by a number of scientific journals. The key issue is, to put it simply, the division of powers between the Union and its member states.

Particular difficulties stem from the problem of overlapping competencies, i.e. situations where more than one legal basis can be offered for enacting a law.

Finally, there are also situations where for one law to be enacted it is necessary for a number of legal bases to come together.[1]

According to Article 249 of the Treaty Establishing the European Community (TEEC), a regulation which has general application allows the Community to regulate even the entire scope of the subject matter at issue.

On the other hand, a directive makes it possible only with reference to specific tasks within a scope of subject matter regulated generally by the member state. [1]

[1] The often-quoted example of overlapping competences should be cited here: Article 175 of the TEEC (environmental policy) and Article 95 of the TEEC (internal market).

The same principles apply when a minimum is being enacted as a legal norm. The legal dilemma that arises can be summarised in the following question: if this type of a Community standard is enacted, does this mean that a member state is barred from enacting regulations which guarantee a higher level of protection of the right at issue?

The difficulties in selecting the appropriate law-making procedure in the Union are hardly mitigated by the codecision procedure, adopted in the Nice and Amsterdam Treaties. It is chiefly so due to the exceptions[2] remaining in the Treaties.

Since unanimity is required in these cases during a vote in the Council, each member state has the power to veto a regulation, and therefore to make it impossible for this power to be abused.

A separate issue is the common commercial policy (Article 133 par. 3 and Article 300 par. 3 of the TEEC), to which the codecision procedure finds no application, to such an extent that a consultation with the European Parliament is not necessary.[3]

Given this multitude of options, the European Court of Justice demands in its jurisprudence that the choice of the legal basis for the enactment of a law be based on reasons that are objective and can be validated by a court.

Such reasons include, according to the Court, primarily the objective and the content of the given legal measure.

However, when studying the methods of selection of the legal basis that have been either applied or considered, one notices that neither the *lex specialis* principle not the principle of gravity points lead to satisfactory results.

Thus, in order to establish a system of selection of legal bases of certain powers and competencies, the hierarchy of integration intensity can be a useful tool.

Simply speaking, this refers to the intensity which is expressed through the assignment of exclusive or shared (to a various extent) responsibility for certain scopes of action or certain objectives.

2. Legal coordination as a challenge to the functioning of the EU

It is not very novel to say that the issue of legal coordination in the EU has already received a lot of attention. This is best evidenced by a number of

[2] These include tax regulations (Article 93 of the TEEC), elements of environmental law with regard to the fiscal aspects (Article 175 par. 2a of the TEEC) or to the choice of energy sources (Article 175 par. 2c of the TEEC).

[3] Although not fully; see also Annex II to the Framework Agreement on relations between the European Parliament and the Commission, Attachment XIII, [in:] AB1. EU No L 61/1, March 5, 2003, p. 122.

provisions to the TEEC,[4] by directives[5] and by regulations.[6] Even the Treaty establishing a Constitution for Europe[7] is not free from provisions referring to this subject matter; what is different is that this Treaty lists no new areas where such coordination is necessary but rather attempts to establish a separate category covering legal coordination.

After perusing the Constitutional Treaty it is hard not to conclude that, while the authors did in fact have a certain concept of coordination, the translation of this concept into specific legal solutions produced no easily comprehensible results.

Does coordination in the Treaty refer to a specific competence of the Union, or is the opposite true? Do the provisions refer to coordination as a competence to undertake certain actions, or does it refer to a specific form of action? There is also no clarity as to the coordinating entity either.

In the light of the above, any analysis of the issue raised in the title of this paper must commence with a reference to the differentiation between coordination as a competence category and coordination of competences that remain outside of the realm of the Constitutional Treaty, the so called open competence. The introductory Article Til and Articles 1-12 to 1-17 pertain to both exclusive and shared competencies; besides the competence in the area of foreign policy and security, also a coordinating competence.

This typology, from a hierarchical standpoint, is not very fortunate. This is because the division of competences in economic policy and employment policy as well as foreign policy and security policy is defined, in opposition to the remaining three categories, not through the type of division of tasks between the Union and the member states, but through the object of its exercise.

What is surprising is the use of the term *coordination* in two places: firstly, with reference to economic and employment policy, in Article 1-12 par. 3, and then in Article 1-15. Similarly, the provision pertaining to coordination in the realm of health care, industry, culture, tourism, education, civil protection and administrative cooperation appear in Article 1-12 par. 5 and Article 1-17. Is this

[4] For example Article 3 par. li and Article 125, Article 130 (employment policy); Article 4 (1) and Article 99 (economic policy); Article 34 par. lb and Article 35 (agricultural policy); Articles 44,46,47 (freedom of residence); Article 73 (aids); Article 152 (health protection); Article 165 (scientific research).

[5] Just two examples: Directive 89/646/EWG of December 15,1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (89/646/EEC); Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive).

[6] Chiefly the regulation 1408/71 of June 14, 1971, which in accordance with Article 42 of the TEEC imposes on the member states the duty to coordinate their social insurance systems.

[7] Treaty establishing a Constitution for Europe, Official Journal of the European Union C310, Vol. 47, December 16, 2004

because each time the provisions pertain to two differing concepts of actions, or it is simply careless law-making? There hardly seems to be a clear answer.

One could therefore risk the comment that at a glance, there seems to be a difference in how these stipulations are constructed - however, it is only so at *first* glance. While the regulations of Article 1-12 par. 5 and 1-17 open to the Union a possibility to coordinate, complement and support the activities of the member states, Article 1-12 par. 3 stipulates that in the areas of economic policy and employment policy the coordination is not placed with the Union itself, but that the Union supports and ensures the coordination through the efforts of the member states.

Since Article 1-12 par. 5 states clearly that the Union has competence to carry out actions to support, coordinate or supplement the actions of the member states but without thereby superseding their competence in these areas, one has to note that the difference between undertaking coordination by the Union itself and by supporting and ensuring coordination through the efforts of the member states on the part of the Union is not of a subtle nature.

3. The need to define the concept of coordination as a category of competence

In the light of the above, an attempt to pinpoint the borderlines - or rather, border points - of the concept of coordination as a category of competence is due. These points are as follows: (a) authorisation to coordinate makes it possible to refer coordination as a competence to the Union, but only to a limited extent. The majority of (b) competencies remain with the member states. Consequently, the Union (c) is only free to support, and the support (d) takes the form of coordination.

Let us move a step forward. What is the answer to the question about specific measures that the Union can undertake on the basis of the authorisation to coordinate? It appears that this matter is open to debate.

Interpretation of Article 1-12 par. 5 and Article 1-17 yields just the result that coordination is not the same as support, and neither is it the same as complementary action.

This however is not all. Articles 1-12, 1-15 and 1-17 clearly include and express the assumption that primarily all competencies lie with the member states, but also the idea that the Union has a competence to coordinate.

At the same time, Article 1-1 par. 1 includes a stipulation which, from the linguistic perspective, is in opposition with these two theses, since it creates a construction of opposition between the powers of the Union and the coordination of policies of the member states by the Union: “The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer

on it."[8] This goes against the grain of the border points outlined above. Moreover, it creates the impression that the Union can at least undertake coordination in each area where it has no other competencies. If this reasoning was followed, it would open to the Community a possibility to coordinate in all areas in which shared objectives of the Union and member states are mentioned. However, it remains unclear how the shared objectives are defined.

The contradiction between Article 1-1 par. 1 on the one hand and Articles 1-12,1-15 and 1-17 on the other hand can only be convincingly solved under the condition that the stipulations of the latter are accepted. In terms of Article 1-1 par. 1 must it thus be said that it is not focused around the concept of competence categories, and that therefore the coordination to which it refers should not be interpreted as a referral of competence. What is necessary here is an independent basis for a competence, whose scope and details can be interpreted from Part III of the Treaty, on the basis of Article 1-11 par. 6.

Two comments are then legitimate. Firstly, that coordination may, on the one hand, be a competence category. Secondly, on the other hand, there are no obstacles to competence becoming a form of action chosen by the Community.

Ultimately then the issue boils down to the following interdependence: if we accept that coordination is a competence category, then the Union must limit its activities; if we agree to understand coordination as a form of action, then this gives the Community authorisation to other types of actions as well.

Here, another problem arises. The competence norm stipulates clearly that the Union may, apart from other forms of action, also undertake coordination. Is the Union then free in its choice, or is it rather, in accordance with the subsidiarity principle, that this norm treated as a referral of competence, which makes coordination stand out among other forms?

In order to understand coordination as a competence category it is further necessary to establish the scope of coordination: in simple terms, what is to be coordinated. With certain exceptions,[9] the Constitutional Treaty makes room for only three options.

Firstly, activities of the member states towards one another can be coordinated.[10] Secondly, activities of the member states towards the Union can be

[8] Treaty establishing a Constitution for Europe, Official Journal of the European Union C310, Vol. 47, December 16, 2004

[9] For example Article III-238 of the Constitutional Treaty.

[10] For example Article III-194 par. la (budgetary discipline in the euro zone), Article III-247 par. 3 (trans-European networks), Article III-278 par. 2 (public health), Article III-305 par. 1 (action in international organisations), Article III-310 par. 1 (tasks within the common security and defence policy).

coordinated.[11] Lastly, coordination may pertain to mutual relations between Community institutions and bodies.[12]

4. Between enumeration and subsidiarity

The classification of coordination as competence category demonstrates that the authors of the Treaty, when they assigned only certain tasks to the Union, at the same time made the decision to leave all the remaining tasks with the member states. This includes the tasks that are tacit, not explicitly referred to. On the other hand, even in the areas which are not under the competence of the Community, the member states are not completely free in their actions. The limitations are derived from the very fact that the member states are participants of the Union. Consequently, it is viable for the member states, in all their activities, to take the interest of other member states into account. Cooperation in the areas of development, space research or activism in international organisation are good examples here.

The situation however is different in the areas in which competences have already been referred to the Union, but the member states are having problems fully accepting these conditions. Similarly, this can be applied to the new member states in the Union that had no competences previously. Under such circumstances, it is hard to disagree with the opinions that coordination is rooted in compromise. The reasons for this are not material; the key reason is that an attempt to transfer the entire competence in a given area to the Union failed.

The subject matter of the deliberation in this paper is a clear understanding of the division of competences. However, it appears that no *either/or* interpretation is possible. All that can be observed is exclusive or competing competences of the Union on the one hand, and of the member states on the other hand. At the same time, the competences of the member states remain closely tied to the Union's competence to coordinate, reflected in Article 1-1 par. 1 of the Constitutional Treaty. Considering that the Convention's task was to actually effect a clear division of competences between the Union and its members, it is hard to disagree with the negative opinions on the blurring of competences that eventually occurred in the Treaty.

[11] For example Article III-179 par. 1 (economic policy), Article III-203 (employment), Article III-221 (economic, social and territorial cohesion), Article III-250 par. 1 (scientific research and technological development), Article III-273 par. 1 (judicial cooperation in criminal matters), Article III-276 par. 2b (police cooperation), Article III-301 par. 1 (common foreign and security policy), Article III-318 par. 1 (development cooperation), Article III-321 par. 6 (humanitarian aid).

[12] For example Article 1-23 par. 1 (the Council of Ministers), Article 1-26 par. 1 and Article III-318 par. 2 (the European Commission), Article 1-28 par. 4 and Article III-309 par. 2 (the Union Minister for Foreign Affairs), Article HI-223 par. 1 (coordination of structural funds), Article III-228 (coordination of markets).

This blurring is nowhere as clear as in the area of establishing the means and measures (or simply speaking, the "how?") by which coordination is realised in the European Union. Given the conclusions so far, a distinction must be made between *who* coordinates and *what* is being coordinated.

As far as the coordination by member states is concerned, the Constitutional Treaty includes certain instructions as to the measures, but they are so wide in scope that they cannot be imagined in any specific manner, regardless of whether they should be applicable to relations among the member states or relations of the member states towards the Union. This is illustrated by Articles III-203 and III-208 of the Constitutional Treaty. An attempt to apply these provisions immediately runs into a fundamental question: is coordination in the area of employment policy (regulated by these provisions), assigned to the member states, to be undertaken by their executives or by their legislatures?

The situation appears different when the Union itself undertakes the coordination. The greater precision of Treaty regulations in this matter is a consequence of *negative* selection, in which coordination is separated from the other three instruments available to the Union. This is well illustrated by Article 1-12 par. 5 and Article 1-17 of the Constitutional Treaty, which lists the three competences of the Union (to carry out supporting, coordinating or complementary action). However, even in this case it seems clear that coordinating, as opposed to supporting and complementary action, assumes acting towards *all* member states. Considering that an inherent element of coordination is acting together with others, what then is the relationship among the three listed forms of action?

In the light of the above, even if we assume, following Article 1-11 par. 2 of the Constitutional treaty, that the stipulation: "Competences not conferred upon the Union in the Constitution remain with the Member States" is perfectly clear, the fact still cannot be overlooked that nowhere the Treaty are the exclusive competences of the member states defined. Since coordination as a competence category is not, in the understanding of the Treaty, identical with coordination as a form of action, it must be also said that this construction not only fails to solve a problem, but rather encourages competence clashes in the future.

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The Growing Role of the European Parliament in the EU. Two Case Studies - Budgetary Policy and Common Foreign and Security Policy

Introduction

The view of the European Parliament shared by most people, including some academics and researchers, is quite often outdated. The opinions shaped as early as the seventies still seem to prevail in the academic and political discourse. The European Parliament, however, is no longer just a debating club! It is has become an equal player in the European institutional triangle. The Parliament is undoubtedly the very EU institution which was strengthened the most in the recent years. If one wants to comprehend the mechanics of every day decision-making in the EU, one has to look closer at the process of the EP's emancipation.[1]

Most analyses concentrate on the modifications introduced by the consecutive treaties. True, it was through the Single European Act, Maastricht, Amsterdam and Nice treaties that the role of the European Parliament in the decision-making was strengthened. The EP has progressively become a true co-legislator in the Union's sui generis bi-cephalous system.[2] The Lisbon treaty, if finally ratified in all of the member states after the Irish fiasco, will continue that very trend, to a certain extent changing the nature of the relations within the Union's institutional triangle. The reforms introduced by the treaties do not, however, tell the whole story. The EP has been entrenching its power also through formal and informal interaction with the Council and the Commission, most importantly through inter-institutional agreements. Thanks to numerous IIA's the EP has gained clout and influence in the fields in which the treaties accord it only limited prerogatives, such as comitology or Common Foreign and Security Policy. It is high time the researchers looked into the European Parliament from a different, more complex perspective. For comparative terms we have decided to look at two case studies, which would best depict the rising power of the EP. We analyse two very dif-

[1] R. M. Cutler, A. von Lingen, *The European Parliament and the European Union Security and Defence Policy*, http://www.robertcutler.org/download/html/ar03es.html.

[2] D. Judge, D. Earnshaw, *The European Parliament*, Palgrave, London 2003, pp. 203-213.

ferent policy fields: budgetary policy, in which the Parliament has always enjoyed a strong role, and the Common Foreign and Security Policy where the Parliament's role, at least on paper, is of very limited nature.

1. Budgetary Policy

The European Parliament, contrary to what many people think, is an equal partner to the Council in the budgetary process.[3] Of course that does not mean that it radically changes the size of the EU budget (the member states still are the pay-masters), but it has a crucial influence over its structure and the rules governing its application. With every Inter-institutional Agreement (as more and more expenditure is progressively being labelled as non-compulsory) the EP has been gaining in strength.[4]

Budgetary powers are important not only in themselves but as a very strong leverage instrument.[5] The EP has been using them very skilfully in order to extend its prerogatives in other domains. The CFSP is a perfect case in point. The powers offered to the EP by the treaty are very limited. However, through Inter-institutional Agreements concerning financing, the EP has secured a steadily rising influence over that area.[6] Through budgetary politics the EP gains influence over policies where the treaty does not assign it any formal powers.[7]

The European Parliament has always defended the principle that the EU's priorities have to be complemented by budgetary means, otherwise the European Union will not be credible. Therefore it has always been defending more ambitious budgetary thresholds. The deputies, however, were always trying to be realistic. For the first time in history, during the negotiations over the current financial perspective, the EP proposed budgetary ceilings lower than the European Commission, because it was aware of the budgetary constraints within the member states. Throughout the negotiations over the current FP it was the European Parliament, not the European Commission, which defended a true European interest (budget better tailored to the needs of reality) much more vehemently.[8]

[3] See: J. Monar, *The Finances of the Union's Intergovernmental Pillars: Tortuous Experiments with the Community Budget*, "Journal of Common Market Studies" Vol. 35, No. 1, March 1997.

[4] A. Bendiek, *The Financing of the CFSP/ESDP: 'There is a democratic deficit problem!*, "CFSP Forum" Vol. 4, No. 6.

[5] D. Judge, D. Earnshaw, *op. cit.*, p. 213-221.

[6] A. Maurer, D. Lietz, C. Völkel, *Interinstitutional Agreements on CFSP*, "European Foreign Affairs Review" 2005, No. 10.

[7] D. Kietz, A. Maurer, Ch. Völkel, *Interinstitutional Agreements in the CFSP: Parliamentarisation through the Back Door?*, "European Foreign Affairs Review" 2005, Vol. 10, No. 2.

[8] R. Trzaskowski, *Rola Parlamentu Europejskiego w procedurze budżetowej* (The role of the European Parlament in the Budgetary Procedure), „Nowa Europa" 2006, Vol. 1, No. 3.

Budgetary negotiations as a testing ground for the deputies from the new member states. The first success was the election of the president of the very powerful budgetary committee (a Pole - Mr Janusz Lewandowski). Through successful lobbying of the friends of the cohesion group the Parliament recognised that cohesion has to be defended at all costs. Certain deputies wanted to by-pass the budgetary committee through setting of the special ad hoc committee and leave the negotiations proper largely in the hands of the more experienced deputies from the old member states. The parliamentarians from the new member states, however, reasserted themselves and took an active part in setting of the EP's priorities, despite the very technical nature of the dossier.

In the final negotiations the European Parliament successfully enhanced its institutional role. The budgetary negotiations became a leverage used in order to strengthen the EP's prerogatives in the process of reforming of the EU policies. The EP managed to secure for itself a significant role in the review of CAP and structural policy, whereas the treaty itself does not assign any prerogatives to the Parliament in that very respect. The EP was able to match the EU's political priorities with financial needs in a very modest, yet important degree, largely through:

- an increase of EUR 4 billion for concrete policies such as youth exchanges, social policy, neighbourhood policy, energy TEN's,
- a substantial increase in the EIB reserve of EUR 2.5 billion to be made available by the Member States under a new scheme of co-financing between the EIB and the EU Budget with a view to reinforcing the leverage effect of the EU budget in the areas of Research and Development, TENs and SMEs,[9]
- the financing of non-programmed needs such as the Emergency Aid Reserve (EUR 1.5 billion) and the EU Solidarity Fund (up to EUR 7 billion) outside the financial framework by supplementary resources called from the Member States, if needed,
- the financing of the European Globalisation Adjustment Fund (up to EUR 3.5 billion) by re-use of cancelled appropriations, outside the financial framework.

The EP also managed to improve the budget structure through more flexibility:

- an overall amount of EUR 1,4 billion for flexibility over the period, financed, in case of utilisation, by supplementary resources to be called from the Member States with the possibility to carry over the annual amount (EUR 200 million) in case of non-utilisation and to use the Instrument for the same needs for more than one year,

[9] J. Wtorek, *Potencjalny wzrost wydatków na Europejską Politykę Bezpieczeństwa i Obrony w budżecie UE*, "Biuletyn Analiz UKIE" 2008, No. 18, February.

- the possibility for the newly elected Parliament to assess the functioning of the Inter-institutional Agreement and the Financial Perspective by the end of 2009 on the basis of a report to be presented by the Commission, possibly accompanied by ambitious proposals.

The EP was also successful in improving the quality of implementation of EU funding and preserving Parliament's prerogatives through:

- the principles established in the revised Financial Regulation, the responsibility of Member States in shared management activities for a better internal control. In that manner the Parliament secured a stronger role in the process of implementing the EU policies.[10]

Under the Treaty of Lisbon, the European Parliament's budgetary powers over all EU spending will be strengthened enormously. The new treaty abolishes the distinction between compulsory and non-compulsory expenditure and makes the multi-annual financial framework legally binding. Such provisions of the treaty will in effect put the Parliament on an equal footing with the Council. No budgetary decision will be possible without the agreement of the deputies, provided of course that the treaty is ratified.

2. Common Foreign and Security Policy

In spite of the intergovernmental nature of the CFSP and limited treaty empowerments, for years the EP has been asserting itself[1] - most importantly through the means of inter-institutional agreements. The EP is determined to increase its participation in CFSP decision-making, including ESDP, to better contribute to the Union becoming a global actor on the world stage.[12]

According to the current treaties the European Parliament has a very limited role within the CFSP. Art 21 of the Treaty on the EU obliges the Presidency to consult the EP on the main aspects and basic choices of CFSP and ensure that the EP's views are duly taken into consideration. According to TEU the EP should be kept regularly informed by the developments, the deputies may also ask questions and ask for recommendations. The EP also holds an annual debate on progress of implementing the CFSP.

The new Inter-institutional Agreement (IIA) on budgetary discipline and sound financial management (of 17 May 2006) should allow the Parliament to improve its scrutiny of CFSP through a constructive interpretation of Articles 42 and 43 which foresees a structured dialogue on this matter. This dialogue in-

[10] Budżet na lata 2007-2013, Ocena decyzji podjętych na szczycie UE w Brukseli w grudniu 2005, "Analizy Natolińskie" 2006, No. 1.

[11] U. Diedrichs, *The European Parliament in CFSP: More than a Marginal Player?*, "The International Spectator" 2004, No. 2.

[12] B. Crum, *Parliamentarisation of the CFSP through informal institution-making? The fifth European Parliament and the EU high representative*, "Journal of European Public Policy" 2006, Vol. 13, No. 3.

eludes joint consultation meetings at least five times a year in the framework of the regular political dialogue on the CFSP between the bureaux of the two Committees concerned (foreign affairs and budgetary) and the Chairman of the PSC, with the Commission also being associated to these meetings.

According to the last IIA, each year, the Council Presidency will consult the European Parliament on a forward-looking Council document setting out the main aspects and basic choices of the CFSP, including the financial implications for the general budget of the European Union and an evaluation of the measures launched in the previous year. Moreover, whenever it adopts a decision in the field of the CFSP entailing expenditure, the Council will immediately send the European Parliament an estimate of the costs envisaged (in particular those regarding time-frame, staff employed, use of premises and other infrastructure, transport facilities, training requirements and security arrangements).

The European Parliament also uses its potential to project the so-called soft power potential and act as a true defender of values on which the EU is founded.[13] Each year, the European Parliament issues a report on the human rights situation in countries outside the European Union, and another on respect for human rights within the Union. The Council is also bound to inform the European Parliament of any decision taken to suspend an agreement with a country on human rights grounds. The deputies can thus put pressure on the country concerned to release political prisoners or to subscribe to international undertakings on human rights protection. At each of its monthly part-sessions, the European Parliament holds debates on cases of breaches of human rights, democracy and the rule of law. It has adopted a host of resolutions condemning governments that breach human rights. In 1988, the European Parliament established the Sakharov Prize for Freedom of Thought. Each year, the prize is awarded to individuals or international organisations who - like the Russian nuclear physicist Andrei Sakharov, winner of the Nobel Peace Prize in 1975 - have distinguished themselves in the struggle for human rights. (In 2006 the Sakharov prize was awarded to Aliaksandr Milinkevich, the leader of the opposition in Belarus and fighter for democracy and human rights).

The Lisbon treaty would open a new chapter in Common Foreign and Security Policy. Its provisions offer a potential base for a coherent and effective foreign policy. Hopefully the potential will be employed in practice. The Treaty is unclear on many points. Certain innovations may, but hopefully will not, cause institutional rivalry.[14] Therefore it is absolutely crucial that in the process of

[13] E. Barbe, A. Herranz, *The Role of Parliaments in European Foreign Policy*, Barcelona 2005.

[14] R. Trzaskowski, *Ćwiczenie wyobraźni. Próba oceny Traktatu konstytucyjnego*, "Nowa Europa" 2005, Vol. 1, No. 1, pp. 150-154.

implementation all institutions - the EP, the Commission and the Council work hand in hand. The EP has to display the collective will aimed at envisaging the best possible working relations in the institutional triangle, in which no one feels sidelined (for example the team presidency, which needs to contribute to CFSP).

The EP did not remain passive in the period of the Treaty's implementation. It has advocated a number of concrete steps (as enumerated in Jacek Saryusz--Wolski's report on CFSP). In the report the following points were stressed:

♦ Invitation to the future High Representative *I* Vice President of the Commission to appear regularly before the Plenary and AFET, as he gets his legitimacy from the Council.

♦ The need to review relations between Council and Parliament following the transfer of the remaining Western European Union (WEU) competences to the EU

♦ The establishment of an inter-institutional agreement between Parliament and Council defining their relations in the field of external action, including the sharing of confidential information and the updating of the Framework Agreement between the Commission and Parliament

♦ Parliament has to be fully consulted on the nomination of the first High Representative/ Vice President of the Commission, due to take office on 1 January 2009, including the establishment of an ad hoc hearing procedure with AFET acting as the lead Committee

♦ Parliament has to be to be consulted on the establishment of the European External Action Service.

In the interest of credibility of all external actions of the European Union there is an indispensable need for scrutiny of the EP over CFSP/ESDP. In order to carry real weight the policy needs strong democratic legitimacy. In the previous year the EP decided to focus on a limited number of well-defined, ambitious, but realistic goals it wants to attain, instead of multiplying long lists of postulates, which are repeatedly ignored by the Member States. Above all there is a need to avoid expensive and unnecessary duplication, and to try to rationalise who does what in the European Union.

The Treaty of Lisbon constitutes a true watershed for both CFSP/ESDP (nascent CSDP) and for the EU inter-institutional relations. The new Treaty significantly enhances the external action of the Union and its role in international relations, and that it raises the Union's visibility and profile while strengthening its capacity to act effectively on the world stage. One should hope that it will be ratified next year.

The new Treaty offers hope and promise of a stronger and more accountable CFSP/ESDP. It also augurs well for the future of new relations with both the Council and the Commission.

There are, however, more steps which could be undertaken. The European Parliament should more systematically adopt positions on each successive stage of CFSP and ESDP decision-making. Where appropriate, common positions and joint actions should contain references to these positions of the European Parliament.

Even though progress in relations between the Council and Parliament has been achieved, especially through the establishment of new and more flexible channels of communication and through the increased number of contacts between the institutions, including regular exchanges of views with the High Representative and more frequent appearances of EU Special Representatives before the Parliament, there is room for further progress.

Even though the value of the current High Representative's and current External Relations Commissioner's periodic appearances before the Plenary and AFET, as well as the more frequent practice of informal meetings should be appreciated, the future High Representative/Vice-President of the Commission, should go beyond the current experience and develop regular, and much more systematic and substantive consultations with the European Parliament.

The Parliament is also of the opinion that the deputies should be given a serious role in the process of choosing and nominating the first High Representative/Vice-President of the Commission, regardless of the fact whether is should be necessary to make an interim appointment.

A special *ad hoc* hearing procedure for the nomination of the High Representative/Vice-President of the Commission should be established. The European Parliament from the very outset should also take part in the preparations for the development of the European External Action Service (EEAS), as well as be formally consulted on its formal establishment.

Conclusion

The European Parliament has been steadily increasing its role in EU policy-making. Through co-decision it has gained a status of a co-legislator. The budgetary politics allows it to expand its formal and informal influence over the areas where the treaty does not provide it with strong prerogatives. Even within the Common Foreign and Security Policy, where on paper the prerogatives of the EP are limited, the deputies have been asserting their role and now they make quite an impact on the external policy of the EU. If we really want to have a strong common foreign and security policy, we have not only to respond to citizens' preoccupations and objective needs generated by our immediate environment, but also to treat our commitments seriously by providing the necessary means for CFSP effective implementation and undertaking the crucial reforms.

The EU should also involve more closely the only democratically elected institution - the European Parliament - in the decision-making concerning foreign policy. CFSP simply needs more legitimacy if it is to remain high on the citizen’s agenda.

DISCUSSION

- Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski
  University College of Economics and Administration in Kielce

As a member state of the EU, Poland will not recognise the Charter of Fundamental Rights as a valid, binding document. Professor, if you say what you have just said here, please also tell us: how should we understand the clearly expressed norm of Article 11-51 part 2 in the draft European Constitution - I am not sure how the situation looks in the Reform Treaty but I suppose the same wording is present there which reads as follows: “This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers or tasks defined in the other Parts of the Constitution.” This is a provision which regulates the matter of powers and as such must be interpreted strictly, and it reads *expressis verbis* just as I have presented it. One might say this is fully in accordance with the underlying principle of the Union, i.e. the principle of subsidiarity.

And the second argument, closely connected with the rights to marry and found a family. It is said in the provision at issue that the rights to marry and found a family are guaranteed in accordance with the national laws governing the exercise of these rights. The Union evidently wants to keep itself clear of any regulation in this respect: other than the general regulation I just quoted, which has a significance, but a very limited one, all powers rest with the member states. Why then should one want to express the opinion, precisely in connection with this subject matter, that the Charter offers opportunities for extending competencies of the institutions of the Union?

- Professor Jan Tkaczyriski, PhD - jagiellonian University

Let me start from the end. As far as Article 11-51 is concerned, it is very clear and precise and leaves no room for doubts. However, let me repeat one general comment: this is just a provision in the third part, and - please note - this is the part which originally had been drafted as a charter. For a long time it was not considered as a potential part of the constitutional treaty. One must bear this in

mind. It was only included in the constitutional treaty quite late. Are the solutions in the Charter compatible with the remaining parts of the treaty? I would answer rather carefully; I am not sure. Of course I am not able to give you new legal solutions off the top of my head, and *ad hoc* give you a good answer, because it would be an entire legal opinion. What I can do is give you an answer not based in law, but based on my intuition. This lack of compatibility results in a situation where, if certain solutions are implied, and always express the idea of the supremacy of EU law over national law, no matter what the actual Article 11-51 in the Charter says, there will always be the possibility to conclude that it is possible to rank the national law one level lower than the EU law.

- Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski
  University College of Economics and Administration in Kielce

  It is difficult to agree with you here.

- Professor Jan Tkaczynski, PhD - jagiellonian University

But we all agree, and we discussed it earlier today, that there is a danger of supremacy — not primacy, but supremacy — of the EU law over national law.

- Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski
  University College of Economics and Administration in Kielce

  There is no doubt as to that.

- Professor Jan Tkaczynski, PhD - Jagiellonian University

Exactly! And therefore the danger arises that no matter how the provision of Article 11-51 reads, there might always be someone who will say: Yes, that is what the Charter stipulates - lets use the term ‘Charter’ for the moment as part III - but how does it work with the idea of the supremacy of the EU law? Can I or can I not? If the EU legislation allows something, it will be, let me put it this way, difficult to oppose this on the basis of national regulations, and argue that we cannot do something that others can do. I would be very careful here. Let me make myself clear here: I am not arguing that this precisely is going to happen. All I am saying is that the danger is there. I am playing Cassandra here, and not an expert. I am just warning that it is a possibility, and the “maybe” here is dangerous. This may have negative consequences, and this is what I would like to avoid. That's all I am saying.

- Rafal Trzaskowski, PhD — Adviser to the Chairman of the Foreign Affairs Committee of the European Parliament

One sentence, maybe two. One important thing: the document that the professor is using is the Convent version, there were two inter-governmental conferences after that. The British have made this language stronger, much

stronger. Generally speaking, if the Community has no powers in a given area, the Charter does not apply. Moreover, the Reform Treaty introduces a qualified majority vote in most of the areas in which the Union makes decisions. For the first time in history this kind of vote will also apply to judicial cooperation. There is however an exclusion: family law. It is a special exception where unanimous decisions are still required. So firstly the Union would have to take the decision that it wants legislation in this area. Nobody in their right sense is going to advocate this. Even if, there is the requirement of unanimity, plus a special clause which was introduced after the Convent, in an inter-governmental conferences, which safeguards against the option that a majority decision would be sufficient to change this provision. So if one member state opposes this decision, it simply cannot be done, and all fears are completely unjustified. Finally, the new government is going to withdraw its opt-out with regard to the Charter, so the problem is irrelevant.

- Professor Dieter Kugelmann, PhD - Harz University of Applied Sciences

I apologise if I abuse the privilege to be up here, to make the remarks on the subject of human rights. In my opinion, it is a ghost discussion. It is a ghost discussion because 99% of the cases are clear cases. There is no doubt that in the Union the rule of law has to apply to human rights. If the institutions do something, of course they are bound by human rights. No doubt about it, it is already what the European Court says today. So most of the discussions are really ghost discussions. Concerning abortion, we had a case in Ireland 20 years ago when it was about an advertisement for abortion. This is market freedoms, where the European Court of Justice said that advertising has to be allowed for abortion in Great Britain, and this is inevitable because it is the common market, there is no exemption. So what is left? Very few cases where maybe by implementing European law in certain areas by national authorities, the question is if the national authorities are then bound if they implement European law and have no margin of appreciation at all, they are bound by the European human rights or bound by the national human rights. We do not even talk here about the European Convention on Human Rights, which is also applicable. So I think in most of the cases actually we are facing ghost discussions, but of course the devil might be in the details, so I do not want to exclude the relevant details. However, in most cases there are no details, there are only the human rights which is the fundament of the European Union.

- Alexandra Hennessy-University of Rochester

I have a question for Professor Kugelmann. I think you explained the institutions and structures in a very cogent way, but I have a question about

the political factors that contribute to a consensus in foreign policy at the EU level. You mentioned that strengthening the European Parliament could lead to more consistency in foreign policy making. And I am wondering what is the basis of this argument, why you believe that. I would think that conflicts in the European Parliament run along national lines, not party lines, and the reason I think that is that colonial and historical legacies of foreign policy-making, as well as geographic proximity to certain countries, should be a stronger predictor of foreign policy preferences than party lines. So I am wondering, what contributes to consensus on foreign policy making? Is it preference intensity of certain countries, or is it country size, or is it simply the codecision procedure? Do you have any ideas about that?

- Professor Dieter Kugelrnann, PhD - Harz University of Applied Sciences

Well, actually the codecision procedure is not applicable, so we are talking about the unanimous decision in the Council and in this context limited influence, I completely agree with Dr Trzaskowski about the in this context limited influence of the European Parliament. My idea only was that you have aims in the EU Treaty concerning what we as Europeans want to do, in which direction we want to move, if it is about foreign security policy, and the Parliament is one interpreter of these aims. So if we talk about human rights, for example in Ukraine and Belarus, they are interpreting the Treaty provisions and in this context I am not sure if in the Parliament really colonial history is so important. I would presume - but you know it better - I would presume that it is actually more the will to strengthen the role of the Parliament itself in this area, because that is what the Parliament did in the past times too: that they of course made a certain policy, but they are also interested in strengthening their own role. So they are interested in common standpoints, and you will find majorities for general policy visions. So of course, you are right, that is not so close to party interests, but in the Parliament we always talk about the interests of parties, and also if they do something in foreign security policy they will have to decide according to what these interests are, how they interpret the Treaty provisions in the light of the interest they are representing. Which are not only party interests, but also the interests of the citizens.

AND HUMAN RIGHTS AND LIBERTIES

Chairpersons:

Professor Manfred Weiss, PhD

Professor Ian Barnes, PhD

Part 1

JAN §l KUTA -J udge of the European Court of Human Rights,
Council of Europe

European Convention on Human Rights with Focus on the Impact of Its Court Case Law on the National and European Law

It is my pleasure to be with you this morning and I would like to thank the organisers for inviting me. At the same time I have to convey the best regards to this conference from the president of the European Court of Human Rights in Strasbourg, Mr Jean-Paul Costa, who is as well one of the two honorary patrons of this conference.

At the beginning maybe I should introduce myself very briefly, although I know I do have 20 minutes only, but I will keep the time, I promise that. My background is a little bit different from other speakers in this conference, because I am not a professor at the university. My background is judicial, I am originally a judge in my country, in Slovakia. I dealt with civil and administrative law cases in the court of first instance and later in a court of appeal in Bratislava, and then I spent ten years as a legal officer with the United Nations, where I worked with the Head Commissioner for Refugees. For the last three years I have been elected as a judge in the Human Rights Court in Strasbourg in respect of the Slovak Republic. So therefore my views will be from that point of view, from the point of view of another system, not the European Union system, as is I think most of this conference, but from another perspective, which I think can be enriching. And also I think it is very good to bear in mind that there are at the moment more systems operating within Europe, not only the European Union but also the Council of Europe system. Moreover, there is the Organisation for Security and Cooperation in Europe, and there is the UN system. So it is good to have such information in mind that we can see the same thing from different perspectives, and that applies also to human rights.

Introduction

The continuous process of new states entering into the existing European systems - Council of Europe or European Union, has had a certain impact on the profile of these systems. Many of these states entered into the system as a result of the dissolution of totalitarian regimes. Membership to the European Union proved to be a more difficult task, while membership to the Council of Europe proved to be relatively easy, since their acceptance by the Council of Europe can be considered a step towards their further integration into the European system.

In Europe there are up to three, at least, different legal sources of fundamental rights co-existing: national sources, international sources - such as the ECHR - and EU law sources, including the case-law of the European Court of Justice. We also have three different types of jurisdictions applying those different legal sources: the domestic courts of the member states, the two Courts of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg. The result is that today virtually every act of every public institution in Europe can be reviewed as to its compliance with fundamental rights. While this represents a huge achievement of the European legal and ethical culture, it also raises the question of the coordination of those multiple legal sources. The co-existence of those different legal systems, each with its own set of fundamental rights, is an essential part of our legal tradition, reflecting an important aspect of European cultural history and diversity. The fact remains that the co-existence of all these overlapping legal sources raises at least two major challenges for the future: respect of efficiency of human rights protection and the need to preserve legal certainty.

Since there has not been adopted a document like “The Constitution for Europe“ or “The Constitution of the European Union“ yet, the European countries - members of the Council of Europe and/or members of the European Union - are still is in the process of finding the tools which would guarantee a unified harmonisation of different national legal systems and legislations into the one system - European.

The Convention and the Court

The European Convention on Human Rights was adopted in 1950 and works within the system of the Council of Europe, to which 46 European states are presently members. The European Convention on Human Rights, which the Court works with, has proved as a long-living instrument, which has never been modified, as far as its substantive provisions are concerned, through the 60 years of its existence.

The Convention has its function of international control, which serves for the "Europe-wide internationalisation" of the protection, on the basis of which whoever is under the jurisdiction of a state-party to the Convention may resort to the Court to complain for an alleged violation of protected human rights. The international control is considered as a final resort, with the added value of the internationally objective judge, when the national system is not ready or fails to meet the requirements of protection.

The Convention also represents the main element contributing to the formation of a European "common" law. It is clear that the Court works on the basis of individual cases, and responds to concrete complaints coming from individual applicants. It should, however, be understood that the Court does not hesitate to change its case-law, when and if it considers that its past pronouncements do not anymore reflect European standards, that Europe has taken different orientations than those proposed by its past case-law. Precisely this richness of the caselaw, and, at the same time, the respect of the precedent that the Court applies in most of the cases, give the opportunity to the states, whether they are or they are not parties to a concrete dispute, to know their exact obligations vis-à-vis the rights protected by the Convention.

The legal system of the Convention is not a closed one. It is in constant dialogue with other legal systems, including, of course, with other courts, both domestic, international or, more particularly, regional. This dialogue basically serves to detect the domestic legal parameters of a case before it, to have a close look at the legal system governing the facts of a case in order to be able to decide *inter alia* whether an applicant has exhausted domestic remedies, whether he has complied with the six-month rule, whether an interference by the state with an individual's right was duly "established" by domestic law and, more generally, whether the legal treatment of an application by the bodies exercising power over him was consistent with the legal order of the state concerned. In any event, the state that has violated the Convention is obliged to redress the damage in the way that the Court indicates in its judgment; if its intention is to avoid similar violations for the future, the only solution for it is to change also the legal regime which generates violations, namely a law, a practice, etc. Judicial decision of the Court acts as a potential starter to provoke legislative or other changes of the domestic legal system.

The finding of a violation of the Convention against one state may have wider repercussions going beyond alterations of the system of the state concerned. The repercussions that the Court's judgments have on the legal system of a state which has violated the Convention, but also on the legal system of third states, potentially transgressors of the Convention, are the driving force behind the creation of a single European common law on matters of protection

of human rights. Other states may follow the opinion of the Courts expressed in its case law and change their own system or law. Behind such a behaviour of a state, other than the state directly involved in a violation, there may be its willingness to align itself with the European legality, but also its understanding that if a state does not align itself with a solution given by the Court with regard to the exact content and scope of a human right protected by the Convention, sooner or later it will also be condemned for similar violations.

The role of the Strasbourg Court is not limited only to settle disputes between an applicant and a state once and for all. By settling individual disputes, the Court creates caselaw which affects more generally the other parties to the Convention, and, in the long term, it contributes, through that indirect function, to the consolidation of a uniform law of protection of human rights in Europe. Taking into account that the rights which are protected by the Convention cut across various branches of domestic or international law - civil law, criminal law, administrative law, constitutional law, etc. - the influence exerted by the Court's caselaw goes well beyond the law of protection of human rights and substantially affects these other branches of law. And this is the contribution of the Convention and the Court in the creation of a common European legal space.

Impact of the Strasbourg Case Law on the National System

The Committee of Ministers invited the Court in its resolution to identify, in its judgments finding a violation of the Convention, what it considered to be an underlying systemic problem and the source of that problem, in particular when it was likely to give rise to numerous applications. The Court has adopted a policy to take the initiative and propose itself to a state which has violated the Convention to take, apart from the individual measures redressing a specific violation, also more general measures to avoid similar violations in the future. The Court's first so-called "pilot" judgment was delivered in the case of *Bromowski v. Poland.*[1] The case concerned the scheme for compensation in kind for the loss sustained by property-owners whose properties had had to be abandoned after the Second World War. They had required "a right to credit" against the state. However, the latter had been unable to honour all those obligations due to a shortfall in the amount of land available. It is estimated that 80 000 people are concerned. The Court was unanimous in concluding that, by failing to honour its obligation to the applicant, the respondent state had violated Article 1 of Protocol No. 1 to the Convention. It also found, for the first time in the history of its caselaw, a so-called "systemic" violation, arising from the fact that the violation in question resulted from a large-scale problem ori-

[1] Application No.: 31443/96, friendly settlement of 28 September 2005.

ginating in a malfunctioning of Polish legislation and administrative practice which had affected a large numbers of people.

Owing to the constructive attitude of the Polish government, it was possible to conclude in this case a friendly settlement, according to which the Polish government not only settled the individual case, but also undertook "to implement as rapidly as possible all the necessary measures in respect of domestic law and practice as indicated by the Court" and to "intensify their endeavours to make the new Bug River legislation effective and to improve the practical operation of the mechanism designed to provide the Bug River claimants with compensation".

The Court forms its caselaw very carefully, in a way that reflects, most of the times commonly accepted mentalities and standards in Europe. The Court interprets the Convention on the basis of a wide acceptance of a rule by the totality of the European states. In these circumstances, its role is limited to finding an individual violation of that rule by a state which simply did not respect its own domestic obligations.

There are many judgments which by their nature are limited to the specific circumstances of a case and are not expandable to future situations. A very characteristic example of that situation is the judgment in the case of *Refah Partisi against Turkey*,[1] where the Court found that the decision of Turkish authorities to dissolve a Muslim-oriented party immediately before national elections did not violate Article 3 of the First Additional Protocol, because the programme of that party and the political posture of some of its protagonists posed a serious threat to the democratic regime, and to the fundamental values protected by the Convention itself. The particular circumstances of a fragile democratic regime, and the peculiarity of the Muslim party, propagating *sharia*, etc., which was very close to taking over the reins of the state through democratic elections influenced the Court in decision. It could be safely said that had the incident happened in any other part of Europe - or even in Turkey for any other party - the decision of the Court would have been different.

In the case of *Rekvenyi v. Hungary*,[3] the Court recognized that new democracies face particular problems which must be taken into account, and which may in the end influence the judicial outcome: then the Court found that the prohibition of association of Hungarian policemen did not violate Articles 10 and 11 of the Convention, because of the particular experience of Hungary, during the communist regime, linking the police with arbitrary power and authority, and serving the political goals of the old regime. "Depoliticisation" then of the police was a justifiable measure taken by the new

[2] Applications No.: 41340/98; 41342/98; 41343/98; 41344/98.

[3] Application No.: 25390/94, Judgement of 20 May 1999.

regime, including, of course, a prohibition of freedom of speech and association in certain circumstances.[4]

Court Case-Law vis-a-vis Constitutional Courts

The Convention, being a subsidiary instrument, is really nothing without the domestic courts. Since the Convention ultimately aims at the realisation of human rights in each of the member states, it is of primordial importance that the national authorities and most of all the domestic courts contribute to the very best to this endeavour. The Court is not supranational and its judgments therefore have no immediate effect in municipal law, contrary to the judgments of the Court of Justice of Luxemburg.

In the case of *Leyla §ahin v. Turkey*[5], a Turkish national and student at the faculty of medicine of Istanbul University complained that she had been prohibited by a circular of the vice-chancellor of the University from wearing the Islamic headscarf at the university. She considered this prohibition to constitute a violation of her freedom of religion, an unjustified interference with her right to education, and also discrimination, since students had to choose between education and religion, which discriminated between believers and non-believers. The Court considered that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.

As to whether the interference was necessary, our Court relied largely on the caselaw of the Turkish Constitutional Court. According to the Turkish court, the prohibition of wearing the Islamic headscarf at university was based in particular on the principles of secularism and equality. Secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle of secularism prevented the state from manifesting a preference for a particular religion or belief. It thereby guided the state in its role as impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the state but from external pressure from extremist movements. The Turkish court added that freedom to manifest one's religion could be restricted in order to defend those values and principles.

The Grand Chamber of the Court considered that notion of secularism to be consistent with the values the Convention. Upholding that principle could be considered necessary to protect the democratic system in Turkey. The Strasbourg Court, in relying to a large extent on the reasoning of domestic

[4] C. Rozakis, "The Impact of Foreign Constitutional Law and Case-Law on the Jusrisprudence of the European Court of Human Rights".

[5] Application No.: 44774/98, Judgment of 10 November 2005.

courts, accepts the important role of such courts and thereby in a larger sense emphasises the subsidiarity of the Convention system. The Court states expressly that where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. Accordingly, the Court accepts that the choice of the extent and form which regulations concerning the wearing and exhibition of religious symbols in educational institutions should take must inevitably be left up to a point to the state concerned. From the standpoint of the Court, the subsidiarity of the Convention system and the doctrine of the margin of appreciation go hand in hand with a European supervision by the Court embracing both the law and the decisions applying it.

The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women. Gender equality - recognised by the Court as one of the key principles underlying the Convention and the goal to be achieved by the member states - had also been found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution. Like the Turkish Constitutional Court, our Court considered that, when examining the question of the Islamic headscarf in the Turkish context, there had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. The issues at stake included the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhered to the Islamic faith. Imposing limitations on the freedom to wear the headscarf could, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol had taken on political significance in Turkey in recent years.

In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious symbols, including the Islamic headscarf, to be worn on university premises. The Court found therefore that the interference in the issue was justified on principle and proportionate to the aims pursued, and could therefore be considered to have been necessary in a democratic society, so that there was no violation of Article 9.

In line with the subsidiary nature of the Convention, any respondent state remained free to choose the means by which it would discharge its legal obligation to execute the Court's judgment. Of course, such means had to be

compatible with the conclusions set out in the Court's judgment. In the case of *Assanidze v. Georgia*,[6] the Court took a further step towards strengthening the efficiency of the Strasbourg system. This is a case, therefore, that has to do with exceptions from the principle of subsidiarity and with endeavours to indicate in extraordinary cases to the respondent state which measures were needed in order to reach full compliance with the Convention. The applicant, a well-known opposition politician, had been in prison on charges of fraud, but then continued to be detained by the authorities of the Adjarian autonomous republic. He was pardoned by the President of Georgia, Mr. Shevardnadze, whereupon the Adjarian authorities challenged the constitutional power of the head of state to pardon prisoners. In the end, Assanidze was acquitted by the Georgian Supreme Court of all charges against him, but remained nevertheless in prison. The Georgian central authorities had taken all procedural measures possible under domestic law in order to obtain enforcement of the judgment acquitting the applicant, had also had recourse to various political means to settle the dispute, and had on numerous occasions repeated their request to the Adjarian authorities for the applicant's release, but without any success. The Court, however, emphasised that, under the Convention, it was solely the international responsibility of the state that was in issue, irrespective of the national authority to which the breach of the Convention could be imputed at domestic level. The Court concluded that the applicant's continued imprisonment was within the "jurisdiction" of Georgia and that the responsibility of the Georgian state alone was engaged under the Convention. Consequently, having found that the applicant was being detained arbitrarily contrary to Article 5 § 1 of the Convention, the Court held, that the respondent state had to secure the applicant's release at the earliest possible date. The very day after the judgment was delivered, the applicant was released from prison in Adjaria, which is a striking demonstration both of the effectiveness of the human rights protection afforded by the Convention and of the very practical importance of the execution of the Court's judgments.

The case *oilla^cu, Ivantoc, Leçco and Petrov-Popa v. Moldova and Russia*,[7] where the Court took a similar approach like in Assanidze. The case concerned events that occurred in the "Moldavian Republic of Transdniestria", the region of Moldova to the East of the river Dniester known as Transdniestria. This region declared its independence in 1991 in connection with the dissolution of the former Soviet Union, which in turn led to a civil war and to the self-proclamation of a breakaway regime. This regime is not recognised by the international community. The case concerned the unlawful detention of

[6] Application No.: 71503/01, Judgment of 7 April 2004.

[7] Application No.: 48787/99, Judgment of 8 July 2004.

the four applicants, following their arrest in 1992 and their subsequent trial by the so-called "Supreme Court of the Moldavian Republic of Transdniestria" and the ill-treatment, inhuman prison conditions and torture inflicted on them during their detention, as well as the death penalty imposed on Mr Ila?cu and the mock executions to which he was subjected. The Court established the responsibility of both respondent states and found a violation of Articles 3, 5 and 34 of the Convention. It ordered the immediate release of the applicants still in detention. Only two of the four applicants have been released to date. Mr Ila^cu was released in May 2001 and Mr Le§co at the expiry of the sentence imposed on him by the "Supreme Court of the Moldavian Republic of Transdniestria" in June 2004. The other two applicants, Mr Ivantoc and Mr Petrov-Popa, are still in custody.[8]

European Courts and the Domestic Courts

With the extension of the competences of the European Union, including in respect of fundamental rights, the traditional bilateral perspective has to give way to a more multilateral perspective, in which the coordination of the multiple sources of fundamental rights co-existing today in Europe represent one of the major issues.

The different legal sources mentioned above are not compartmentalised in the sense that each court would have to apply only the fundamental rights of its own legal system. Rather, in most cases different sources will have to be combined, as the legal systems concerned do not only *co-exist* but *overlap.* This is especially true for the domestic courts of the member states which, in cases involving EU law, may have to take into account up to three different sources simultaneously: their own national law, the European Convention on Human Rights and EU law. The national courts may also ask the Luxembourg court, with a prejudicial request, to pronounce with a prejudicial judgment, as issue of human rights. In this respect, domestic courts can be said to play a central role in the European protection of fundamental rights. In EU law they are often called "*Community* courts of ordinary jurisdiction."[9] In fact, one should add that they are to the same extent "*Convention* courts of ordinary jurisdiction", as it is first for them to apply the Convention, since the Convention makes it an essential requirement for any complaint to be declared admissible by the Strasbourg Court that it has been duly raised before the domestic courts of the respondent state. Despite the clear difference of subject-matter separating these two courts, there have been instances where the Luxembourg Court has entered into the field of protection of human rights, while the Strasbourg Court dealt with

[8] L. Wildhaber, *The National Conference of the Judicial Studies Institute,* Dublin, November 18,2005.

[9] Juges communautaires de droit commun; ordentliche Gemeinschaftsgerichte.

issues closely connected with matters pertaining to the European Community competence. The Luxembourg Court, whenever an issue of human rights arises, has, up to now, followed the caselaw of Strasbourg.

Insofar as the Strasbourg Court is concerned, the only question which has arisen to date is to what extent may this Court control acts or omissions of the Community violating human rights and the provisions of the Convention. From the well-known cases, e.g. *Waite and Kennedy v. Germany*[10] or *Matthews v. U.K.,*[11] and others, the following principles which, for the time being, govern the jurisdiction of the Court with regard to the European Union *I* Community, may be deduced:

- the Community itself cannot be considered as a person who may be responsible for violations of the Convention, and be a party before the Court, because it is not a party to the Convention. As a consequence, applications against the Commission itself are inadmissible because of incompatible *ratione personae;*

- the fact that a state may be found responsible for acts of the EC does not necessarily lead to the conclusion that is also responsible for the alleged violation;

- member states may be also held responsible for acts or omissions which emanate from applications of community law within their domestic order. They cannot invoke their obligations to apply the law or practices of the Community, in order to evade responsibility;

- member states of the Community may be held liable for acts or omissions of the Community on the basis of their obligation to respect the Convention and not to void their responsibilities by relinquishing their own competence to international organisations. While a state may relinquish its competence and sovereignty to an international organisation, this does not mean that it does not remain responsible for possible violations of the Convention by the international organisation which affects rights of an individual under the jurisdiction of the relinquishing state.[12]

As far as the cooperation between the two European Courts is concerned, it can be seen in the caselaw of the Court of Justice, parallel to the gradual expansion of the amount of litigation involving fundamental rights, an increasing number of references to the Convention and to the Strasbourg case-law, demonstrating a clear commitment to ensure harmony between the Luxembourg and Strasbourg jurisprudence.

[10] Application No.: 26083/94, Judgment of 18 February 1999.

[11] Application No.: 24833/94, Judgment of 18 February 1999.

[12] C. Rozakis, “The Operation of the New Court in the Enlarged Europe".

As a result, hardly any conflicts between the two European courts have occurred in the past.

A striking example of this approach can be found in the preliminary ruling recently given by a Grand Chamber of the Court of Justice in the case of *Maria Pupino (16 June 2005, C-105/03),* which had to deal with an issue relating to domestic criminal procedure, one of the core areas of the European Convention on Human Rights. Called upon to interpret the Framework Decision on the standing of victims in criminal proceedings, the Court of Justice stated *inter alia* that it was for the domestic courts to ensure that in interpreting national law in conformity with Community law, criminal proceedings remained fair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights.[13]

The harmony between the Convention and Community law is to a significant extent also the result of an essential contribution being made by the domestic courts, through their role in respect of the preliminary rulings by the ECJ. For at the end of the day it is for the domestic courts to apply the ECJ's preliminary rulings to the facts of the case in the main proceedings. While there are indeed a good many preliminary rulings in which the ECJ draws itself the conclusion from the existing Strasbourg caselaw, in other rulings it confines itself to pointing to the relevant Strasbourg caselaw, leaving it to the referring domestic court to apply it to the circumstances of the specific case, thereby conferring on the domestic court some discretion as to what the impact of the Convention on Community law issues should be.

A good illustration of these different approaches can be found by comparing the cases of *Carpenter (11 July 2002, C-60/00)* and *Hacene Akrich (23 September 2003, C-109/01),* which were both concerned with the expulsion of third-country spouses of EU citizens. In the Carpenter case the ECJ ruled, having regard to the Strasbourg jurisprudence, that a deportation of Mrs Carpenter would not be proportionate and would therefore infringe her husband's right to respect for his family life within the meaning of Article 8 of the Convention.

A similar problem, though involving different Community law provisions, arose in the case of Hacene Akrich, in which the ECJ considered that even though *Regulation no. 1612/68* did not apply to the facts of the case, the authorities of a member state, in assessing an application by the foreign spouse of an EU citizen to reside in that member state, were under a Community law obligation "to have regard to the right to respect for family life laid down in Article 8 of the Convention".

[13] L. Wildhaber, *National Conference of the Judicial Studies Institute,* Dublin, November 18, 2005.

Unlike in the Carpenter case, however, the ECJ did not itself assess the impact of Article 8 on the facts of the case but confined itself to referring to the relevant Strasbourg caselaw.[14]

An indication that domestic courts are doing fairly well in using the amount of discretion left to them in this respect by the ECJ can be seen in the fact that so far there have hardly been any serious applications brought to the Strasbourg Court challenging the result of the application by domestic courts of ECJ preliminary rulings, even though such applications are admissible *ratione materiae*, as has now been recently confirmed by the Strasbourg Court in the *Bosphorus case.* The case concerned the impounding by the Irish authorities of an aircraft which had been leased by the applicant Turkish company from a Yugoslavian airline. The Irish authorities had acted in pursuance *of EC Council Regulation 990/93* which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In a preliminary ruling delivered on 30 July 1996, the ECJ had found *inter alia* that the consequences of the impounding for the applicant company were not disproportionate and therefore not incompatible with the fundamental right to property. The Strasbourg Court made an important and much awaited contribution to clarification of the relationship between the Convention and the Community Law. It found that the protection of fundamental rights by EC law, unless manifestly deficient, could be considered "equivalent" to that of the Convention system. Consequently, there was a presumption that a state would not depart from the requirements of the Convention when it was merely implementing legal obligations stemming from its membership of the European Union.

A new legal situation may evolve in case of the future accession of the Union to the Convention. Such an eventuality may create dynamics which, in the end, and for those rights which coincide both in the Constitution and the Convention, may offer a unity of protection. This is absolutely clear for acts or omissions of the organs of the European Union, less clear for violations coming from national authorities in applying Union's law. It may be anticipated that in the latter case the Luxembourg Court, through its prejudicial judgments, would follow the Strasbourg caselaw. One may also envisage that a closer cooperation may develop between the two Courts in order for them to streamline their caselaw.

Conclusion

In order to demonstrate the complexity of the human rights protection system in Europe and to sum up my presentation, let me conclude with the

[14] L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, Geneva, September 8, 2005.

case *ofMrKoua Poirrez.*[15]'' Here was a physically disabled applicant, a national of Ivory Coast, who had been adopted as an adult by a French citizen, although he did not thereby acquire French nationality. He applied for an adult disability allowance, but the French courts turned down his application on the ground of his Ivory Coast nationality. The French court hearing his appeal decided to ask the Court of Justice of the European Communities for a preliminary ruling on the compatibility between the relevant French law and Community law, on the basis that the applicant was a direct descendant of a citizen of the European Union. The Court of Justice found that Community law did not apply to the facts of the case: although the applicant's adoptive father was indeed a national of a member state of the European Communities, he did not qualify as a migrant worker, since he had always lived and worked in France. On the strength of this Luxembourg judgment, all the French courts which successively dealt with the appeal rejected the applicant's request for a disability allowance. He then applied to the Strasbourg Court which, in a judgment of 30 September 2003, i.e. more than 13 years after he had originally applied, found that the applicant had been the victim of discrimination based on nationality. This was contrary to Article 14 of the Convention taken together with Article 1 of Protocol no. 1, and our Court, ruling on an equitable basis, awarded him 20 000 euros for the damage he had suffered.[16]

This case demonstrates the complementarity of the three legal systems involved, but also the complexity of their interplay: French law contained an element of discrimination which Community law was powerless to remedy, because it did not apply in the particular case; accordingly it was only in Strasbourg that the situation could finally be remedied.

The Koua Poirrez case furthermore highlights the problem of the length of proceedings in Europe. The applicant had to wait for more than 13 years before finally being vindicated in Strasbourg. While such a duration is also the result of the intervention of three different levels of jurisdiction, it is no option to abolish one of them, as each level has a key role to play in the European legal architecture. It is of course true that the Court of Justice had no other choice but to rule that Community law was not applicable to the facts of the case, but it would not have taken much for Community law to apply.

Another major challenge of the years to come will be the preservation of legal certainty and harmony between all those different legal sources of fundamental rights, through a coordinated and harmonised approach designed

[15] Application No.: 40892/98, judgement of 30 September 2003.

[16] L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, Geneva, September 8, 2005.

to avoid confusion and relativism in this sensitive but most important area. While each legal system should be allowed to have its own fundamental rights and levels of protection, adapted to the specificities of the state or system concerned, it is equally essential to have a coherent approach in respect of the rights which are common to most of the legal systems concerned, especially those laid down in the European Convention of Human Rights. Here we have to be aware of the fact that the same persons may claim the same rights under different legal systems. Remember Mr Koua Poirrez who invoked basically the same right - the right not to be discriminated against - first under French law, then under Community law and finally under the Convention, each time with a different result.[17]

Fortunately, a lot has already been achieved in this respect, not least thanks to an excellent cooperation between the domestic courts of the EU Member states, the European Court of Justice and the European Court of Human Rights.

[17] Ditto as under footnote 17.

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The Constitution of Liberty: The Normative and Dogmatic Connections of Principles of Liberty, Fundamental Freedoms and Human Rights within the Union

/. The legal network of liberty

There was a vision in Europe which developed into a horror: the vision and horror of a common constitution. Fortunately, our politicians found a pragmatic solution: The European Union will get another framework which shall work as a constitution without the title "Constitution". Much ado about nothing? Instead of discussing a Shakespearean comedy or of squaring a circle, I will try to look behind the institutions and competences, following John Rawls' remark that the political system must follow its basic liberties.[1] Rawls repeated Kant's sentence that the civil constitution is based a priori on liberty,[2] and so we are just amidst the European enlightenment. From this point of view I will look for the principles the Union is based on.

According to the Treaty on European Union, the leading principle is liberty. Long, long ago it stimulated the foundation of the European Communities to lead the European states out of the narrowness of their national egocentrism. Nowadays, Article 6 paragraph 1 demands more. It demands liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law *(Rechtsstaat, I'etat de droit).* Because democracy combines equality and liberty, and the rule of law - if we understand this term more in Kant's and the continental sense of *Rechtsstaat* than in Dicey's and the very special British sense[3] - includes fundamental rights. The cross-section, the common meaning of this complex of values and aims is liberty, freedom, autonomy. The Treaty on the European Union declares that these principles are *a priori* common to all Member States. So we may assume that liberty should be effective all over the Union as an objective principle in order to form its de-

[1] J. Rawls, *Political Liberalism,* New York 1993, 8th lecture § 1.

[2] I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (1793), [in:] *Werke in sechs Bänden,* ed. by W. Weischedel, Vol. 6, Darmstadt 1966, p. 125 (145).

[3] Cf. I. Kant, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht,* 1784; Concerning the German term "materieller Rechtsstaat", cf. E.-W. Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs,* [in:] E.-W. Böckenförde, *Recht, Staat, Freiheit,* Frankfurt a. M. 1991, p. 143 sqq.; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland,* Vol. 1, München 1977 § 20. Concerning "I'etat de droit", cf. P. Pactet, *Institutions politique. Droit constitutionnel,* 14th ed. Paris 1995, p. 127 sqq. Concerning the British term "rule of law" cf. K. Loewenstein, *Staatsrecht und Staatspraxis von Großbritannien,* Bd. 1, Berlin-Heidelberg-New York 1967, S. 74 ff.

mocratic society[4] and as a subjective right in order to establish the autonomy of the citizens of the Union.[5]

I will understand this system of principles, freedoms and individual rights as a "Constitution of Liberty". "Constitution of Liberty" was the title of E A. Hayek's - winner of the Nobel Prize 1974 - famous book,[6] and it is an ideal of European civilisation. Though the norms guaranteeing liberty within the Union derive from different sources and are effective on different levels, they form one system, because they are concepted as a meaningful structured whole, which parts could be joined together under a leading sense and should work in a practical connection. This system can be named constitution, if we do not reserve that term only for the organisation of a state, but extend it with regard to its fundamental contents to the relations between the commonwealth and its people.[7] This valuing understanding may be relied on Blackstone[8] and Kant,[9] and Hamilton[10] as well as on the US-American constitutional doctrine and especially on Article 16 of the French Declaration of Rights of 1789, which declares human rights as an unconditional essence of a substantial constitution. Designing the development and the efficacy of human and fundamental rights within its historical and normative context, you will pass the frontiers of a formal term of constitution of nation-states and its specific ideal of codification. So you will reach the connection of the national and international constitutionalism of fundamental rights.[11]

From the point of view of a citizen of the Union, the European constitution of liberty is rather complex, because it consists of a network and hierarchy of norms. The legal situation of the Federal Republic of Germany is even more difficult because the German *Länder*[12] have constitutions of their own

[4] Cf. R. Grawert, *Die demokratische Gesellschaft der Union*, "Der Staat" 46 (2007), p. 33—60.

[5] Cf. P. Kubicki, *Die subjektivrechtliche Komponente der Unionsbürgerschaft*, "Europarecht" (EuR) 2006, p. 489-511.

[6] F. A. Hayek, *The Constitution of Liberty*, Chicago-London 1960; German version: 2nd ed. Tübingen 1983.

[7] The history of the terms "constitutio", "Verfassung", "Konstitution" is explained by H. Mohnhaupt, D. Grimm, *Article "Verfassung I, It'*, [in:] *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, eds. O. Brunner, W. Conze, R. Koselleck, Vol. 6, Ist ed. Stuttgart 1990, p. 831 sqq., 863 sqq.

[8] Sir William Blackstone, *Commentaries on the Laws of England in four books* (1765), 9th ed. London 1783, reprint New York-London 1978, Vol. 1, p. 50 sq., 124 sqq.

[9]1. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, 1793, II ("versus Hobbes").

[10] Publius (Hamilton), *The Federalist Papers*, No. 84.

[11] K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. III/l, München 1988, 2nd cap. (p. 175 sqq): "Grundrechtskonstitutionalismus".

[12] "Land", "Land Nordrhein-Westfalen", "Länder", "Grundgesetz", "Bundesverfassungsgericht", in this paper, I use the constitutional German terms.

with special codes of fundamental rights. If an inhabitant of a *Land* will look like me from the base of these regional constitutions up to the roof of the Union, he will recognise the following explanations of liberties and freedoms, listed from bottom to top:

within Germany

1. the fundamental rights and principles of the constitutions of the *Länder*, which rank above the law of the Land, but beneath that of the federation;

2. the human rights and fundamental freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which ranks beneath the *Grundgesetz of* the Federal Republic with the force of the federal law which transforms the international Convention into state law;

3. the European Charter of Social Rights (1961), transformed into federal law;

4. the fundamental rights of the *Grundgesetz*, which oblige all state functions of the federation as well as those of the Länder (Article 1 paragraph 3 GG);

5. the International Agreements on human rights (1966) as well as the Charter of the United Nations (1948) and the dogmatic traditions as sources of inspiration to interpret the national constitution;

within the Union

6. the fundamental freedoms of the Treaty Establishing the European Community (1957, 1992, 1997, 2001);

7. the fundamental rights developed by the European Court of Justice as a result of the constitutional traditions common to the Member States;

8. in virtue of Article 6 paragraph 2 of the Treaty on the European Union the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the Union "shall respect";

9. in virtue of Article 136 of the Treaty Establishing the European Community the "fundamental social rights such as those set out 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", which "having in mind" the Community and the Member States will favour "the harmonisation of social systems";

10. at least the Charter of the European Union on Fundamental Rights solemnly proclaimed by the Council at Nice and taken as an instrument of interpretation by the Court of Justice, though the Charter is not yet in force.

These different sources contain "hard" and "soft" law, obliging on the one side and influencing the politics and interpretations of laws on the other side. Liberalists hope that the combination of all those sources will amount to a con-

sistently functional system. Optimistic liberalists may rejoice: an integrating constitution of liberties. Pessimistic liberalists may regret: a chaos of values and norms. But before we criticise that system, let me explain how it works, namely by incorporation of transmitted texts, by mutual influences of national and international law systems, and, of course, by harmonising interpretation. Finally, I will discuss the competition of fundamental rights - what we call in Germany *Grundrechtskonkurrenzen* - and the question of jurisdiction.

2. Constitutional incorporation of legal values and texts

At first let us consider the incorporation of legal ideas and texts into the constitutions of member states. Modern positivists are convinced that the legal force of human rights is primarily based on positive decisions of a constituent power. Nowadays, this conviction depends on the doctrine of democracy, that the *demos* is its legal source of its own and contains its law by itself. From this - very continental - point of view the legal force of human rights depends mainly on a positive constitution.

But in spite of the democratic theory of decision-making, another widespread conviction exists in Europe, that, in a deeper sense, human rights belong to the very nature of men and therefore precede all public forces. This conviction depends on the cultural impression of Christian-occidental traditions of thinking and of monarchist-feudal political structures: Magna Carta on the one side, enlightenment on the other side. Because of these common traditions, the doctrine of human rights requires a supra-positive validity, which influences constitutional politics as well as the interpretation of constitutional charters. The German legal dogmatics and jurisdiction understands therefore an order of fundamental values as the basis of the positive legal order with the human dignity as focus.[13]

Some constitutions stress that cultural background by the explicit recognition of or attachment to dignity, liberty and other values or rights. An example is Article 1 paragraph 2 of the *Grundgesetz*. The constitutions of Italy, Poland, Portugal, Spain and of some German *Länder* do the same. In this way philosophical and moral axioms become valid parts of the constitutions and leading aims of those member states. In a technical sense they are incorporated by positive recognition, acknowledgement or attachment.

Some constitutions of the German *Länder* incorporate not only unwritten traditional dogmas but even texts from other constitutions in order to complete their constitutional programme. Instead of formulating codes of human rights themselves they refer to the code which the *Grundgesetz* has constituted. For example, Article 4 paragraph 1 of the Constitution of the *Land Nor-*

[13] BVerfGE 35, 202 (225); 39,1 (43).

drhein-Westfalen declares that the rights laid down in the *Grundgesetz "in the form of 23 May 1949"* are constituent parts *(Bestandteil} of* the constitution of the *Land* and oblige as constitutional law of the *Land* everybody directly. To understand this formula you should know that the same rules on human rights are valid as constitutional law of the Federal Republic (Article 1 paragraph 3 GG), so that they are binding twice, but on different hierarchical levels, as multiple guaranties for the inhabitants of the *Land Nordrhein-Westfalen.* But does the incorporated text have the same meaning? I don't think so, because it works in a different context. Though the constitutional courts of the *Lander* normally follow the jurisdiction of the *Bundesverfassungsgericht,* it is evident that for example the right to move and reside freely alternatively means the territory of the *Land* or that of the Federal Republic, and that the freedom of broadcasting depends on the different legal competences. The constitution of *Nordrhein-Westfalen* has another problem with the date 23 May 1949: Does it mean that later amendments to the federal code of human rights shall not be incorporated into the law of the *Land* - so called petrifaction — or does it mean that the reference to the *Grundgesetz* is dynamic so that the constitution of the *Land* could legitimately be changed by another constituent power than that of the *Land?.* Of course, several opinions exist and therefore chances for arguments.

The legal situation on the level of the Federal Republic as well as on the level of the *Lander* is even more complicated because the European Convention for the Protection of Human Rights and Fundamental Freedoms has been transformed into German law by a simple statute of the Federal Republic.[14] While Austria incorporated the Convention into its constitution, it ranks in Germany beneath the federal constitution but above normal federal laws and above the constitutions of the *Lander.* The *Bundesverfassungsgericht* has decided that the text of the Convention as well as the jurisdiction of the European Court of Human Rights must be taken into consideration for the interpretation of the human rights laid down in the *Grundgesetz.* Therefore the Convention and its European interpretations oblige the German legislators with the force of the federal constitution and the jurisdiction of the *Bundesverfassungsgericht.* It took several years until this Court had adjusted its jurisdiction on human rights to this European dimension. Only after it had been convinced that the Convention guarantees a minimum standard of valid protection which principally fulfils the demands of the *Grundgesetz* did it oblige itself to respect the contents and developments of the Convention.[15]

[14] BVerfGE 74, 358 (370); 82,106 (120); 111, 307 (317).

[15] BVerfGE 73, 339 (370); confirmation by BVerfGE 82, 106 (120); 83, 119 (128); 111, 307 (latest leading case).

The European Charter of Social Rights from 1961 holds a similar position in German law.[16] Even if it should directly entitle and oblige not only its Member States, but also individuals, it does not have the force of constitutional law. But it can be important for the interpretation of constitutional human rights, especially for the understanding of Article 9 paragraph 3 GG,[17] in which the rights of the social partners are guaranteed. Moreover, the International Agreement on Civil and Political Rights from 1966[18] principally is considered as a source of interpretation of the German human rights.[19]

The ranking system of these different dogmas, norms and jurisdictions is rather complicated, and not only the normal person, but the normal jurist, too, could become confused. Nevertheless it is the federal code of human rights on the one side and on the other side the intensive jurisdiction of the *Bundesverfassungsgericht* which produce a certain harmonisation and, moreover, a unification within the Federal Republic of Germany. At the same time, they open the national system for the influences of international and supra-national European law. That does not mean giving up the constitutional autonomy. But as soon and as far as national constitutions open their codes to those influences, they act in an integrative way.

3. Interdependences and interferences of European law

From this point of view, we may follow the legal ways of liberty into and within the Community and the Union and from there back to the Member States: ways of reciprocations. In the case of Germany it was the *Bundesverfassungsgericht* which paved those ways by its famous *Solange* (as-long-as-) judgments. By these judgements the Court insists on its constitutional sovereignty on questions of fundamental rights as long as the process of integration of the Community has not proceeded so far that the Community law includes a valid code of fundamental rights formulated and laid down by a parliament, a code which should be adequate to the code of fundamental rights of the *Grundgesetz.*[20]

Nowadays, its Article 23 paragraph 1 demands approximately the same.[21] The essence of the code of fundamental rights therefore defines an essential of the German constitution and of Germany's national identity in the sense of Article 6 paragraph 3 of the Treaty on the European Union. The above men-

[16] V. 18.10.1961 (BGBl. 1964II1262).

[17] BVerfGE 88,103 (112); 58, 233 (253 sq.); 76, 1 (81).

[18] V. 19. 12.1966 (BGBl. 1973 II1534).

[19] BVerfGE 76,1 (81).

[20] BVerfGE 37, 271 (280 sqq.); 52, 187 (202 sq.); 73, 339 (378).

[21] Since the constitutional law from 21. 12. 1992 (BGBl. I 2086).

tioned reservation of the *Bundesverfassungsgericht* was formulated in May 1974.[22]

But in October 1986,[23] just twenty years ago, the Court decided that meanwhile, the protection of human rights by the Community had reached an acceptable standard. This progress had been the answer and the success of the European Court of Justice.

Originally, the Rome Treaty Establishing the European Economic Community which we celebrated this year had been concentrated on the Common Market: The free movement of goods, persons, services and capital were concepted as "Community Policies".

These policies were supposed to direct the common institutions and oblige the Member States to entitle workers[24] and other persons. The original Treaty favoured private persons, but did not entitle them directly in relation to the public power as classical human rights do. Therefore, subjective rights depend on legal concretions.

Nowadays the Treaty Establishing the European Community follows this concept. It is qualified by a special relationship between liberty and equality: Individual liberties result from organising equality.[25] The Treaty stresses the elimination of discriminations and the realisation of equality.[26]

This programme for legal liberty by effective equality is adjusted to "the principle of an open market economy with free competition" in order to Article 4 paragraph 2 of that Treaty. But it mistrusts the dogma of neo-liberalism by obliging the Member States to intervene for a social policy.[27] It does not rely on the energy of individual and social autonomy.

But since 1969 the European Court of Justice[28] and since 1992 the Maastricht Treaty have caused a paradigmatic turn. At first, the Court developed, beginning, of course, with the right to property and the freedom to peruse a trade or profession, step by step a broad panorama of fundamental

[22] BVerfGE 37, 271.

[23] BVerfGE 73, 339.

[24] Cf. R. Grawert, *Free Movement of Workers: Changing the European Society*, "Managerial Law" 47 (2005), p. 70-81.

[25] Cf. R. Grawert, *Die demokratische Gesellschaft der Union*, "Der Staat" 4 (2007), p. 33,46 sq.

[26] Cf. Art. 2, 39 sqq., 4 sqq. ECT.

[27] Cf. Title XI, especially Art. 136 ECT.

[28] ECJ [in:] ECR 1969, 419 - 29/69 - (Stauder-Ulm); ECR 1970, 1125 - 11 / 70 - (Internationale Handelsgesellschaft); ECR 1974, 591 - 4/73 - (Nold). But cf. the decisions of the Court refusing to consider such rights: ECR 1959, 17 - 1/58 - (Stork) and ECR 1960, 423 - 36, 37, 38, 40/59 - (Geitling). Cf. C. O. Lenz, *Der europäische Grundrechtsstandard in der Rechtsprechung des Europäischen Gerichtshofes*, "Europäische Grundrechte-Zeitschrift" (EuGRZ) 1993, p. 585 sqq., and the short survey [in:] P. Craig, *Gráinne de Búrca*, EU Law. Text, Cases, and Meteríais, 3rd ed., Oxford 2003, p. 317 sqq.

rights, which meanwhile concerns nearly all aspects of social life. This development is the human-rights answer to the expansion of the competences of the Community.[29] Of course, the basic source of this jurisdiction was and must be the rules of the treaties, especially the rules on non-discrimination. Because these rules do not say very much about liberties, the Court has practised something like an authentic and dynamic interpretation. Pointing it, you might say that the Court did - in the opinion of the *Bundesverfassungsgericht* - what a European parliament should have done.[30] With which legitimacy? Does the jurisdiction depend on something like the sovereignty of the Union, depending on the "peoples of Europe", as the Court means?[31] Or does it depend on a so-called "bottom-up" structure of a practised European "community of justice", scholars and courts, as an Advocate-General presumes?[32] Or are the decisions of the Court only facts accepted by the member states, their jurists and courts? Anyway, that jurisdiction establishing a complex of fundamental rights and freedoms was a legal and political necessity, and so it became valid by acceptance. Since 1992, the interpretation may follow Article 6 of the Treaty on European Union, which declares that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and that it shall respect fundamental rights as guaranteed by the European Convention from 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. According to this declaration, the Court of Justice now uses a standing formula[33] in order to define its "sources of inspiration" - "inspiration" is a good expression because the Court seldom expresses exactly which sources are meant.

But is it possible to fix the relevant "constitutional traditions common to the Member States", in view of twenty-seven states? Is that a question of legal culture, history or comparison? If legal comparison should be relevant, we have to compare less traditions than valid constitutions, and I think that this is the way to respect the identities of the member states. Nevertheless, comparison is only a process and not a rule. Therefore it is not astonishing that the European Convention for the Protection of Human Rights and Fundamental Freedoms has a prominent position amidst the Court's "sources of

[29] The connection between these two developments was stressed by the "Bundesverfassungsgericht"; cf. BVerfGE 73, 339 (375); 58,1 (30 sq.); 37, 271 (279).

[30] Cf. the text above to n. 19.

[31] Cf. ECJ [in:] ECR 1963, 3 - 26/62 - (Van Gend & Loos).

[32] Cf. M. Poiares Maduro, *Der Kontrapunkt im Dienst eines europäischen Verfassungspluralismus*, "Europarecht" 2007, p. 4 (12 sqq.).

[33] The Charter of Fundamental Rights, proclaimed at Nice 2001, transmitted this formula into its Art. 53.

inspiration."[34] Meanwhile the Charter of Fundamental Rights works in the same way, though it is only proclaimed by the Council.[35] Thus, the Convention works on multiple levels: twice within Germany, then within the European Council, and moreover within the European Community and Union.

4. Concurrences and conflicts of human rights rules and courts

This situation illustrates at least the main problem of the European "constitution of liberty": the problem of unity by concurrence and competition, more precisely: the concurrence or competition between different legal rules on human rights with similar contents and between different courts applying those rules on freedoms and liberties. Normally the rules and courts work within the frames of their special systems. Within these legal systems (from my personal point of view: the systems of the *Land Nordrhein-Westfalen,* of the Federal Republic of Germany, the European Council, the European Community and of the Union) the way of ranking the rules follows well-known principles, for example the principle of hierarchy or legitimacy or the principle of speciality or the principle of friendly interpretation.

But these normally helpful principles are not sufficient to solve the very special problems of legal concurrences and competitions in hieratic, but at the same time integrated systems, for example the Federal Republic of Germany and the European Community and Union. Let me for example indicate at first the German situation. There, the Republic and most of the *Länder* have autonomous constitutions with similar codes of fundamental rights. Their rules principally are applicable side by side. Therefore, contradictions are possible, if the rules differ in the extent of their guarantees of liberty or in their authorisations to limit the liberties. But even if they are worded quite similarly, they could be interpreted and applied in different ways by different administrations and courts which, perhaps, follow different "sources of inspiration". In order to minimise such problems, the *Grundgesetz* dictates that a federal rule "overcomes" *(bricht)* contradictory and even similar rules of the *Länder* (Article 31) so that they are not yet valid. But it makes an exception in respect to regional fundamental rights: Those rules of the *Länder* shall remain valid "also in so far" *(auch insoweit),* as they guarantee liberties "in conformity with" *(in Übereinstimmung mit)* the *Grundgesetz* (Article 142), so that there are double protections of liberties, doubled by their contents and by the competences of the constitutional courts.

For a long time, the *Grundgesetz* and the *Bundesverfassungsgericht* developed the protection of fundamental rights in a unifying way. Nowadays, the

[34] Cf. e.g. ECJ [in:] ECR 1991,1-2925 (2951 n. 41) - C-260/89 (Elliniki Radiophona Tileorassi AE).

[55] At Nice 7.12.2000, ABI. n. C 364/01 v. 18.12.2000.

Constitutional Courts of the *Länder*[36] act with a new self-consciousness stressing the autonomous validity of the regional constitutions and of their own competences.[37] And the *Bundesverfassungsgericht* promotes and respects this development in its latest jurisdiction, so that, for example, the Constitutional Courts of the *Länder* are able to apply the rules of the Länder on fundamental rights on rules of procedure of the Federation even if these fundamental rights resemble those of the *Grundgesetz*.[38] Nevertheless, there remained some problems about the meaning of those ranking rules and about their extents.[39] But that is not astonishing because the quarrels about interpretations are in fact political quarrels about autonomy, hierarchy and subsidiarity. I will not bore you with these quarrels and restrict myself to the thesis that rules of integrated states on fundamental rights must be respected as far as possible, that means: as far as their application does not disturb the functions of the federal law system. Normally, it is not necessary for the functional compatibility of a law system that constitutional rules of federated states lose their authoritative validity. Because we may handle possible contradictions as problems not primarily of validity, but of application. In order to avoid contradictions it will be enough to suspend the application of the contradicting rule in the very case of a contradiction and to let it be valid for other cases.

I base my thesis on the respect to the constitutional autonomy of the people who established a constitution. With regard to Germany, this respect is expressed in Article 28 paragraph 1 of the *Grundgesetz.* In its recent jurisdiction, the *Bundesverfassungsgericht* stresses that rule which is an expression of subsidiarity, too. And therefore its sense fits for the European Community and Union and their relationship to the Member States. The Treaties establishing those federations expressively stress the principle of subsidiarity.[40] But the consequence of "breaking" and excluding a rule of a Member State is not so urgent, because Article 6 of the Treaty on Establishing the European Community stipulates "principles which are common to the Member States" and also fundamental rights based on "the constitutional traditions common

[36] Some of them are named "Landesverfassungsgericht" some "Verfassungsgerichtshof".

[37] Preeminent the so-called "Honnecker-Beschluss" (= decision) of the Verfassungsgerichtshof of Berlin 12.01.1993, "Neue Juristische Wochenschrift" (NJW) 1993, 515 sqq. About the new selfconsciousness and power of the constitutional courts of the *Länder* cf. *Christian Tietje,* Die Stärkung der Verfassungsgerichtsbarkeit im föderalen System Deutschlands in der jüngeren Rechtsprechung des BVerfG, "Archiv des öffentlichen Rechts" (AöR) 124 (1999), p. 282 sqq.

[38] Verfassungsgerichtshof des Landes Sachsen, "Neue Juristische Wochenschrift" (NJW) 1998, 1736 sqq.; BVerfGE 96, 345 (345, 351 sqq.).

[39] Cf. R. Grawert, *Wechselwirkungen zwischen Bundes- und Landesgrundrechten,* [in:] *Handbuch der Grundrechte in Deutschland und Europa,* eds. D. Mertens, H.-J. Papier, Vol. 3, Heidelberg 2007-2008, § 80 n. 76 sqq.

[40] Art. 5 ECT, Art. 2 and 6 par. 3 EUT.

to the Member States“. Nevertheless it is imaginable that the development of fundamental liberties comes to other results than constitutions of Member States or of their official interpreters,[41] maybe with regard to the extent of the guarantee, maybe to the protected subjects,[42] its restrictions, for example the restrictions “a constraining social necessity“ respectively “necessities of a democratic society,“[43] restrictions which the Court of Justice, but not the *Bundesverfassungsgericht* took over from the Court of Human Rights; or we may reflect the consequences of the *Bosman-Case* which the Court of Justice decided obliged private associations by common fundamental rights, whilst national constitutions do not allow such restrictions of privates.[44] Such differences can become problematic, because the Community law not only obliges the Community and the Union itself, but the Member States, too, if they execute the law of the Union.[45] Article 51 paragraph 1 of the Charter of Fundamental Rights dictates that obligation expressively. Normative contradictions may result judicial contradiction. They may remember the judicial reservation of the *Bundesverfassungsgericht* that it will reserve and keep its internal and Germany’s external sovereignty to prove the level of the Community liberties. In the cases “banana-market“[46] and “European warrant for arrest“[47] that Court seemed to become suspicious of the extending power of the Union. Only three months go, the President of the Bundesverfassungsgericht cautioned against “conflicts“ caused by the expanding jurisdiction of the Court of Justice on the common fundamental rights.[48]

This attitude, which you can observe also in other Member States and the problems of normative and judicial concurrence are, of course, a consequence of the problem of sovereignty. I will repeat: a consequence of the problem, not of sovereignty itself. In its classical meaning sovereignty presuppo-

[41] Cf. J. Kokott, *Der Grundrechtsschutz im Europäischen Gemeinschaftsrecht*, “Archiv des öffentlichen Rechts“ (AöR) 121 (1996), p. 599 sqq.

[42] The so-called “Deutschenrechte“, e.g. Art 12 par. 1 GG, which entitle only German nationals perhaps contradict the inhibition of discrimination on grounds of nationality (Art. 12 ETC); R. Störmer, *Gemeinschaftsrechtliche Diskriminierungsverbote versus national Grundrechte?*, “Archiv des öffentlichen Rechts“ 123 (1998), p. 541 sqq., denies such possibilities.

[43] Cf. ECJ, C-l 12/00, v. 12. 6. 2000, "Europäische Grundrechte-Zeitschrift“ (EuGRZ) 2003, p. 42 (498 n. 79).

[44] Cf. ECJ 1995, 1-4921 (Bosman), ‘Neue Juristische Wochenschrift“ (NJW) 1996, 505, and the critics of W. Kluth, *Die Bindung privater Wirtschaftsteilnehmer an die Grundfreiheiten des EG-Vertrages - Eine Analyse am Beispiel des Bosman-Urteils des EuGH*, "Archiv des öffentlichen Rechts“ 122 (1997), p. 557 sqq.

[45] Cf. the survey of T. Jürgensen, I. Schlünder, *EG-Grundrechte gegenüber Maßnahmen der Mitgliedstaaten*, “Archiv des öffentlichen Rechts“ (AöR) 121 (1996), p. 200 (208 sqq.).

[46] BVerfGE 102,147 (161 sqq.).

[47] BVerfGE 113, 273 (297 sq.).

[48] Cf. the interview with Professor Dr. Hans-Jürgen Papier in “Frankfurter Allgemeine Zeitung“ No. 169, 24.07.2007, p. 5.

ses one sovereign. Therefore it has been and is rather difficult to identify its place in the frame of a federal republic which consists - like the Federal Republic of Germany - of states with peoples and constituent powers and democratic legislation of their own. Today the common opinion is that the people of the Federation and its *Grundgesetz* dominate the national legal system of Germany, and the *Bundesverfassungegericht* participates in its internal sovereignty. The European Union cannot pretend one people of its own. But the Court pretends that the European Communities own a sovereign power depending on the "union among peoples of Europe" named by the preamble of the Treaty on the European Union, and that this common power legitimates the pre-eminence and superiority as well as the direct validity of the European rules, especially those of the primary European law[49] of which the fundamental freedoms and liberties are parts. But if we do not want to flirt with the old-fashioned American thesis of parted sovereignty and respect the Treaty, then the Union cannot compete with its founders and Member States in sovereignty. Consequently, the pre-eminence and the superiority and the direct validity of the common fundamental freedoms and liberties cannot depend but on the respect of the Member States. From this point of view, the courts of these States are at least able to solve conflicts between European and national laws. They may retain their power, like the *Bundesverfassungsgericht* normally does, or they may reject the European law. In the last case the Member State may decide whether it will be better for him to reform its constitution or to leave the Union. At last, it is this check-up which decides the question on legal and cultural identity. But the most clever way - clever in the sense of Macchiavelli's theory of surviving - will be to avoid the clash by minimising the zones of conflicts, by coordination and cooperation early.

One special zone is the interpretation and application of the European Convention for Protecting Human Rights. Because the rules of that Convention are sources of interpretation and jurisprudence on rather different levels, several ways to contradictions are imaginable. Of course, the interpretation of the conventional rules is mainly a task of the European Court of Human Rights.[50] But its decisions neither oblige the European Court of Justice nor the *Bundesverfassungsgericht.* Neither the Union nor the Community are members of the Convention. Therefore and in order not to disturb the European horizons, the different courts apply for a so called cooperation. That means: When they find and formulate their interpretations of the decision-making rules, they respect the foregoing interpretations. The *Bundesverfassungsgericht* adds: only in respect to the national identities. The re-

[49] Cf. ECJ [in:] ECR 1963, 3 - 26/62 (Van Gend & Loos).

[50] Art. 32 ECHR.

suit of those co-operations is a European "constitution of liberty" developed by high courts. For a simple advocate or judge it will be very difficult to know and to follow the mysteries of their dogmas and interpretations, not to imagine the European "everybody". Nevertheless, that "constitution of liberty" will produce a European harmonisation and unification. That is the same process one may observe in the case of the Federal Republic of Germany: There the fundamental rights are very valid instruments of unification, ft is a political question whether this process is useful or not, but there can't be any doubt that it works rather efficiently.

5. Outlook

The more the supra-national competences of the Union will extend, the more its liberties will get a certain leading part for the European integration. If you look upon the different sources of guarantees, you will see that they work in a processual functional connection, although they are not parts of one codification. The instruments connecting the different levels and liberties are reception, incorporation and friendly interpretation of values and rules and the mutual respect of courts. Perhaps this working network will lead to a broader extension of liberties, perhaps with reference to the contents of liberty, but mainly with reference to crossing frontiers. But it could also lead to expanding limitations if they are discovered and applied as common "traditions" or "principles" of the majority of member states, and in this case it will become interesting to know what the constitutional courts of the member states will answer.

Will the European Charter of Fundamental Rights change or put under stress this process when it becomes valid as primary Community law? As far it will introduce further fundamental rights, especially social rights, it will extend the domain of liberties and restrict the powers of the Union as well as of the member states. Of course, that is the hope of liberalism. Those who want the Union to be more liberal and integrated will welcome that event. But even beside the enlargement of the code of fundamental rights, the Charter will have a harmonising and unifying function and will not intensify the principle of subsidiarity. Those who want to keep their nation and its state as autonomous and sovereign and as culturally unique as possible will regret the additional liberties, equally common in and for all member states. In any case, the consolidation of the "constitution of liberty" is a necessary part of the consolidation of the Union.

Why so? However the Union will be organised, maybe by a perfect, maybe by an imperfect constitution called "reform", it will be developed in an unconditional connection of legitimacy with the modern European state. This state, more generally said: this special European form of public power, gets

its legitimacy by fundamental rights. Let me remember again, like in the beginning of my lecture, the French Declaration of Rights of 1789. Its Article 2 proclaimed: *"Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression"* Since these ideas are in the heads of men, it is neither religion nor force nor nation which legitimates public power, but the principle of equal freedom. Therefore the "Constitution of Liberty" is the base and the motor of the political association named "Union". Although it is a pity that the intended "reform" of the Union shall be concentrated on its institutions while the fundamental rights shall remain non-essential accessories. But anyway, those rights will and must direct the institutional and processual structures of the Union as well as of the Community. They are not only leitmotifs, but requirements of the principle of "Rechtsstaat" ("rule of law") and of the principle of democracy in the meaning of Article 6 of the Treaty on European Union.

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The Charter of Fundamental Rights of the European Union

I. Introduction

Democracy, the rule of law and the promotion and protection of human rights and fundamental freedoms are the defining principles of the European Union. History, not least that of the Union itself, has shown that adherence to these principles constitutes a fundamental prerequisite for prosperity, justice, peace and stability for all.

There are a couple of systems applying in Europe for the protection of human rights. They operate at the world-wide, regional, and national level. This variety reflects historical developments which, at least in part, do not exist any more. For instance, the Council of Europe was established as an organisation associating only the states of (politically) Western Europe. After the fall of communism its membership reached 47 states. The number is close to that of the membership of the Organisation for Security and Co-operation in Europe (OSCE); the main difference between these two organisations is the presence of the United States and Canada in the latter. Moreover, after the enlargement of the European Union, there is much greater homogeneity in Europe. Gradually the enlargement has brought the composition of the Union into line with that of the Council of Europe. Obviously, it will still take some time and probably never become a complete process. For example, Russia's accession to the European Union seems at the moment a very remote possibility. However, one could say that all the major European organisations substantially will have the same members. The visible differences in membership would anyway hardly justify the existence of different European levels of protection of human rights.

The Council of Europe, the European Union, and the OSCE are all concerned with ensuring that human rights are properly protected. With regard to the same organisations, certain types of rights are covered by different instruments, each with its respective treaty body supervising compliance with the relevant obligations. This is due partly to historical reasons. All these instruments add to those that have been established at the universal level for the same rights. The ensuing result gives a fairly complex picture.

It is important, however, to mention that some instruments overlap at least in part. To take just one example; the right to information is covered by Art. 19 of the Universal Declaration of Human Rights,[1] Art. 10 of the Euro-

[1] Universal Declaration of Human Rights, adopted by GA Res. 217 A (III) (1948, in United Nations, *A Compilation of International Instruments* (1994), Vol. 1, Part. 1.

pean Convention of Human Rights, Art. 19 of the UN Covenant on Civil and Political Rights,[2] Art. 15 of the UN Covenant on Economic, Social and Cultural Rights[3], Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination,[4] the Final Act of the Helsinki Conference,[5] and in numerous other documents including Art. 11 of the Charter of Fundamental Rights of the European Union.[6] Each of these texts has some distinctive elements. Very often, when a new text is adopted, the rewording of a rule concerning a given right finds its origin in the drafters' perception of the importance of some aspects that may have previously been less evident. Thus one could say that the number and variety of provisions concerning the same rights are also a product of historical developments.

Once an instrument is adopted and a machinery for monitoring its implementation is put into action, there is an understandable reluctance on the part of those more directly concerned with its functioning - whether it is states, institutions or officials - to resist any change that one may wish to introduce. This occurs irrespective of the fact that certain features of the system may be due to a specific reason that no longer hold.

Since any suggestion of changes - even for the sole purpose of streamlining the existing systems for the protection of human rights - is likely to run into political difficulties, one could find some justification in limiting oneself to a description of what has been achieved so far. However, the interest in discussing the existing systems for the protection of human rights is not simply theoretical. In view of enhancing that protection and making a better use of resources, a reassessment appears of some use, even if only a few minor changes to the present systems will be regarded as politically suitable. Moreover, the production of texts for the protection of human rights is far from being concluded. An evaluation of the existing systems appears to be essential before any new initiative is taken in order to establish yet another instrument. A further text should be adopted only if it serves an appreciable purpose that prevails over the disadvantages that would be caused by making the systems for protecting human rights even more complicated.

[2] International Covenant on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) (1966), *International Instruments*, (1994), Vol. 1, Part. 2.

[3] *Ibidem.*

[4] International Convention on the Elimination of All Forms of Racial Discrimination, adopted by GA Res. 2106 A (XX) (1965), in *International Instruments*, Vol. 1, Part. 2.

[5] Helsinki Final Act, adopted at the Conference on Security and Cooperation in Europe, Helsinki, August, 1975, reprinted in (1975) 14ILM 1292.

[6] Charter of Fundamental Rights of the European Union, in *Official Journal of the European Communities*, 2000/C, 364/01.

In the European Union, where the institutions of the Union may only exercise the powers which are attributed to them by the Member States, the implementation of fundamental rights essentially takes place at state level. Therefore it is clear that the international protection of human rights has its antecedents in domestic efforts to secure legal protection for individuals against the arbitrary excesses of state power. Such domestic attempts have a long and dignified history and are intimately connected with revolutionary activity directed towards the establishment of constitutional systems based on democratic legitimacy and the rule of law. Even today, the protection of human rights at both the national and international level is closely connected, if not symbiotic. All international instruments require states' domestic constitutional systems to provide adequate redress for those whose rights have been violated. It is only when those states' own internal protective systems fail or where, in extreme cases, they are non-existent, that international mechanisms for securing human rights come into play.

In a sense, therefore, international mechanisms operate to reinforce domestic protection of human rights and to provide remedy when the domestic system collapses or is found wanting. Europe has evolved what is probably the most sophisticated system of judicial protection of human rights, involving both the domestic constitutional orders of the states and the European Convention system. All European Union member states are already signatories to the European Convention for the Protection of Human Rights and Fundamental Liberties - agreed by the Council of Europe in 1950.

In brief, it is necessary to point out that the European Convention is a text from the Council of Europe, which is made up of 47 European states, including Russia. The Charter is a text from the EU, which currently has 27 member states. Also the scope of the protection provided by these two texts is different.

The Convention of the Council of Europe relates solely to civil and political rights, while the Charter of the EU covers additional aspects, such as the right to good administration, and workers' social rights, including the right to strike. The Charter also responds to the challenges of new technology by including articles, as already mentioned above, on bioethics and the protection of personal data.[7] Moreover, the Charter covers those political rights of

[7] Nearly 15 years after the Council of Europe first called for a pan-European convention on issues on bioethics to harmonize disparate national regulations, in November 1996 the Council's Committee of Ministers approved the Convention on Biomedicine and Human Rights for formal adoption. The draft convention released in July 1994 provoked strong public, professional, and governmental debate among European nations, particularly regarding provisions for biomedical research with subjects unable to give informed consent. After the ratification the Bioethics Convention became the first such document to have binding force internationally. The Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data (1981) - which was the first legally binding international document with worldwide significance on

Union citizens that, by definition, cannot be included in the Convention of the Council of Europe (it is not a EU document).

//. EU approach to human rights in a historical perspective - the paradox of the EU's Human Rights Policies

Providing that since the proclamation of the EU Charter a considerable step forward has taken place in the EU policy in the field of human rights, it is necessary to make a couple of remarks concerning the previous policy on this issue.

The European Union has from its conception up till now undergone a significant transformation.[8] In the last five decades it has developed from a system of a predominantly economic co-operation between the member states into a new constitutional polity, simultaneously separated from and at the same time completely dependent on its constituent units (member states). Following this transformation, and while the integration deepened and widened, economic issues have become more and more pervaded by the fundamental issues, leading to the core questions of the European identity, fundamental values, standards of human rights protection on the national and Community level, to the most contentious issues of ever more extended competences of the Community at the expense of the member states. Human rights are all too often assumed to be primarily matters arising in a country's external relations rather than its internal affairs. The same way of thinking may or even should even be applied to the role of human rights within the external relations of the European Union. However, if we take a close look at this issue, it soon becomes apparent that the internal and external dimensions of human rights policy can never be satisfactorily kept in separate compartments. They are, in fact, two sides of the same coin.

In the case of the Union, there are several additional reasons why a concern with external policy also necessitates a careful consideration of the internal policy dimensions. First, the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements. Secondly, in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and au-

data protection - draws inspiration directly from the European Convention on Human Rights and Fundamental Freedoms. In particular art.8 of this Convention states that "Everyone has the right to respect for his private and family life, his home and his correspondence". The EU directive 95/46/E on the protection of individuals with regard to the processing of personal data and on the free movement of such data is based on the above-mentioned document.

[8] For a great analytical presentation of the transformation of Europe and for reasons and consequences see J. H. H. Weiler, *The Transformation of Europe,* 100YALE L.J. 2403, 1991.

thentic internal policy can have no hope of being taken seriously. Thirdly, at the beginning of the 21st century a credible human rights policy must assiduously avoid unilateralism and double standards, and that can only be done by ensuring reciprocity and consistency. Finally, the reality is that a Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy and consistency. As long as human rights remain a suspect preoccupation within, their status without will remain tenuous.

The human rights policies of the EU for a long time was beset by a paradox.[9] On the one hand, the Union was a faithful defender of human rights in both its internal and external affairs. On the other hand, it lacked a comprehensive or coherent policy at either level and fundamental doubts persisted whether the Institutions of the Union possessed adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies.

On the positive side of the balance sheet, a strong commitment to human rights has been one of the principal characteristics of the European Union. The Amsterdam Treaty proclaimed that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law''[10] In other words, any member state violating human rights in a "serious and persistent" way can lose its rights under the Treaty[11]. The European Court of Justice has long required the Community to respect fundamental rights and the European Council has issued several major statements emphasising the importance of respect for human rights.[12] Similarly, the Community has taken notable initiatives in a wide range of fields from gender equality to racism and xenophobia.

Thus, in diverse ways the European Union has acknowledged that it has an important role to play in promoting respect for the human rights of its citizens and of all other residents within the Union, and of ensuring that those rights are fully respected. This is so despite the fact that the Member States are, and will remain, the principal guardians of human rights within their own territories.

Equally, the Union is a powerful and uniquely representative actor on the international scene. It has the responsibility, reinforced by the capacity and

' The Union's policies have been analysed in considerable detail elsewhere. See generally, M. Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, (1985), 10 *European LR* 398; J. H. H. Weiler, N. Lockhart, *Taking Rights Seriously*, "The European Court and its Fundamental Rights Jurisprudence" 1995, 32, CLM Rev. 51 and 579.

[10] Art. 6 TEU.

[11] Art. 7 TEU.

[12] See J. H. H. Weiler, N. Lockhart, note 1 above.

financial resources, to influence significantly the human rights policies of other states as well as those of international organisations. In recognition of this responsibility it had insisted, before the enlargement, that states seeking admission to the Union had to satisfy strict human rights requirements.[13] Other governments wishing to enter into co-operation agreements with the Union, or to receive aid or benefit from trade preferences, must covenant to respect human rights. If that covenant is breached, serious consequences can ensue.[14] It has adopted a number of declarations underlining the importance of human rights in its external relations and it has given substance to this approach by funding a wide range of development co-operation initiatives with major human rights components. It has sought to strengthen the capacity of civil society in many countries, before as well as after the enlargement. It has founded election monitoring and human rights monitoring, and has played an active role in support of human rights in a multilateral context.

Nevertheless, there is also the other side of the balance sheet. Here, despite the frequency of statements emphasising the importance of human rights and the existence of a variety of significant individual policy initiatives, the European Union for a long time has lacked a fully-fledged human rights policy. This is true in relation both to its internal policies and, albeit to a lesser extent, its external policies. By the end of the 1990s the institutions of the Community, in relation to its internal human rights situation, had succeeded in cobbling together a makeshift policy which had been barely adequate, but no means sufficient.

Therefore there has been a growing opinion that in the foreseeable future this approach might become unsustainable, increasingly ineffective and ultimately self-defeating. Ironically, the Union has, by virtue of its emphasis upon human rights in its relations with other states, and its ringing endorsements of the universality and indivisibility of human rights, highlighted the incompatibility and indefensibility of combining an active external policy stance with what in some areas had come close to an abdication of internal responsibility. For that reason, on the base on what has just been pointed out, the Union could only achieve the leadership role to which it aspires through the

[13] Art. 49 TEU. In the European Communities' founding documents moderate attention was paid to fundamental rights and freedoms. However, over time, the EU has increasingly articulated its desire to represent not only stability and prosperity, but also democratic values, culminating with the adoption of clearly political criteria for EU membership at the Copenhagen Council in 1993, including "respect for and protection of minorities". The direct consequence of the Copenhagen declaration was that candidate states were requested to make evident that they ensure minority protection in order to accede to the EU. For more see M. Estebanez, *The protection of National or Ethnic religious and Linguistic Minorities*, [in:] *The European Union and Human Rights*, eds. N. Neuwahl, A. Rosas, The Hague 1995.

[14] See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 8, *The Relationship Between Economic Sanctions and Respect for Economic, Socialand Cultural Rights, C/C* 12/1997/98 (1997).

example it sets to its partners and other states. Leading by example should become the *Leitmotif* of a new European Union human rights policy.

III. The Charter as an example of a new EU human rights policy

The way towards the new EU policy in the field of human rights became more clear and perceptible at the time when the work on the Charter began. The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council in June 1999, and in October, at the Tampere European Council, it was decided to establish a 62-member Convention (headed by the former German President Roman Herzog) to draft a Charter of Fundamental Rights of the European Union. Already in 1999, the Amsterdam Treaty established that the EU "should respect human rights and fundamental freedoms, upon which the Union is founded". It allowed the Council of Ministers to suspend certain rights of a member state found to breach the Treaty, and it gave the European Court of Justice the power to ensure that EU institutions respect those rights.[15]

In December 2000 in Nice EU leaders, the European Commission and the European Parliament proclaimed the Charter of Fundamental Rights of the European Union. The summit did not make the Charter legally binding by incorporating it in the Nice Treaty, as there was too much opposition. Instead the Charter was declared a political declaration, but the question of its future role was already controversial. The Charter draws together for the first time all the personal, civil, political, economic and social rights into a single document. The way the Charter was drafted was itself an achievement by involving all the EU institutions, national parliaments as well as a broad spectrum of society. The question of the legal status of the Charter had been the focus for the debate ever since the European Council in Cologne in June 1999 decided to draw up such a document. Pressure for the Charter to be given full legal status was clear during the drawing up of it. The European Parliament came down firmly in favour of a binding legal document, integrated into the Treaties, as did the Economic and Social Committee and the Committee of the Regions. Civil society representatives were virtually unanimous in their support as well. Accordingly, the Convention on the Future of Europe proposed to incorporate the Charter of Fundamental Rights as part II of the draft Constitution Treaty, which was submitted to the Thessaloniki European Council on 20 June 2003. The text submitted by the Convention served as the basis for the work of the Intergovernmental Conference, which brought together the representatives of the current Member States as well as the states

[15] See more V. Bogdandy, *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 CML Rev. (2000).

that joined the EU during the forthcoming two rounds of enlargement (27). Turkey also took part in all the meetings of the IGC.

The Charter was incorporated as part II to the Constitutional Treaty signed by Heads of the EU Member States in October 2004 in Rome. The inclusion of the Charter in the basic treaty would have had made it legally binding once the draft constitution had been approved. However, the Constitutional Treaty failed to be ratified after referendum defeats in France and Netherlands in May 2005 and the EU was plunged into one of the greatest crises of its 50-year history. Nevertheless, despite the "no" vote, which sent a shock wave through the establishment of the European Union and brought for some time uncertainty to the existence of the Charter, the document remains an important part of the Reform Treaty agreed on by the EU leaders on 18 October 2007. The Lisbon Treaty deepens the co-operation in some areas, and extends it to new areas. But opinions differ on how much power this treaty transfers to the EU, and whether it transfers more or less than earlier treaties. In general this document sets forth a more pragmatic approach, and it is a rather technical improvement of the primary law of the EU because it simply amends its Founding Treaties. The amended treaty will clarify the limits of European interference with individual rights by referring to the Charter of Fundamental Rights as a legally binding instrument, which also makes more visible rights as guiding values for all the EU policies.

There has been a number of doubts concerning the relationship between the Convention and the Charter. As pointed out earlier, the Charter differs from the European Convention in that it covers some economic and social rights that are not contained in the Convention on Human Rights, such as the right to good administration, and workers' social rights, including the right to strike. As well as this, it responds to the challenges of new technology by including articles on bioethics and the protection of personal data. And it covers the political rights of citizens of the EU, which the Convention does not, because it is not an EU document. During the elaboration of the Charter, it soon became evident that it meant, with respect to the rights and freedoms corresponding to those guaranteed in the Convention,[16] the risk of a reduction in the level of protection already guaranteed by the Convention itself; to which risk might be added the risk of variant interpretations by Luxembourg and Strasbourg.[17]

[16] See P. Lemmens, *The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights - Substantive Aspects*, "Maastricht Journal of European and Comparative Law" 2001, No. 1, p. 50-55.

[17] A risk as the doctrine has shown, has become a reality on more than one occasion, specifically with regard to the inviolability of the home with regard to undertakings, and the right to prevent self-incrimination in the field of Competition Law. See, among others, the opinion of R. Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg in the Dynamics of the Protection of Human Rights in Europe. Essays in Honour of H. R. Schermers,* Vol. 3, Dordrecht-Boston-London 1994, p. 236 onwards.

An additional matter of concern is the question what happens if rulings made by the European Court of Justice contradict judgements made by individual national states and the European Court of Human Rights, which adjudicates on the European Convention on Human Rights. However, if a national government chose to ignore European Court ruling, there would be no way to resolve the conflict apart from political negotiations. On the other hand the European Court of Justice adjudicates on purely EU matters. Therefore if the Charter becomes a binding law,[18] a mechanism would have to be worked out to allow a single jurisprudence - probably the European Court in Strasbourg - to interpret the law. Mainly, because this change might open the way for the European Court of Justice to rewrite national laws in the social sphere: on strikes, collective bargaining, social security, working hours, and so on. At the moment, however, it is not possible to predict all the legal and political problems that might arise from this relationship in the future.

The full text of the Charter of Fundamental Rights was relegated to an annex and replaced by a short cross-reference with the same legal value.[19] It is supposed to make sure that EU regulations and directives do not contradict the European Convention ratified by all EU member states and to which the EU as a whole would accede under the treaty. Numerous questions and doubts have been raised lately with reference to the present legal position of the Charter. Some commentators state that the European Court of Justice might take steps towards rewriting national laws in the social sphere: on strikes, collective bargaining, social security, working hours, and so on. However, it is necessary to point out that notwithstanding the principle of primacy, the European Court of Justice cannot scrap any national judgment or decision as, in turn, national authorities may not annul acts or legislation of the European institutions. The functioning of this “multilevel constitutional system" is rather based upon mutual trust and on the full respect of the law. The others assume that the Charter applies to member states only when they are implementing EU law, and most social and employment law is national law. Art. 34 (social security and social assistance) of the Charter explicitly points out that these rights are guaranteed by the Charter only “in accordance with... national laws and practices“. And an explanation of the Charter’s right to strike declares that “The modalities and limits for the exercise of collective action,

[18] The Lisbon Treaty sealed in Portugal on October 19,2007 amends, rather than replaces, existing EU treaties, including the failed constitution. This document, after being ratified by all 27 Member States, would make the Charter legally binding.

[19] The Reform Treaty (and The Declaration included in an Annex), if it acquires legal force after the ratification of all EU Member States done by the end of 2008, will only be binding on the Institutions of the European Union. The Union does not have competence beyond such. Therefore, the Charter does not limit the competence of Member States under the Treaties.

including strike action, come under national laws and practices". (Uris comes among the non-binding declarations accompanying the treaty.)

The UK, as one of the two countries with a common law legal system in the EU and largely uncodified Constitution, was strongly against making the Charter legally binding. Great Britain has negotiated for itself, as an extra guarantee, a legally binding protocol, which basically says that no court can rule that the "laws, regulations or administrative provisions, practices or action" of the UI< are inconsistent with the principles laid down in the Charter.[20] But again, whether this protocol will work in practice is a matter of intense debate at present, and experts are divided on how effective this will be. Poland has joined Great Britain in asking for an opt-out of the Charter on the same issue and additionally made a unilateral declaration that seeks to prevent the Charter being used to influence national legislation in the sphere of "public morality and family law."[21]

It is necessary to view this document as a significant development in establishing the progressive EU human rights policy: the first formal EU instrument that upholds basic Western values such as the right to freedom of speech and thought, and equality before the law. It also recognises the right to strike, subject to national law, and fair and just working conditions, protects the right to collective bargaining and collective action, equal pay for men and women, the right to social security and freedom from discrimination. It bans reproductive cloning. Its main aim is to make these rights more visible.

The text of the Charter does not establish new rights, but assembles existing rights previously to be found in a variety of legislative instruments, such as national laws and international conventions from the Council of Europe, the UN, and the International Labour Organisation. Each of the Charter's 54 articles, which set out individuals' rights or freedoms, is taken from a "precursor" text. This can be another charter, a convention, a treaty or jurisprudence. Certain rights appear to be new, such as those relating to bioethics or the protection of personal data, in so far as they seek to respond to the challenges of new technologies in the areas of communication or biotechnology. In fact, as mentioned earlier a specific Council of Europe Convention on Bio-

[20] It is true that Britain obtained a protocol, commonly called an "opt-out", saying that the Charter cannot be used in British courts unless British law itself guarantees the same rights, But, in fact, the rights contained in the Charter are almost all provided for in the UK's national law. This is because the Charter contains the rights derived from the European Convention on Human Rights of the Council of Europe (part of UK law through the Human Rights Act) and rights that derive from EU law (directly form the Treaties, such as equal pay for equal work, or through European legislation, such as limits on working time through the working time directive). The Charter must anyway be respected in all European legislation.

[21] Declaration by Poland on the Charter of Fundamental Rights of the European Union: "The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."

ethics already exists. Likewise, the protection of personal data is the subject of another specific Council of Europe Convention, as well as of Community directives. What the Charter does is to express these rights in a new way and raise them to the status of fundamental rights.

Having said the above, one might encounter a question about the necessity of the Charter, since these rights already exist. The main reason is to make these rights visible, clear, and well-defined for European citizens. Whilst the rights deriving from the European Convention on Human Rights were already visible, those deriving from the judgments of the Court of Justice of the European Communities and the European Court of Human Rights were much less so. For example, the right to good administration found in the Charter synthesises a series of decisions of the Court of Justice of the European Communities in this field.

As well as making certain rights more explicit, the Charter is totally innovative in including fundamental economic and social rights alongside the more traditional civil and political rights and citizens' rights resulting from the Community Treaties. This is something which has never been done before by any international European document in this field.

Since the time it was proclaimed in Nice, the Charter has increasingly made its existence felt. More and more EU citizens have been referring to its provisions in the letters, petitions and complaints they send to the European Parliament and Commission. EU lawyers, and specially the Advocates General at the European Court of Justice, regularly cite it in decisions - although they emphasise that it is not mandatory. In this way, the Charter has been already achieving its first objective of making fundamental rights visible.

The opponents object that there is no need for the Charter because such rights are already protected by the established conventions and national constitutions in Europe. I would argue that even if the Charter merely represented a consolidation of existing law, it nonetheless enhances transparency and the legal certainty of the citizens of Europe, and is a contribution to global democracy as it provides a more consistent basis for EU's external policy, and can thus be seen as a step towards a more democratic world order.

By making fundamental rights and freedoms clearer and more visible, the Charter helps to develop the concept of citizenship of the European Union and to create an area of freedom, security and justice (as stated in the preamble). The Charter increases legal security as regards the protection of fundamental rights, where in the past such protection was guaranteed only by the case law of the Court of Justice and art. 6 of the Treaty on European Union.

Summing up, it is necessary to point out that the Charter of Fundamental Rights of the EU has to be seen in the wider context of the EU's long-lasting commitment to human rights and fundamental freedoms and its policy

in the areas of justice, freedom and security. The role and the position of the Charter cannot be underestimated in Europe at the beginning of the 21st century. It should be treated as a visible sign that the EU has taken a step forward towards common policy in the field of protecting its individuals (not only citizens) in the same way regardless the borders, and taking into consideration only humanity.

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Freedom, Solidarity and Health Care in the European Union[1]

Introduction

A fundamental freedom to receive cross border medical treatment is granted to citizens of the European Union by the internal market in services under the European Community Treaty as interpreted by the European Court of Justice,[2] most recently in the case of *Yvonne Watts v Bedford Primary Care Trust?* Controversially, the Court ruled in the *Watts* case that Member States may be required under European Community law to make adjustments to their social security systems.[4] "An obligation exists under Community law to authorise a patient registered with a national health service to obtain, at that institution's expense, hospital treatment in another Member State where the waiting time exceeds an acceptable period having regard to an objective medical assessment of the condition and clinical requirements of the patient concerned."[5]

The Court found that Article 49 of the European Community Treaty applies where a patient receives medical services in a hospital environment for consideration in a Member State other than her State of residence, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequen-

[1] Diane Ryland, Senior Lecturer in Law, The University of Lincoln, United Kingdom. The author thanks the British Academy for the award of the Conference Grant which facilitated her participation as a speaker at the International Conference on 'The European Constitution and National Constitutions) organised by Andrzej Frycz Modrzewski Krakow University College, the Jagiellonian University in Krakow, the University of Hull and the Consulate of the Republic of Poland, held in Krakow, Poland, 21 to 24 October 2007.

[2] Article 49 of the European Community Treaty. Joined Cases 286/82 and 26/83 *Luisi and Carbone;* Case C-158/96 *Kohli; Case C-120/95 Decker;* CaseC-368/98 *Vanbraekel;* Case C-157/99 *Geraets-Smits and Peerbooms;* Case C-385/99 *Miiller-Faure and van Riet;* Case C-56/01 *Inizan.*

[3] Case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health.* Judgment of the Court (Grand Chamber), 16lh May 2006.

[4] *Ibidem,* para. 147.

[5] *Ibidem,* para. 148. See: D. Ryland, "Patient Mobility in the European Union: A Freedom to Choose?", paper presented at the 7th International Academic Conference held on 28 May 2007 at Andrzej Frycz Modrzewski Krakow University College, published on the Internet at http://www.fom.com.pl. The implications of this ruling for the United Kingdom Health service are profound. 'More than 450,000 patients a year wait more than 12 months between seeing their GP and their admission to hospital. The figures released by the Department of Health spell out the scale of the challenge facing the National Health Service in England in its drive to cut the maximum wait from GP visit to operation to just 18 weeks by the end of next year. 12 per cent of patients have waited more than a year by the time they are admitted to hospital or operated on, and the average wait looks closer to 25 weeks than 18'. Source: "Financial Times", 8 June, 2007, 'NHS still short of waiting time target'

tly sought operates[6]. Competence in the field of public health is retained by individual Member States, each of which has the responsibility for organising and delivering health services and medical care.[7] There is thus the need to balance the objective of the free movement of patients in the European Union against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems.[8]

National Health Systems versus Freedom to Receive Cross-Border Health Care

The Member States of the European Union feel that it is necessary to clarify the interaction between the European Community provisions on the free movement of services and the health services provided by national health systems;[9] and strongly believe that developments in this area should result from political consensus, and not solely from case law. Representatives of the Member States in the Council of the European Union have endorsed a Statement on common values and principles that underpin the health systems in the Member States of the European Union;[10] recalling the overarching *values* of universality, access to good quality care, equity and solidarity. Universality is defined as meaning that no-one is barred access to health care; whereas *solidarity is closely linked to thefinancial arrangement of Member States'own national health systems and the need to ensure accessibility to all.* The *value* of equity is stated to relate to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay. Emphasis is placed on the essential feature of all Member States' health systems, namely, the aim to make each system *financially sustainable* in a way which will safeguard the above mentioned values in that Member State for the future. In addition, and beneath these overarching values, a set of shared operating principles include: good quality health care; patient safety; care based on evidence and ethics, embracing "the challenge of prioritising health care in such a way that *balances the needs of individual patients with the financial resources available to treat the whole population;""* patient involvement, transparency

[6] There being no need in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is itself a service within the meaning of Article 49. *Ibidem,* para. 90.

[7] Article 152(5) of the European Community Treaty.

[8] Case C-372/04, *Ibidem,* para. 145 of the judgment.

[9] See Council Conclusions on Common values and principles in EU Health Systems, 2733rd Employment, Social Policy, Health and Consumer Affairs Council meeting, Luxembourg, 1-2 June 2006, 3rd conclusion, http://www.consiIium.europa.eu/Newsroom.

[10] *Ibidem,* 5th and 6th conclusions.

[11] *Emphasis added.*

and, *where possible,* choice between different health service providers; redress, a fair complaints procedure and clear information about liabilities and compensation; and privacy and confidentiality. Any standardisation of health systems in the European Union would be deemed inappropriate. Member States would commit themselves to working together to share experiences and information about good practice in health care, through the Open Method of Coordination[12] in order to promote efficient and accessible high quality health care in Europe. The Member States would only countenance *a legalframework* on health services which *enshrines the values and principles endorsed by the Council.*[13]

The European Commission, in response, is developing, through a consultation exercise, a Community framework for safe, high quality and efficient health services in the European Union. Questions being addressed include, *inter alia:* whether there are shared values and principles for health services on which citizens can rely throughout the European Union; what practical issues need to be clarified for citizens who wish to seek healthcare in other Member States, such as, for example, the availability of transparent information on good quality health care, contractual liability and after care service. Greater choice in exercising individual entitlements in an enlarged European Union needs to be reconciled with the financial sustainability of Member States' health systems and the flexibility of Member States to regulate their own systems without creating unjustified barriers to free movement. The Commission, ultimately, will propose a draft Community Directive on health services with an internal market legal basis during the course of 2007.[14]

[12] See the Communication from the Commission, "Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the 'open method of coordination'", COM (2004) 304, 20 April 2004.
Article 152 of the European Community Treaty provides, *inter alia*-.

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, ... shall complement national policies,

2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

[13] The Council invites the European Commission to ensure that the common values and principles are respected when drafting specific proposals concerning health services; and invites the institutions of the European Union to ensure that the common values and principles contained in the statement are respected in their work. *Ibidem,* 7th and 8th conclusions.

[14] Commission Communication, "Consultation regarding Community action on health services" SEC (2006) 1195/4,26 September 2006. Therein, the Commission explains that the Commission proposal for a Directive on Services in the Internal Market (COM (2004) 2,13 Jan. 2004) included proposals codifying the rulings of the European Court of Justice in applying free movement principles to health services but that this approach was not considered to be appropriate by the European Parliament and the Council, which institutions invited the Commission to develop a specific proposal in this area. See further, D. Ryland, *Patient Mobility*

A High Quality of Health Care: Principles; Procedures; Competence and Reform?

To what extent can the European Community become involved in what is essentially the responsibility of Member States, namely public health?

Consider the following two opposing views.

On the one hand:

"By providing every EU citizen with the right to access the best national healthcare services available in the EU, in circumstances where his/her own national healthcare system has failed, the Court of Justice has given him/her the most valuable service available anywhere."[15]

On the other hand:

"The European Court of Justice has embarked on a policy of strengthening the rights of EU citizens to obtain treatment in other Member States. ...is this individualistic view of health care rights mistaken and likely to damage the sense of *social solidarity* essential to any public, social welfare system?"[16]

The Principle of Solidarity[17]

There is a tension between the free movement of persons and the principle of national solidarity. Giubboni continues: "So it is not by chance that the principle of national solidarity has been invoked by the Member States as a form of *defence* against the dynamics of economic integration - and particularly of the liberalistion of services - regarded as potentially destabilising

in the European Union: A Freedom to Choose', ibidem. See further, Health and Consumer Protection Directorate-General, European Commission, "Summary report of the responses to the consultation regarding 'Community action on health services'", (SEC (2006) 1195/4,26 Sept. 2006). The full list of contributors and their responses received may be consulted directly on the Commission's website: http://www.ec.europa.eu/health/phoverview/cooperation/mobility/results_open_consultation_en.htm. A health services Directive has been drafted and will be formally released by the Commission on 20 November, 2007. Source: "Financial Times", 17 October, 2007, p. 7.

[15] A. Kaczorowska, *A Review of the Creation by the European Court ofJustice ofthe Right to Effective and Speedy Medical Treatment and its Outcomes,* "European Law Journal" 2006, Vol. 12, No. 3, p. 345 at p. 352.

[16] *Emphasis added.* C. Newdick, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity,* "Common Market Law Review" 2006, Vol. 43, p. 1645.

[17] "It should be noted that the principle of solidarity is embraced in Title IV of the Charter of Fundamental Rights of the Union, but that "the solidarity which underpins the recognition of fundamental social rights in the Community legal order does not reach into the protected sphere of national welfare provision". S. Giubboni, *Free Movement of Persons and European Solidarity',* "European Law Journal" 2007, Vol. 13, No. 3, p. 360, at p. 374. ".. .the European Community has not so far crossed the threshold to a true social union of all Member States which could be considered as just one community with mutual solidarity, where revenues and financial charges are shared irrespective of national boundaries". K. Hailbronner, *Union Citizenship and Access to Social Benefits,* "Common Market Law Review" 2005, Vol. 42, p. 1245, at p. 1265. Citing Tomuschat, 'annotation of *Sala'* in (2003) 37 *CMLR,* 449 at 454.

to the viability, *in primis* financial, of national social protection systems."[18] It is the nation state that is faced with difficult decisions and choices in the management of its own finite resources for health care. "Individual health care rights at the European level may not foster notions of solidarity. They will benefit a vocal minority, but divert resources from poorly represented, less visible, less articulate groups typically composed of disabled, mentally ill and elderly patients."[19]

Procedures

Newdick goes on to say that health rights in systems based on social welfare are relative rights. "Relative rights cannot guarantee access to substantive benefits, so it is crucial to understand the *procedure* by which the court will scrutinise the decision-maker's authority."[20]

The ruling of the European Court of Justice in the *Watts* case is significant here in that it purported to circumscribe the potential for arbitrary discretionary decisions of national health authorities concerning the grant or refusal of prior authorisation and the regulation of their waiting lists[21]. The Court noted that the National Health Service regulations do "not set out the criteria for the grant or refusal of the prior authorisation necessary for the reimbursement of the cost of hospital treatment provided in another Member State, and therefore do not circumscribe the exercise of the national competent authorities' discretionary power in that context."[22] Moreover the Court ruled, "...a refusal to grant prior authorisation cannot be based merely on the existence of waiting lists enabling the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out in the individual case in question an objective medical assessment of the patient's medical condition, the history and probable cause of his illness, the degree of pain he

[18] S. Giubboni, *op. cit.*, p. 366.

[19] C. Newdick, *op. cit.*, p. 1645.

[20] *Ibidem*, p. 1651.

[21] Case C-372/04, *ibidem.* It is settled caselaw that a system of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see Case C-157/99 *Smits and Peerbooms*, para. 90, and Case C-385/99 *Muller-Faure and van Riet*, para. 84). Thus, in order for a system of prior authorisation to be justified even though it derogates from a fundamental freedom of that kind, it must in any event be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Such a system must furthermore be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings *[Smits and Peerbooms*, para. 90, and *Muller-Faure and van Riet*, para. 85).' paras. 115 and 116 of the judgment.

[22] "The lack of a legal framework in that regard also makes it difficult to exercise judicial review of decisions refusing to grant authorisation." *Ibidem*, para. 118.

is in and/or the nature of his disability at the time when the request for authorisation was made or renewed."[23] Furthermore, the Commission consultation is examining such issues of procedure as, for example, more patient information; and transparency of reasons for refusing authority to undertake cross border medical treatment, these being facilitative of judicial review. Suggestions by contributors for improvements include:[24] clear information for patients on cross-border care; effective and transparent decision procedures; a patient-centred approach;[25] evidence-based standards;[26] and the right to appeal against refusals. There was a broad consensus that responsibility for clinical oversight should be with the country of treatment, with importance attached to cooperation with the relevant authorities in the patient's home country, inclusive of managed cross-border care and international patient transport.

The Principle of Subsidiarity[27]

Many contributors to the Commission consultation (in particular from national governments, unions and purchasers) emphasised that any Community action that affects the health systems should respect the subsidiarity principle, referring in particular to Article 152 of the European Community Treaty. In particular, many argued that the 'steering capacity' of national or regional healthcare regulators should be preserved.

Some contributors (especially umbrella organisations of dentists and some Member States) argued that the principle of subsidiarity does not pre-

[23] *Ibidem*, para. 119.

[24] European Commission, "Summary report of the responses to the consultation regarding 'Community action on health services'", (SEC (2006) 1195/4, 26 Sept. 2006). *Ibidem.*

[25] With regard to countries in which waiting lists are used to limit and manage health service supply, some contributors were concerned that "patients could bypass waiting lists" via cross-border healthcare. However, other contributors argued that patient mobility should be seen as a signal that patients are seeking alternatives due to concerns over quality, cost or accessibility (in particular unions). From this perspective, patient mobility would signal that action should be taken by the responsible authorities to address patients' concerns over their own health system, rather than suppressing patient mobility through administrative barriers.

[26] One university considered that the definition of "undue delay" should be based on the best available scientific evidence rather than on cultural or national preferences, and therefore should be universal within the EU.

[27] Article 5, para. 2 of the European Community Treaty provides: "In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". For further reference, see: G. de Burca, *The Quest for Legitimacy in the European Union*, "Ute Modern Law Review" 1996, Vol. 59, No. 3, p. 349, at pp. 366-368; A. G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, "Common Market Law Review" 1992, Vol. 29, p. 1079; N. Emilou, *Subsidiarity: An Effective Barrier against the Enterprises of Ambition?*, "European Law Review" 1992, p. 383; G. de Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, "Jean Monnet Working Paper" 1999, Vol. 7, http://www.jeanmonnetprogram.org; G. Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, "Common Market Law Review" 2006, p. 63.

vent the application of European Union fundamental freedoms. In their view, increased freedom of choice and movement could be positive, and could help to increase access, quality and financial sustainability, rather than endangering the balance of the healthcare system. Some contributions (in particular scientists and dentists) highlighted in this context the potential danger of a series of measures that could be used to limit patient, professional and provider mobility against the principles of the Treaty and the rulings of the Court of Justice. These include a reference to insufficient provision of information to patients, extensive use of the prior authorisation requirements, or the general argument of "danger of instability" to health care systems.[28]

It should not be overlooked that the principle of subsidiarity, intended to regulate the exercise of Community competence is inextricably linked to the existence of Community competence,[29] soon to be Union competence.[30] The reformed Treaties signed at Lisbon on 19 October 2007 have delineated more explicitly the competences conferred upon the European Union.[31]

[28] European Commission, "Summary report of the responses to the consultation regarding 'Community action on health services'", (SEC (2006) 1195/4, 26 Sept. 2006). *Ibidem.* It is interesting to note here that the European Commission views subsidiarity "as a way of justifying the exercise of power by the Community, rather than as a way of limiting or restricting it", whereas "the Council generally views the principle as an expression of a limit on Community powers, implying a reduction in and repeal of Community legislation". G. de Burca, *The Quest for Legitimacy in the European Union*, "Ihe Modern Law Review" 1996, Vol. 59, No. 3, p. 349, at pp. 366 and 367.

[29] "...these two are not conceptually as distinct as they may first appear." P. Craig, G. de Burca, *EULaw, Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2007, at p. 100.

[30] The Intergovernmental Conference (established on 23 July 2007) was asked to draw up a Treaty (hereinafter called *'Reform Treaty')* amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution' has been abandoned. The Draft Reform Treaty - Council of the European Union, Presidency Conclusions of the Brussels European Council (21/22 June 2007) 11177/07,23 June 2007, General Observations Point 1. http://www.eu2007.de/en/News/downIoad_docs/Juni/0621-ER/010conclusions.pdf Only available to date is the draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, which was submitted to the Intergovernmental Conference (IGC) (Foreign Ministers) meeting on 15 October 2007, with a view to its final adoption at the IGC (Heads of State or Government) meeting in Lisbon on 18 October 2007, CIG 1/1/07 REV1. http://www.europa.eu The Union will be founded on the Treaty on European Union (TEU) and on the Treaty on the Functioning of the European Union (TFEU) (referred to as 'the Treaties'), each Treaty having the same legal value. The Union will replace and succeed the European Community. Article 1, para. 3 of the Treaty on European Union.

[31] In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. Article 4 (1) TEU. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Article 5 (1) TEU. Under the principle of conferral, the Union shall act *only* within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Article 5 (2) TEU. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Article 5 (3), first para., TEU. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to

Competence and Reform

The majority view of contributors to the proposed Community action on health services Consultation was that a combination of both "supportive" tools (such as practical cooperation, or the "open method of coordination") and legally binding measures would be the most efficient approach. There were clearly two main approaches preferred by different contributors. Some contributors preferred to include any changes within the Regulations on the coordination of social security systems,[32] while other contributors preferred a new Directive on health services.

The internal market will remain a shared competence of the European Union with the Member States under the reformed Treaties;[33] whereas the Union may only take complementary or supportive action,[34] *respecting the*

achieve the objectives of the Treaties. Article 5 (4), first para., TEU. See further Declaration 28, Declaration in relation to the delimitation of competences, DS 870/07 Lisbon, 19 October 2007.

[32] Regulations (EC) No. 1408/71 and 574/72, [1971] OJ L149/2 and [1972] OJ L74/1, as since amended by Regulation (EC) No. 883/2004, [2004] OJ L200/1. These are based on Article 42 of the European Community Treaty (under the chapter on the free movement of workers), and entitle persons for whom a medical treatment becomes necessary during a stay in the territory of another Member State, using the European Health Insurance Card. Reimbursement between the Member State and the providers is regulated by national rules. The Regulations ensure assumption of costs for planned treatment in other Member States, subject to prior authorisation, and deal with the settlement of financial claims between receiving and sending Member States.
Article 22 of Regulation 1408/71:
(1) An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits ..., and:
(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:
(1) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay... in accordance with the provisions of the legislation which it administers, as though he were insured with it;
(2) The authorisation required under paragraph 1 (c) may not be refused where the treatment in question is among the benefits provided by the legislation of the Member State on whose territory the person resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of his disease.
Form E 112 is the certificate necessary for the application of Article 22 (1) (c) (i) of Regulation 1408/71.

[33] Under the Treaty on the Functioning of the European Union, replacing the European Community Treaty. Shared competence between the Union and the Member States applies in the area of the internal market. Article 4 (2) (a) TFEU. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. Article 2 (2) TFEU. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. Article 22a (1) TFEU. See also, Protocol Number 8 on the Exercise of Shared Competence: With reference to Article 2 (2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area. CIG 2/01/07 REV 1, Brussels, 5 October 2007, Conference of the Representatives of the Governments of the Member States, IGC 2007, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community - Protocols, http://www.europa.eu.

[34] In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding

defined responsibilities of the Member States for health services.[35] A new provision in the health Article 152[36] empowers the Union in particular to encourage cooperation between Member States to improve the complementarity of their health services in cross border areas. A further addition authorises the Commission in close contact with the Member States to take any useful initiative to promote coordination amongst Member States of their policies and programmes on health services in cross-border areas, and *"in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation!'*[31] These fall short of empowering command and control legislation, legitimising supporting, supplementary or coordinating action only. It remains the case that the responsibilities of a Member State for its health services have been further strengthened under the reformed Treaty on the Functioning of the European Union so as to include the management of its health services and medical care and the allocation of the resources assigned to them in each Member State.[38] This is a significant confirmation of the competence of a Member State as regards the allocation of resources assigned to health services and medical care and their consequential management in that Member State.

The Charter of Fundamental Rights of the Union

The Charter of Fundamental Rights of the Union[39] provides: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.[40]

their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. Article 2 (5) TFEU. The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in the area of the protection and improvement of human health. Article 6 (a) TFEU.

[35] Article 152 (7) TFEU.

[36] Article 152, (2), subpara. 1 TFEU.

[37] The European Parliament shall be kept fully informed. Article 152 (2), subpara. 2 TFEU. *Emphasis added.*

[38] Union action shall respect the responsibilities of the Member States *for the definition of their health policy and* for the organisation and delivery of health services and medical care. *The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.* Article 152 (7) TFEU *Emphasis added.*

[39] The Charter's provisions will be solemnly proclaimed by the European Institutions one day before the Treaty of Lisbon is signed formally in December 2007. Source: Professor Hans-Gert Pottering, President of the European Parliament and honorary Patron of the international Conference entitled, 'The European Constitution and National Constitutions! *Ibidem,* Krakow, 24 October 2007.

[40] In Title IV Solidarity, Article 35.

This two-pronged provision corroborates the conferred substantive competence of Member States in the field of health care. At the same time it lends weight to the shared competence of the Union to integrate a high level of health care into its internal market activities.[41] In exercising this shared competence, a framework directive which would leave as much scope for national decision as possible and which would respect well-established national arrangements and the organisation and working of Member State's legal systems;[42] incorporating procedural objectives only, would constitute a viable instrument, and one which would fall within the remit of the Member States' endorsed statement in the Council.

The Charter of Fundamental Rights is not incorporated in the Treaty of Lisbon; instead it receives a cross reference in an amended Article 6 of the Treaty on European Union, which provides that the Union recognises the rights, freedoms and principles set out in the Charter,[43] which accords to the Charter the same legal value as the Treaties, and which confirms that the Charter's provisions shall not extend in any way the competences of the Union as defined in the Treaties.[44] Moreover, "the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."[45]

In order to assuage doubts and dilemmas in the controversial area of social 'rights^ in particular those of the United Kingdom government which is opposed to their direct enforceability in the national courts, the inserted Article 52(5)[46] of the Charter provides: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts of Member States when they are implementing Union law, in the exercise of their respective powers. *They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.*[47] The interpretative provi-

[41] See further the explanatory notes to Article 35 of the Charter. See D. Ryland, *The Charter of Fundamental Rights of the European Union: Questions, Problems and Perspectives*, "Państwo i Społeczeństwo" (State and Society) 2005, No. 1, p. 113; D. Ryland, *The Charter of Fundamental Rights of the European Union: Pandora's Box or Panacea?*, "Managerial Law" 2003, Vol. 45, No. 5/6, p. 145.

[42] In accordance with the currently worded Protocol on the Application of the Principle of Subsidiarity and Proportionality attached to the European Community Treaty, Article 7.

[43] The Charter of Fundamental Rights of 7 December 2000, as adapted [at..., on... 2007].

[44] Article 6 (1), paras. 1 and 2, TEU.

[45] Article 6 (1), para. 3, TEU.

[46] This subarticle would have been inserted by the Constitutional Treaty. See P. Craig, G. De Burca, *op. cit.*, at p. 416. It is not known whether it will be confirmed by the 2007 Intergovernmental Conference in the Charter of 2000 as adapted, which will be proclaimed in December 2007. See note 43, above.

[47] *(emphasis added).* "One may wonder to what extent the Court of Justice of the European Communities will accept such limitation." J Dutheil de la Rochere, *The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty*, "Common Market Law Review" 2004, p. 345, at p. 352. See D. Ryland,

sions incorporated in the Constitution may have circumvented the direct enforceability of the Charter of Fundamental Rights. The scope still exists for the provisions of the Charter to be enforced indirectly by way of an interpretative ruling from the European Court of Justice, on a reference from a national court on a question of Union law.[48]

It is submitted that the United Kingdom's exclusion from the jurisdiction of the Courts concerning the Solidarity Title IV of the Charter is intended solely to protect the United Kingdom's laws on industrial action.[49] In any case, it has been submitted that "[t]he effect of this exemption is questionable, however, as it would appear to undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire* (EC law, the Treaties and the caselaw of the European Court of Justice)."[50] Moreover, "[i]t has been suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the ECJ ruled on Charter-related issues in other EU Member States."[51] The United Kingdom House of Commons European Scrutiny Committee have reported their concerns about the security of the United Kingdom's position under the Charter. In their view, it requires to be made clear that Protocol Number 7 to the reformed Treaties takes effect notwithstanding other provisions of the Treaty or Union law generally.[52] Fundamental principles of non-dis-

The Charter of Fundamental Rights of the European Union: Questions, Problems and Perspectives, *ibidem*, atp. 117.

[48] *Ibidem*, at p. 122.

[49] Protocol (No. 7) on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom, CIG 2/01/07 REV 1, Brussels, 5 October 2007, *Ibid.* Article 1 (1) The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. Article 1 (2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. Article 2 To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom. Poland would appear to be doing somersaults here as a further Declaration would appear to contradict that which Poland purports to safeguard by way of being a Party to this Protocol. See Declaration Number 53, Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights in relation to Poland and the United Kingdom. Therein Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union. CIG 3/1/07 REV 1, Brussels, 5 October 2007, *Ibid.*

[50] V. Miller, *EU Reform: a new treaty or an old constitution?*, "House of Commons Library Research Paper" 07/64, http://www.parliament.uk.

[51] *Ibidem*, Citing EUObserver, 27 June 2007, http://www.euobserver.com.

[52] The United Kingdom Parliament Select Committee on European Scrutiny Thirty Fifth Report on the European Union Intergovernmental Conference, para. 73. "the words of the recital reaffirm that the Protocol is without prejudice to other obligations of the United Kingdom under the Treaty on European Union, the

crimination on grounds of nationality and proportionality spring to mind in this regard. The TEU explicitly provides that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States shall constitute general principles of the Unions law."[53]

The European Court of Justice has declared: "The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000." Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm "rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court... and of the European Court of Human Rights."[54]

The Charter, states one learned commentator, "is bound, in time, to be recognised as an authoritative re-statement of fundamental rights that derive their character as general principles of law from the constitutional traditions of the Member States or from international agreements to which the Member States are parties."[55]

Conclusion

A balance of the principles as succinctly laid out in the Health Article of the Charter of Fundamental Rights of the Union, which does have the same legal value as the Treaties, should, thus, be the benchmark for any Union action on health care. Issues of conferred competence are at stake and, respecting the principles of subsidiarity and proportionality, the patients right of access to a high quality of health care in an internal market in health services in the Eu-

Treaty on the Functioning of the European Union, and Union law generally... If it is intended that ECJ case law based on the Charter should have no effect at all within the UK, we should have expected some provision in the Protocol to make it clear that the Protocol takes effect notwithstanding other provisions in the Treaties or Union law generally. This would be the more necessary given the tendency for any derogation from the Treaties to be interpreted restrictively by the ECJ." A possibility would seem to exist „that following a reference to the ECJ from some other Member State the Court might find that, in the light of the Charter," a derogation from a provision of EU law, "has to be interpreted more restrictively than before (i.e. before the Charter had legal effect)," para. 58. http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/1014/101403.

[53] Article 6 (3) TEU.

[54] Case C-540/03 *European Parliament v Council*, [2006] ECR1-5768, para. 38. See further Declaration 29, Declaration concerning the Charter of Fundamental Rights: The Charter of Fundamental Rights, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties. CIG 3/1/07 REV 1.

[55] Editorial Comments: What should replace the Constitutional Treaty?, "Common Market Law Review", 2007, Vol. 44, No. 3, p. 561, at p. 566.

ropean Union should be facilitated legislatively by best practice procedures, information and transparency; it should further be qualified by the principles of solidarity and the sustainability of Member States' national health systems.

DISCUSSION

- Professor Jo Carby-Hall, PhD - The University of Hull

I was very interested in the talk of the learned judge from the European Court of Human Rights. I understand that you had some cases relating to economic migrants, you mentioned in a very minor way the situation of economic migrants. We have had a very big problem in the last four years of economic migrants coming to Western Europe to work and the exploitation that we have experienced by employment agencies as well as unscrupulous employers. I would be interested to have your opinion - I want to be as brief as possible - on this situation, which is a European situation, it is happening in all *T1* European Union member states, and also whether you have had any complaints in this respect in the Court.

- Jan èikuta - Judge of the European Court of Human Rights, Council of Europe

Yes, but economic migration it is not the very agenda which we are facing in the Court, because what we are dealing with mostly with migration are cases concerning asylum applicants and questions relating to the access to the territory, also detention because of preventing the entry or because of expulsion, and then family reunification cases relating to Article 8 of the Convention, that kind of cases. But as regards economic migration, as far as I remember at the moment, I really do not remember which provision was invoked by them. It is difficult to answer at the moment, maybe later on during this conference I will come to certain case law in this regard, but what I remember at the moment are only political migrants. From the beginning they have always been political migrants, applying for a certain kind of protection, and that was my experience from my previous job where I worked for the United Nations High Commissioner for Refugees, but it is a different cup of tea.

- Professor Dieter Kugelmann, PhD - Harz University of Applied Sciences

Mr Sikuta, my first question goes to you. How would you appreciate the influence of the EU Charter of Human Rights, if it will be valid, will it be applicable as law for the European Union, do you think it will influence the jurisprudence of the Court in Strasbourg, because the Union law is not untouchable, so will it change your jurisprudence? Do you think the European Court of Justice in Luxembourg will adapt its jurisprudence like it does already to your jurisprudence concerning the specific rights guaranteed in the Human Rights Charter?

And my second question goes to Professor Grawert, concerning the principle of equal freedom. Liberty is one thing, equal freedom is a bit different. How do you think the social rights in the European Charter influence this concept of liberty? Liberty of course in the market freedoms is no question, but if you implement the Charter with a strong emphasis on the social aspect, on social rights, which we discussed in Germany some years ago, is there an influence on this general tendency of equal freedom?

- Professor Rolf Grawert, PhD - University of Bochum

It is the same with the social rights in the Union as the social rights in the states. Social rights means competencies of the state to explain what the social status of their citizens shall be. Therefore one thing is the competence of the state, and therefore Great Britain and Poland are afraid, I think, and the other thing is that social rights demand financial help from the state, and that is another problem of the budgets of the states. But I think, when we speak about migrant workers and so on, very many things in the social rights area do not cost very much, but still must be managed by the state laws. For instance, and that would be a question to you, Diane, for instance insurance laws. If I go to Great Britain, perhaps to Scotland, and I do not have the money I need. Therefore I think it is very necessary to stress that principle of subsidiarity, and Diane said something about this.

- jan Sikuta - judge of the European Court of Human Rights, Council of Europe

Maybe back to the question raised by Professor Carby-Hall about migrant workers. They probably would invoke those social rights, which are not much covered by the European Convention of Human Rights. There are provisions relating to education and so on, but the Convention mostly covers citizen and political rights.

To your question, thank you very much for this interesting question. There has been discussion for a long time about the co-existence of the Strasbourg

Court and Luxembourg Court. Now as far as I know there was recent information that there is a further development in this regard that EU probably is going to accede to the European Convention of Human Rights, Article 6 of that Treaty I think is where there has been adopted this kind of decision, so in this case the situation of course will maybe in the future clarify, because in case the Union as an entity accedes to the Convention, then it is a party to the Convention like any other 47 member states. This means that at the end the European Union will also have a judge there, who would be elected there in respect of the European Union, who would be an expert on EU law, which is of course in our realm very essential because all of us are judges who are experts on national laws of countries in respect of which we are elected there, plus maybe constitutional law and other kinds of law, but national law for sure, and more and more in this very complex system of different legal systems which are now applicable within Europe. It is not only the *T1* member states of the EU but it is much more complicated because we do have other 20 states which are not members of the European Union and our Court has to apply the rights in the same way to both categories of applicants. I would like to say much more, but there is not time now. Maybe we will have the opportunity to continue later.

• Diane Ryland - University of Lincoln

I would just like to address two questions, one to Judge Sikuta and one to Professor Grawert. Judge Sikuta, you have just touched upon the issue which I wish to raise, about the accession of the European Union to the Convention on Human Rights. And you have mentioned the minimum standards. And I wonder if there might be scope possibly for raising the standards, because the EU can actually adopt higher standards, they have to adopt the same minimum standard but may raise protection in certain areas. But my interest is in the constitutional significance of this. The Convention or your statute only allows states to accede, so there will have to be some prior amendment, because the EU is not a state. Has there been any move to change the statutes to accommodate this? And when will be done? Has it started? I have an interest in your side of affairs.

My second question to Professor Grawert. I noticed with interest a comment you made towards the end of your paper, about the real liberalism, the positive force for human rights in the European Union, even though we have not been able to get a concordance on human rights. You mentioned that rulings may come that the majority of member states aspire to certain social standards, and I wonder if you could elaborate a little bit more on that in relation to the United Kingdom and Poland’s stance on social rights under the Charter, their opt-out.

- Jan èikuta - Judge of the European Court of Eluman Rights, Council of Europe

As I indicated earlier, of course I will stay with you all the day today, which means that in case you have further questions, as was proposed by the Chairman, I am available in the afternoon or later. Back to your question. Let me start with the second question. It is a question that I am not able to answer, because it regards the change in our statutes. Myself I am a judge, and here very much depends on the decision of member states. We have not dealt with that yet during our plenary of the judges.

And to the first question, of course it is a very interesting case, accession of the EU to the Convention. Several articles have been written on this coexistence. One of the opinions was that maybe in the narrow field of human rights which are mentioned in the Convention and protocols the Strasbourg Court will add something like a constitutional court in Luxembourg, something like a supreme court of that entity. In practice, will the standards increase? Of course everything is possible, and we had just a few days ago a discussion on the qualification directive of the European Union to our Strasbourg case law. In practice, the court is making decisions and judgements in the Chamber and in the Grand Chamber. In case there is an impact, important impact on the existing case law of the Court, very probably such case would be relinquished to the Grand Chamber because this is a case - in practice, I am speaking from a practical point of view, because I am not a professor, but I think it is quite relevant - so this would raise the important question of the interpretation of the Convention. So from this point of view we can expect that if there is an impact, then it goes to the Grand Chamber and the Grand Chamber takes a judgement which is something like a binding jurisprudence and case law which gives direction for further judgments.

- Professor Rolf Grawert, PhD - University of Bochum

I think the answer for Poland and Great Britain I can give you with Hegel and the ghost. Hegel's European "world spirit" will do the thing. European world spirit has processual interpretation. I think even Great Britain and Poland must interpret their constitutions and their laws in the way of the European Charter, because the European Charter after Lisbon is valid. Not as a literal part of a constitution, but it is valid. And the Court of Justice in Luxembourg makes its decisions not by interpretation but by inspiration, inspiration. Therefore I spoke of Hegel's *Weltgeist.* By inspiration, and this inspiration will touch Great Britain and Poland.

Also, I believe the other thing is the freedom of workers. The freedom of workers will bring them the social rights and they will demand from Great Britain and Poland to change their laws, as they will demand from the courts and the constitution makers to change the social rights to be common in all of Europe.

And therefore I think it is a question of time till we will have a shared set of social rights in Europe. The first proof will be, we have very many Polish workers in Great Britain, and they will come back and they will go to France and after our famous three years also to Germany, and so on. And they will bring the social rights with them, and the courts must make their decisions in this way.

Part 2

Professor ZDZISŁAW MACH, PhD - Jagiellonian University

Social Dimension of the Constitutional Treaty: European Identity and Citizenship

It is my pleasure to share with you a few thoughts about the social aspect of the Constitutional Treaty, and more particularly about some implications that the Treaty may have on the European identity, including the role of European citizenship.

It is a bit difficult to speak on this subject in detail at the moment, because the new Treaty has been signed but is still very new, and there has been no time to analyse it in detail. Nevertheless, there are a few problems and a few dilemmas related to the social implications of reforming the European Union and constructing a new treaty. I believe that in view of the European enlargement, and in view of possible further enlargement, and in view of the necessity to reconstruct and rethink the European institutions and European law, it seems important to take a different approach to identity.

The question whether a common European identity is a realistic project, whether we can have or whether we should have common European identity, is one of the most difficult and most controversial issues in the European Union, not only among the new member states but also among the 15 "old" member states. And it seems to me that it is very unlikely that a future common European identity will be based on common culture, on a core culture and cultural boundaries that we would all share. In this sense it is very unlikely that a consensus could be reached on who is European and who is not European on the basis of a common culture. We neither have nor intend to have a common language. The working language of Europe may be English, but as far as identity is concerned, we protect our languages, we protect our heritage, we have different interpretations of history. We adhere to the idea that culture, policy and education should remain within the competence of nation states. And we also like, cherish and celebrate diversity.

The situation of Europe is very different from the situation in which nation states were 200 or 150 years ago, when national identities were built to replace local identities. Nation states had a tremendous power to execute this project, and the EU neither has this power nor there is any intention to construct such a homogenous cultural entity as European culture. Also, if we look at the way we interpret European history, as we know very well there is much more story of some Europeans against other Europeans than a common European position against Others, and particularly Others who would be significant, equally important partners to all Europeans.

There is one exception of course: there is Islam. We can, if we like - most of us don't like - present European history as a story of conflict against Islam. Today it would be neither practical nor safe to base European identity on this principle, not only for global reasons, but also because we have very significant Muslim communities within Europe, our core citizens. Also, as for the place of Christianity in the preamble to the European Constitution when it was still discussed, the discussion revealed that the consensus on this, on core cultural elements, is not an easy thing to reach.

If we try to build core European culture, common European culture, then the question will remain to whom we can refuse European identity, where are the boundaries, who will be told “Sorry, you are not European, because you don’t share what we do share” So it seems to be much more realistic I think to expect that a common European identity will not be based on a core European culture, but will be based on European citizenship, common participation in European projects, and development of European institutions.

If we want to follow this way of thinking, then we need to look at Europe and the European identity not as something we have, but as a process of becoming, as a process of action, of joint, coordinated activity, aiming at some common goals and organised by the common institutional framework. If we look at identity not as a relatively stable model, but as a process of becoming, a process of constructing, creating the feeling of belonging to a common framework, to a common civil society, then it looks much more realistic. I think the events which are currently going on in Europe allow us to be rather optimistic as far as the probability of the success of such a project is concerned.

I particularly want to emphasise the role of the category of European citizenship, which apart from whatever else it might be, is designed in such a way that it encourages people to be active in local communities, wherever mobile European citizens happen to choose residence. And it remain to be seen to what extent this is going to be a reality of new trans-national democracy, to what extent people will participate actively in democratic procedures on a local level and where parliamentary elections are concerned. Just a couple of days ago we saw that Polish immigrants in Britain and in Ireland are

very active as far as national elections are concerned: we watched the queue to cast a vote in the national elections with amazement. It will be very interesting to see whether they will be equally involved on the local level in the democratic procedures.

And in may ways one can say that this new identity, understood as being active in trans-national projects and in trans-national institutions, is already happening. Many people are actively involved in activities within the European framework, exceeding and crossing national boundaries, and yet at the same time they do not consciously construct their symbolic identity as a European identity. We are now in my Institute of European Studies involved in a large-scale project on trans-national démocratisation, and the very preliminary results show that a great and growing number of people, especially young people, when asked about their identity, still stick to traditional boundaries: they describe themselves through national or local identifications. Europe as a point of reference of the symbolic identities is still something very vague and very distant. At the same time however they are very active on the European level, and they take it for granted that mobility, common European projects, are something that is a real possibility for them, that there is a new framework of activity. Of course they massively take part in the new institutional possibilities, such as taking cases to the Court of Human Rights against their own state, and think this is their right, because they are Europeans. Of course if this develops, then after a while we may have a situation in which the European identity understood as participation of citizens in institutions, in projects, in trans-national activity, in cross-border activities, will in fact construct and constitute the new type of identity as Europeans. People will be Europeans through what they do, even if symbolic labelling and symbolic identifications (i.e. that the people call themselves European) may come a bit later. The awareness of what it means to be active may be a bit delayed, because on the symbolic level we are still in the overwhelming domination of national rhetoric, of national symbolism. And if this happens, if I am right, then in a few years we will see a situation in which Europe will be taken for granted as a frame of reference for both democratic activity and symbolic identifications. Then it will be completely out of the question that this frame of reference should not be applicable, that it should change, and for instance people would be again forced to limit their activities back to the national boundaries.

Therefore a great deal depends on how consistently we will develop those institutions and projects on the European level that will facilitate this process. What is going to be the real meaning of European citizenship? Will any steps towards a European democracy, for instance European elections to the European parliament, European political parties be taken? Is it realistic? At the moment it does not seem to be very realistic, but perhaps in the future it will

be. There is also the issue of how much power we give to the European Parliament, because it is a key institution in this process, the institution which represent European citizens and not the European states. So a more democratic mechanism, a greater role of the European Parliament, more common European projects and less veto power to member states: these are the conditions for the new European identity if we, as I suggest, see it not as a core European culture body, but as a process of becoming Europeans through being active within the European frame of reference.

Professor HARALD KUNDOCH, PhD - Gelsenkirchen University of Applied Sciences

Free Movement of Capital and Payments (Article 56 and the Following Articles of the Treaty Establishing the European Community - TEEC)

Free movement of capital and payments plays an important role in the European single (internal) market. Free movement of capital means that economic entities have access to a production factor, i.e. capital, which helps achieve optimal allocation. Free movement of payments is indispensable for the functioning of the other fundamental freedoms. Transnational payments are necessary for the conclusion of translational legal actions. Free movement of capital and payments is complementary to free movement of goods, services and persons, just like mortgages are complementary to the claims they secure. Thus, free movement of capital and payments is the underlying condition of the Economic and Monetary Union.[1]

Free movement of capital consists in transnational transfers of monetary capital and tangible goods, primarily with the purpose of investing. This freedom is one of the five fundamental freedoms and is guaranteed by Article 56 of the TEEC and its following articles. Ensuring the possibility of transfer of capital and an integration of the banking and financial markets within the EU community system is a key element of the Economic and Monetary Union. Liberalisation of the flow of capital is, together with the other fundamental freedoms, a crucial component of the single (internal) market. At the same time, it constitutes an important aspect of the open market economy based on free competition.[2]

The legal basis for the enforcement of the freedom of movement of capital is the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. According to its Article 1 par. 1, member states are obliged to abolish restrictions on movements of capital taking place between persons resident in member states. Since January 1, 1994, Article 56 and the following articles of the TEEC have placed very severe restrictions on the possibilities for limiting the freedom of movement of capital. In other words, limitations implemented by member states are only

[1] K.-D. Borchardt, *Europarecht. Die rechtlichen Grundlagen der Europäischen Union*, 3rd edition, Heidelberg 2006, Rdnr. 1029 ff; Haag, [in:] R. Bieber, A. Epiney, M. Haag, *Die Europäische Union. Europarecht und Politik*, 7th edition, Baden-Baden 2006, Rdnr, 28 ff.

[2] K. Hailbronner, G. Jochum, *Europarecht. Binnenmarkt und Grundfreiheiten*, Stuttgart 2006, Rdnr 664 ff; M. Herdegen, *Europarecht*, 9th edition, München 2007, § 19.

allowed when their objective is to prevent infringements of national law and regulations. As a result of the application procedure, administrative or statistical data from the field of taxation law or banking supervision law is gathered. The European Court of Justice only in exceptional situations allows limitations to the freedom of movement of capital and the obligation to obtain foreign exchange permits.[3]

Freedom of movement of capital has become the subject of a jurisprudential debate. The Treaty itself contains no legal definition of the notion of movement of capital. Therefore, this notion has been defined in the following general way by jurisprudence: "Overall, the notion of capital movement signifies a transfer of value in the form of monetary capital connected with making a deposit or a transfer of tangible goods, from one member state to another. On the basis of Directive 88/361 (which however has not been binding since the Maastricht Treaty came into force), this includes direct investments, investments in real estate, activities performed on securities which are traded on the capital market, monetary markets, futures contracts, as well as civil-law based secured transactions and flows of capital of personal nature."[4]

Compared to other economic freedoms, the freedom of capital and payments has one distinguishing quality. In contrast to the other freedoms, this freedom is effective not only between the member states, but also in relation to third countries. It is however unclear whether this results in nationals of third countries having the right to appear before national courts. Possibly this right might depend on such individuals having their permanent residence on the territory of a member state. The protection applies to all individuals undertaking transnational capital transfers and relevant payments. Article 56 and the following articles of the TEEC are not applicable only where to a given situation the provisions on freedom of services clearly apply.[5]

Article 56 of the TEEC extends beyond the classic ban on discrimination expressed by Article 12 of the TEEC in that it prohibits all restrictions on movement of capital. This prohibition covers all measures which hinder the flows of money, in and out of entities, both in terms of amount and of form. The scope of protection of freedom of capital and payments is therefore very wide. It results in a ban on any national regulations which directly or indirectly, actually or potentially, might hin-

[3] A. Haratsch, Ch. Koenig, M. Pechstein, *Europarecht,* 5th edition, Tübingen 2006, Rdnr 625 *ff;* von Wilmowsky [in:] *Europäische Grundrechte und Grundfreiheiten,* ed. D. Ehlers, 2nd edition, Berlin 2005, § 12.

[4] *EU- und EG-Vertrag,* eds. O. Lenz, IC.-D. Borchardt, 3rd edition, Köln 2003, p. 703 ff; EuGH-Rechtsprechung Rechtssache 203/80 *"Casati" Amtliche Sammlung* 1981, p. 2595.

[5] U. Haltern, *Europarecht-Dogmatik im Kontext,* 2nd edition, Tübingen 2007, p. 657 ff.

der the freedom of movement of capital and payments. Restrictions in this field are derived chiefly from tax law and certain provisions with regard to deposits (for example, the obligation to deposit foreign securities in a bank).[6]

Article 57 of the TEEC stipulates however that certain measures with regard to direct investment in third countries are admissible. These restrictions on movement of capital pertain only to third countries. Similar measures between member states would be inadmissible. These measures include restrictions involving direct investment (including investment in real estate), establishment, the provision of financial services or the admission of securities to capital markets. This is a closed catalogue of such situations.[7]

Article 57 par. 1 of the TEEC applies to measures already in existence in this regard, created on the basis of national or Community law. As far as these measures are concerned, even after Article 56 and the following articles enter into force, their continued existence is guaranteed. After their entry into force, only the European Community has the competence to establish such restrictive measures (Article 57 par. 2 of the TEEC). In terms of the intended liberalisation of movement of capital and payments, unanimity as the sole method of decision-making with regard to such measures might constitute a step back. For this reason, Article 59 of the TEEC gives the European Community the right to take safeguard measures, limited in time, where movements of capital to or from third countries may threaten to cause serious difficulties for the operation of economic and monetary union.[8]

Article 60 of the TEEC regulates the competence of the Council to take unilateral measures against a third country (an embargo) in the understanding of the Common Foreign and Security Policy. The Council is urged to use this competence if there is no other way to prevent serious disruptions of the economic and monetary union. The right to introduce such measures rests with the member states until the Council itself acts to introduce appropriate measures (Article 60 par. 2 of the TEEC). This is a regulation which allows for an exception and which expresses the obligation to inform the Commission and other Member States of such measures.[9]

Article 58 par. 1 sec. b of the TEEC allows the EU Member States under certain conditions to limit the movement of capital and payments that is be-

[6] H. J. Küsters, *Die Gründung der Europäischen Wirtschaftsgemeinschaft,* 1st edition, Baden-Baden 1982, p. 359 *ff.*

[7] *J.* Schwarze, *Europäisches Wirtschaftsrecht,* 1st edition, Baden-Baden 2007, Rdnr 145-156.

[8] F. Möslein, *Kapitelverkehrsfreiheit und Gessellschaftshrecht,* "Zeitschrift für Wirtschaftsrecht" 2007, p. 208 ff.

[9] *EU- und EG- Vertrag,* eds. O. Lenz, K.-D. Borchardt, 3rd edition, Köln 2003, p. 747 ff.

tween the Member States but also with third countries. Its subject matter concerns defined goods protected by law, which are specified in Article 58 par. 1 of the TEEC. The steps undertaken by the Member States can be justified in the light of the Article 58. Within this fundamental freedom, as a result of necessary reasons the European Court of Justice decision in Cassis de Dijon case is justified (C-120/78). The privileges granted by acts of law to the EU Member States that have shares in capital companies need according to the view of the European Court of Justice justification by virtue of commonly acknowledged interests accounting for proportionality. This, in particular, refers to the convenient representation in the company units as well as the increasing ability to influence the company by means of the so+called 'golden shares'.

"The freedom of movement of capital, as a key principle of the TEEC, may be limited by a national law only in the cases listed in Article 73d par. 1 of the TEEC, or if required by the common interest. The national regulation is only justifiable when it is adequate to guarantee the achievement of the designed objective and when its scope is no greater than necessary to achieve this objective. Consequently, the measures introduced by the member states may be deemed, for the above-mentioned reason, to be justified. An example of a justifying reason can be the need to secure the supply of energy in an emergency."[10]

There are varying opinions in the jurisprudence as to what falls into the category of freedom of movement of capital and payments. The European Court of Justice has classified capital deposits made abroad as free movement of capital, but the money due in mutual consideration as a form of the passive freedom of services. This ruling was based on the previous version of the TEEC, according to which the freedom of payments was only an unwritten appendix to a given fundamental freedom. Now the freedom of payments, regulated in Article 56 par. 2 of the TEEC, includes - apart from any transnational transfer of currency executed in exchange for a consideration - also transitional payments of damages and compensations, as well as claims for return of unjust enrichment.[11]

Where, then, is the dividing line between the freedom of movement of capital and the freedom of establishment and free movement of services? With regard to direct investments in establishment, depending on the involvement there is a distinction between having a managerial influence on the undertaking and exercising the right of control (freedom of establishment) and simply making a deposit (free movement of capital). As far as tax

[10] Rechtssache C-503/99.

[11] M. Herdegen, *Europarecht,* 9th edition, München 2007, § 19 Rdnr 5.

regulations with regard to dividend payments are concerned, the European Court of Justice has adopted both perspectives. Similarly, in cases where real property is purchased in another member state, both the freedom of establishment and freedom of movement of capital apply. The jurisprudence of the European Court of Justice has not established a general division between these fundamental freedoms. Instead, the Court often allows a simultaneous application of provisions on free movement of capital, alongside provisions pertaining to other fundamental freedoms.[12]

According to Article 56 par. 1 of the TEEC, all restrictions on the movement of capital between member states and between member states and third countries are prohibited. Par. 2 of this article constitutes the same prohibition with regard to payments. In its efforts to maintain a common unified European capital market, the European Court of Justice has used a wide interpretation of the notion of restrictions. This interpretation includes all direct and indirect measures which hinder transnational movements of capital and payments, including discriminatory measures. In principle, the ban applies to all types of inspections of the flow of currencies, all regulations in which capital transactions depend on obtaining a permit, as well as tax and penal law regulations that have a limiting effect.

Finally, the important issue of "golden shares". As state enterprises were being privatised, governments wanted to maintain control over important decisions and the development of the enterprises even after they were no longer state-owned. This is why the member states reserved special rights, such as for example the right to withhold permission for certain acts, voting rights in the establishment of company's managing bodies, and the veto right to a takeover by a foreign entity and to a transfer of the enterprise abroad.

- In Portugal, this is why for a large number of enterprises there was a cap at 10% of foreign shareholding, and a requirement to obtain a permit to sell capital amounting to more than its 10%.
- In France, the purchase of shares of the formerly state-owned enterprise ELF-Aquitaine required the permission of the French minister of economy, who was entitled to veto the sale of the property of the enterprise.

The European Commission challenged these member states for breach of the provisions of the Treaty. In both cases, the European Court of Justice found that a breach had indeed occurred.[13]

[12] J. Schwarze, *Europäisches Wirtschaftsrecht,* Ist edition, Baden-Baden 2007, Rdnr 148.

[13] J. Oechsler, *Erlaubte Gestaltungen im Anwendungsbereich des Art. 561 EG,* "Neue Zeitschrift für Gesellschaftsrecht'' 2007, p. 161 ff.

For Germany, the case against the federal government for the breach of the Treaty provisions on free movement of capital by adoption of the so-called “Volkswagen law” has been of particular importance. The “Volkswagen law” envisages, *inter alia*, that every shareholder, regardless of his/her share-stake in Volkswagen Company, which was privatised in the meantime, cannot claim a bigger share than 20%. This was supposed to guarantee the state of Lower Saxony, the main shareholder, a continued influence on the company. The European Court of Justice rules in this case on October 23, 2007. (Rechtssache C-112/05).[14]

[14] W. Kilian, *Verstößt das VW-Gesetz gegen die Kapitalverkehrsfreiheit?,* 'Neue Juristische Wochenschrift" 2007, p. 1508 ff. F. Sander, *Volkswagen vor dem EuGH - der Schutzbereich der Kapitalverkehrsfreiheit am Scheideweg,* “Europäische Zeitschrift für Wirtschaftsrecht” 2005, p. 106 ff; Ch. Teichmann, E. Heise, *Das VW-Urteil des EuGH und seine Folgen,* “Betriebsberater” 2007, p. *IST?* ff.

Professor IAN BARNES, PhD - University of Lincoln

The Economic Aspects of the Constitution

The introduction of my paper should not really be limited to the economic aspects of the constitution, because that would seem to imply that I am making substantive reference to the constitutional treaty. This has informed my discussion, but really I have tried to move things onwards and look at the Reform Treaty and take from it the keywords and expressions that are part of this particular document.

Before I move on to the presentation proper, I would like to go back to the founding fathers. The interesting thing about the old gentlemen (well, not all of them were gentlemen) is - many of us on this platform here remember a long long time back - and one of the first things that strike me about the European Union is that the politicians always used to describe it as being an economic entity, and the economists always used to describe it as being a political entity. I certainly believe it to be essentially a political entity, but I think it is interesting as well that in many respects it is a very confused economic constitution. And I think the reason why we get ourselves into a real state about many of the issues which the lawyers here are wrestling is that the economic governance of the EU has always been based on a kind of second-best model, rather than if it were from a purely economic rationale. It is based upon the idea of a customs union and a common market, both of which are about excluding others and about promoting cohesion with those who actually belong to the club.

Essentially, what happens is that the EU has set up some basic frameworks for governance, but within that, each member state runs its own economy. And with that in mind, we have to remember that things have not moved as far as many people would expect they might have done. Certainly the current French government is talking now about creating national economic champions: they are not talking about European champions, they are talking about French champions. That is very typical of the conflict between the individual aims of countries and the collective ideal.

At the same time, we are dealing with a European Union which is very diverse. You look at the sort of league tables of who has got the money and who does not, as it were, and of course down there at the bottom there is Bulgaria and Romania, and I regret to say somewhere down at the bottom as well is Poland, while at the top end you have states like Denmark, Ireland, Luxembourg, and indeed, surprisingly, the United Kingdom is up there near the top end as well. This diversity is remarkable.

It is interesting that our Chair should actually mention the fact that we have the same understanding of the social market economy. Naturally, there

are many models of economic governance within the European Union. Every state tends to run its economy in a different way, and really that is where the problems come in. Because what we have in essence is a series of economies linked together, but very different in terms of their character and nature. Some are richer, some are poorer. In the case of France very much there is a statist, etatist tradition, Germany has the so-called social market economy, which has been described as a kind of relish model, in the United Kingdom there is the Anglo-Saxon model, there is the Scandinavian model, indeed what you have is a club which has got very many very distinct type of economy and society within it.

Overall, I suppose, this is in response to our Chair: are we considering the social aspect of this? I think it is clear that we are not the United States of America. So actually we do believe in a European social model, and this involves a developed interventionist state funded by relatively high levels of taxation, we believe in a robust welfare system, and in social protection, and of course we believe in equality, which in some societies is allowed to fall by the wayside. So in that sense we have got this diversity but also this belief in a social model for Europe. The only problem with this social model that we have got here is of course: can we actually afford it? And it is with the nature of globalisation becoming a real issue. Generally speaking then, I have tried to develop here some economic challenges that we face. Let me now move on to my presentation to give you outline of my ideas.

Introduction

Economic governance within the EU is essentially a shared competence and depends upon the interaction between the member states and their relationship to the EU as a whole. As time has gone on, the extent to which any member state can act autonomously had declined as the economies have become increasingly interdependent. The role of the EU in this complex set of relationships is laid down in the Treaties in a very general way. The fact that the EU, as an organisation, came about because of a desire to pursue peace through economic means is important. As the EU has expanded and become significantly more complex, the market mechanism has bound the states together, in a way that has led to a feeling that economic governance is being wrested from the member states. The most specific example of this was the launch of the single currency in 1999 and the attempted completion of the single market in 1992. The expanded economic governance role of the EU has led to greater homogeneity of economic management, but member states are still able to make their own decisions. However, as Miriam L. Campanella and Sylvester Eijffinger (2003) point out deeper integration has not, yet, de-

livered the necessary flexibility to cope with the seemingly relentless march of globalisation. They suggest that the EU economy is too rigid and poorly equipped to turn the differences between member economies into an asset when faced with global shocks and competition.

This paper critically examines the tensions between the constitutions of the 27 member states and that of the European Union. This discussion is informed by an examination of the draft Reform Treaty, which was adopted by the Brussels European Council of June 2007 and, at the time of writing, awaits adoption or rejection by the EU member states. At the same time the paper notes the tensions between the different models of economic management of the member states.

All of the EU *T1* economies are at very different stages of development and have different challenges to face. The response to these differences is often to rail against the constraints of the EU's market-based economic philosophy, as elaborated in the Treaties. Nevertheless, abandoning the internal market is not an option, as long as states wish to stay within the EU.

It is difficult to establish an appropriate relationship between the economic constitutions of the member states and the European Union. The paradox of greater economic integration is that the economies of the EU are very different. The EU has become more diverse as membership has grown from six to twenty-seven states and because some states have displayed a greater sense of adaptability to the European mission. The pattern of contemporary economic development across the EU is different because states make different choices within the very broad framework of the EU's policies.

One thing that makes the economies appear similar is the linking of the social with the economic. This occurs at the EU level and aspects of this go back to the social dimension of the European Coal and Steel Community. Social and welfare provision exists in varying amounts within all the member states. In a very broad sense, this is often described as the European Social Model (ESM). An aspect of the ESM is the social market economy. This was a concept that was applied to a specific blend of economic management to be found in Germany and it was an alternative to models such as French indicative planning and *etatism.*

Now the paradigm with respect to the social market economy has shifted and the concept is seen as being more inclusive. The term "social market economy" is likely to appear in the EU's Reform Treaty and has been described as part of the Lisbon Strategy.

The Performance of the EU Economies

In September 2007, it was clear that the EU's economy was going through one of its upward phases with good growth performance and falling unem-

ployment. However, as the table below illustrates, there were enormous differences between the very best performing economies and the laggards. The highest growth rates were generally to be found in the economies of Central and Eastern Europe, but with incomes highest in the developed economies. Even with superior growth rates, the process of catch-up will take at least 50 or 60 years.

Economic Indicators for the EU 2007

	Economic Growth Rates	**Inflation**	**GDP Per Capita[1]**	**Annual change in total hourly labour costs**	**Unemployment**
Bulgaria	6.2	5.7	37	14.6	7.5
Romania	6.0	4.3	38	23.4	6.9
Poland	6.9	1.9	53	11.4	9.7
Latvia	11.3	7.7	56	31.7	5.6
Lithuania	7.7	4.6	58	21.6	4.7
Slovakia	9.4	2.4	63	7.9	10.6
Hungary	1.8	7.7	66	11.6	7.7
Estonia	7.3	5.2	67	18.7	8.0
Portugal	1.6	2.5	75	3.9	8.2
Malta	4.5	0.5	77	4.4	6.3
Czech Republic	6.2	2.0	79	7.7	5.2
Slovenia	7.5	2.9	87	5.6	5.1
Greece	4.1	2.9	89	5.1	8.6
Cyprus	3.8	1.7	94	7.4	4.1
EU27	2.8	2.1	100	3.2	6.8
Spain	4.0	2.5	102	3.2	8.0
Italy	1.8	1.9	104	=	6.1
France	1.3	1.3	113	3.5	8.5
Germany	2.5	1.7	113	1.2	6.4
Finland	5.4	1.3	117	2.6	6.8
United Kingdom	3.0	1.9	118	4.2	5.3
Sweden	3.3	1.4	121	2.3	5.2
Belgium	2.9	1.7	123	2.7	6.6
Denmark	0.6	1.5	127	3.7	3.2
Austria	3.7	1.7	129	2.7	4.3

Netherlands	2.4	1.6	131		3.4
Ireland	7.2	2.6	144	5.4	4.7
Luxembourg	6.2	2.0	280	2.9	4.9
EA13	2.5	1.7	=	2.5	6.9

Source: Eurostat various.

The challenge for the EU is to maintain a system that can overarch the very different member states economies and still enable the collective whole to respond adequately to the problems posed by globalisation and the rapid rate of technological change. Both these developments offer opportunities for the best performing and most flexible economies, but not all economies may be able to cope with the intensity of competition if they fail to reform. However, the extent to which there is an agreement about the direction of reform remains in doubt. The Organisation of Economic Cooperation and Development (OECD) set out the challenges facing the EU economy in their 2007 report (OECD 2007). They were to:

- Further reform the internal market, including removing the remaining barriers to trade in goods and services.
- Ensure there is improved efficiency by promoting greater competition in the network industries such as telecommunications, ports and the energy sector.
- Remove barriers to labour mobility.
- Construct a cohesion policy that is more effective by ensuring that regional policy promotes sustainable growth.
- Promote the EU's role as a global trade power, by improving market access and utilising the strength of the internal market, also abandoning policies that distort world trade.

All the above can be constructed as being about permitting the forces of the free market to do most of the work of reform. The OECD report points out that those countries that reformed early over such issues such as creating a flexible labour market have been the most successful. Much of this is the language that has emanated from the European Commission for many years, but has been resisted by individual member states. Member states can see reasons for rules that allow them access to other markets, but not the own.

The problem of divergent economies is illustrated by the desire of the French government under Nicolas Sarkozy. Whilst Sarkozy was regarded as a supporter of free markets prior to the 2007 Presidential elections, he soon dispelled that image in challenging the EU's competition policy. His government started to consider creating national champions. The suggested creation of a €70 billion power company in 2007 by the merger of Gaz de France with the private utility Suez was meant to offer a significant challenge to for-

eign energy companies trying to penetrate the French market. This may allow the nuclear electric industry to be run by the private sector within France. Another example of a French champion that was being examined was the merger of Thales and Safran in the defence sector. Sarkozy also challenged the anti-inflation strategy of the European Central Bank by suggesting that boosting exports was more important than controlling inflation. The strategic aims of the French government are of course at odds with EU competition policy. It is not that Sarkozy was proposing long-term nationalisation, it is more that he is seeking to directly influence industrial structure, rather than leave that to the market mechanism (Hollinger, Benoit 2007).

The European Social Model (ESM)

The European Social Model can be viewed as the broad range of social legislation that exists within the member states and the EU. It also represents a variety of shared values that exist across the EU. It is one of the broad linking features of European economies and societies. ESM has many different variants depending upon the author. Anthony Giddens (2007: 2) presents a simple model that suggests the core ideas would be:

- a developed interventionist state funded by relatively high levels of taxation;
- a robust welfare system that provides effective social protection, to some degree for all citizens, but especially those in need;
- a limitation, or containment, of economic and other forms of inequality.

Whilst the process of European integration has moved onward, there are many social models within the member states of the EU. Each state adopts a different approach, but as Anna Diamantopoulou, the EU Commissioner for Employment and Social Affairs (2003) pointed out at a fringe meeting of the Labour Party Conference, the EU states' work and welfare policies are not the same as those of the USA. (So she was clear what it was not.) One possible description could well be that it is a political counterweight to EU fiscal rules that govern Economic and Monetary Union. In essence, she believed that the model was both a political term as well as a technical term. In this respect:

> "... even if it escapes precise definition, the notion of'model' is significant because it is 'anticipatory' or 'aspirational'. In other words, like the expressions 'European Union' or 'Common Foreign and Security Policy) the word 'model' hints at a progressive real convergence of views among Member States on the broad objectives which they seek to achieve in employment and social policy."

The ESM has been under attack for some time by market-based economists, largely because of the disappointing economic growth. It appears to be barely affordable and is believed to act as a disincentive to change and enterprise. When the impressive growth rates of the post-Second World War period came to a halt in the early 1970s, the funding of the ESM became more difficult because of the burden of high levels of unemployment and a dwindling tax base. Greece, Spain and Portugal joined the EU in the 1980s, but these were countries that were only able to support limited welfare spending. Although the 1995 enlargement seemed to reinforce the ESM, the 2004 and 2007 enlargements brought with them states who were trying to reform themselves to be less reliant on the state. Within the EU, the creation of Economic and Monetary Union (EMU) put an institutional limit on budget deficits. This meant that welfare measures had to be funded in a way which they had not been in the past. Finally, the reality of globalisation is that the EU cannot rely on its manufacturing base any longer. The pace of deindustrialisation has speeded up and many of the products that were traditionally made within the EU are now being made in South-East Asia.

The ESM would appear to be contradictory. Is it possible to have the balanced budgets that EMU demands, respectable rates of economic growth, high levels of employment, good welfare provision and more equal societies? The Denmark, Finland, the Netherlands and Sweden are cases where it would appear the ESM might work (although Sweden and Denmark are not part of EMU). However, the problems faced by the larger member states within EMU found controlling budget deficits very difficult in periods of slow economic growth in the early years of the millennium.

The ESM is related to the concept of the social market economy in that those states that have a social market subscribe actively to the ESM.

The Concept of the Social Market Economy (SME)

In his important perspective on European economies in the mid-1960s, Andrew Shonfield noted the very different ways in which the capitalist model was developing in post-war Europe (Shonfield 1965). His examples ranged from the state as an entrepreneur in Italy to indicative planning in France and the market socialism of the Swedish state. Over fifty years later, despite the impact of the EU and the process of economic integration, the organisation of the European economies still differs significantly. Along with this they are still at very different stages of development.

The expression ‘social market economy’ is embedded in the language of the development of post-second World War Europe. The concept most commonly refers to the development of the German economy after the Second World War as a reaction to the state driven model of capitalism under the Nazi era

and the challenges of Marxist determinism. The economist most closely associated with this set of ideas was Walter Eucken of the Freiburg School, who suggested that the states role in the modern economy was to provide a political framework for economic freedom. The Christian Democrat Ludwig Erhard, who was the Minister of Economics under Konrad Adenauer's chancellorship and who later became German Chancellor in his own right from 1963 to 1966, led the development of the model and its early implementation. Soziale Marktwirtschaft suggests that there is a choice of economic model that a state may adopt, which may involve both economic and social considerations. In this sense, it is not meant to be a socialist economy with all the implications of regulation and state control. As the model was originally operated in Germany, very large businesses were broken up and the powers of Germany's Federal Government over the economy, were weakened (Shonfield 1965: 240-241).

In 1999, Romano Prodi (then President of the Commission), echoed the language of the post-war origins of the social market economy. In his speech to mark the 10th anniversary of the fall of the Berlin Wall he said:

> "Their victory is the victory of freedom over oppression, of democracy over totalitarianism, of the social market economy over the Marxist-socialist command economy." (Prodi 1999).

This places the social market firmly in the front-line of the Cold-War battle of economic systems, which communism was to lose.

The concept of a social market changed over time in Germany. There are now many large-scale enterprises, and the German economy has moved from being highly market-orientated to one with a significant degree of social protection. However, Germany has no privatisation agenda and mergers are closely monitored to ensure that market dominance does come about (Economist Intelligence Unit 2007). In recent years, attempts have been made to ensure state expenditure does not get out of control, so the state's spending as a percentage of GDP declined from 48% in 1980 to less than 46% in 2006.

The German economy experienced major problems with the launch of EMU with a period of slow growth, in part due to becoming a member of EMU at a too high an exchange rate. The recovery of German competitiveness in the period 2004 to 2007 came at the price of domestic deflation and was brought about by the restructuring of large enterprises in Germany, not by the reforms of the Merkel government. That is the industrial restructuring took place prior to the reforms having a significant impact. Change and modernisation is therefore possible without resort to the extremes of market forces (such as those that were imposed in the UI< under Margaret Thatcher) as long as industry engages in the task.

Michel Albert further developed Shonfield's view that there are differing models of economic governance that can be identified across Europe (Albert 1993). The economic governance models to be found in a group of countries around the Rhine Valley adopted what he called the Rhenish model, based on the German style of social market economy. This was distinct from the Anglo-Saxon model (or the Neo-American capitalism). The Rhenish model was described as being institutional, collectivist, involved stakeholders, and having social partners who were involved in the decision-making process. In contrast, there was the Anglo-Saxon model, which was based upon the needs of the shareholders. For Albert, the stakeholders value consisted of reconciling the interests of clients, employees, shareholders and the social environment in general. In terms of company finance, banks were thought of as being a more stable means of finance, rather than subjecting companies to the vagaries of the stock market (Albert 1997). The problem with this stability is that it may offer a threat to the change which is needed to meet the challenge of globalisation. As Albert (1997) was to observe:

> "All the problems of the Rhenish model, both those of a cyclical and those of a structural nature, are directly or indirectly associated with the difficulty of reconciling the competitiveness and creativity of an enterprise with the costs of social security, costs that are becoming increasingly high due both to demographic factors and to medical progress. Throughout continental Europe, the vitality of the economy and its ability to create jobs increasingly depend on the reduction of labour costs and on firms' profitability."

The way that the Rhenish model works at its very best is via high levels of capital investment per worker, leading to impressive levels of productivity, at least in comparison to many other European economies, especially the UK. Workers also tend to work far fewer hours than their counterparts in the UI< and the USA. This points to the superiority of the model, but the shorter hours worked are in the case of France, the result of constraints on individual choices, and elsewhere arise because of involuntary unemployment (Brittan 1999). What does the term SME mean therefore? It is part of the debate about the Social and Economic constitution for the EU and it appears to be an attempt to reconcile economic dynamism and social cohesion within a set of legal rules and social conventions (Ebner 2006). Not surprisingly, the Economic and Social Committee embraced the model. They believed that the EU had a role to play in defining the social dimension of globalisation because of the foundation of common values shared by its members whom they believed constituted the essence of a social market economy. They believed

(perhaps optimistically) that the success of the Lisbon Strategy was the key for the success of an EU-policy contribution to the social dimension of globalisation (Economic and Social Committee 2005a). The social market economy's values included;

> "...individual responsibility, respect for the rule of law, respect for the individual and property, transparency, integrity, human dignity, equality and freedom, fundamental trade union and workers rights, access to education, sound industrial relations and a high level of social protection." (Economic and Social Committee 2005b).

The SME is a preferred option for a number of the EU states in that it is within the tradition of the European Social Model. Given a choice, there are many aspects of the SME that European voters prefer, even if they worry about the unemployment and lack of flexibility associated with it. A 2007 FT/Harris poll of 65,000 people on systems of economic government demonstrated that the populations of Europe deeply distrust the US model of market capitalism. When asked whether a free-market system was the best economic system, the Germans and Spanish, 48 per cent and 49 per cent respectively, said that they thought it was, but respondents from Italy, France and the UK were considerably less enthusiastic. Only a minority of those polled felt that their economies should be modelled on that of the USA. They believed that their economic model should be reformed, not jettisoned. The German Finance Minister Peer Steinbriick suggested that the 2007 reforms taking place in Germany; "represent a successful renewal of our economic policy model of the social market economy.... We deliberately did not introduce an Anglo-Saxon model." (Atkins 2007). What this statement clearly implies is that the from the German perspective the SME is the way forward, despite doubts about its flexibility.

The Lisbon Strategy

The debate about the concept of the social market economy informed the Lisbon Strategy; the most radical attempt to reform the EU's economy. The European Council held a special meeting on 23-24 March 2000 in Lisbon to agree a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy. The new strategic goal was to become within a decade (by 2010):

> "...the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion." (European Council 2000)

To achieve this strategy there needed to be preparation for

> "...the transition to a knowledge-based economy and society by better policies for the information society and R&D, as well as by stepping up the process of structural reform for competitiveness and innovation and by completing the internal market; modernising the European social model, investing in people and combating social exclusion; sustaining the healthy economic outlook and favourable growth prospects by applying an appropriate macro-economic policy mix." (European Council 2000).

The purpose of this strategy was to achieve full employment and strengthen regional coherence. Interestingly the strategy talked about an emerging new society which is more adapted to the personal choices of women and men and the implementation of sound macro-economic policy, hopefully achieving an average economic growth rate of around 3%. The strategy was developed and refined at subsequent meetings of the European Council and an environmental pillar was added at the Göteborg European Council meeting in June 2001. This stressed the need to ensure that economic growth was not to be at the expense of a deteriorating environment.

The Lisbon Agenda required that there be cooperation between the EU and the member states. The member states were responsible for implementing reforms in line with the overall strategy. This was far more difficult to achieve than the Strategy document envisaged and the member states that failed to reform or invest in an appropriate way were to blame. They were, for example, slow to transpose or agree to the new legislation to achieve the strategy. A progress report published in 2004 by the Commission noted the success of the strategy to that time but commented that:

> "Indeed, in certain domains there are significant problems which hold back the entire strategy and which hinder the return of strong growth. What is more, the most important delays have been identified in three strategic domains which are crucial for growth: knowledge and networks, industrial and service sector competitiveness, and active ageing." (Commission 2004).

The slowness to achieve the Lisbon Strategy was against a difficult background of generally slow growth within many EU states. Part of this slow growth was associated with the difficulties that the large member states had in adjusting to the launch of the EMU. However, the fact that the Lisbon Strategy had aspects of liberalisation, as in the Internal Market measures,

with exhortations for the member states to invest more heavily in research and development, displays a predictable confusion between the various systems and the EU's economic governance priorities. The issues are therefore the concern of national governments and are likely remain beyond the scope of the EU in any formal treaty sense for the foreseeable future.

In 2005, the Strategy was relaunched because of a lack of progress and the need to take account of the fact of enlargement from 15 to 25 member states in 2004. It was recognized that Europe needed to become a more attractive place to invest and work, that knowledge and innovation needed to be at the heart of things and that policies must be put into place to allow businesses to create more and better jobs. It was felt that Europe's actions need more focus, that support for change needed to be mobilised and that the Lisbon Strategy needed streamlining (Commission 2005).

The relaunch of the Lisbon Strategy was coincidental with an upturn on the European economy. This led to a more optimistic outlook and a recognition that the targets set by the Strategy could be achieved, although the 2010 objectives look likely being missed, for example with respect to the target of 3% research and development expenditure (Commission 2006:7). More importantly, the strategy still does not really address the long-term problem of very high European labour costs in a globalised world.

From the Treaty of Rome to the Reform Treaty - in Search of the Economic Constitution

The Treaty of Rome is now fifty years old and has within it the basis of the economic constitution, which governs the relationship between what we now know as the European Union and the member states. As time has gone on the constitution has been refined by a series of cases heard before the European Court of Justice such as Cassis de Dijon,[1] which was the landmark judgement that confirmed that products must be treated the same as domestic production no matter where they came from within the Community. The 1986 Nouvelles Frontières judgement[2] of the ECJ confirmed that competition rules applied to the air transport sector under Article 85 of the Treaty of Rome, which prohibits anti-competitive agreements and actions, and Article 86, which concerned the abuse of a dominant market position. In addition, the Single European Act (signed in 1986 but coming into force in 1987) transformed the basis of the economic constitution by laying down the imperative for the completion of the Internal Market.

[1] "Cassis de Dijon" case 120/78 judgment of 20.02.1979 ECR 1979, page 649.

[2] *Nouvelles Frontières-*, Joined Cases 209-213/84 [1986] ECR 1425.

The above changes illustrate the way in which the economic constitution has been created. Firstly, they maintain the basis of national sovereignty over territory, but at the same time requiring that markets be kept open for those who wish to trade freely. For most of the fifty years since the signing of the Treaty of Rome in 1957, reform has tended to be incremental, with initiatives being recycled in order to meet the priorities of the moment. Even the launch of Economic and Monetary Union was something which took many years to reach fruition from the Maastricht Treaty (Treaty on European Union, TEU) signed in 1992 to its launch in 1999. Even now, there are only 13 members of the Eurozone.

The background to the Reform Treaty is the Constitutional Treaty, which, in retrospect, always looked fated to fail given the use of referenda to ratify it at a national level. In the case of both France and the Netherlands, domestic political issues deflected much of the campaigns' efforts towards domestic concerns. The EU's Reform Treaty could possible succeed, largely because it has a more modest nomenclature and may be ratified in a more benign political environment. However, at its heart is still the notion of the creation of a common market/internal market. Increasingly over the decades from the launch of the European Economic Community (EEC) Treaty in 1957, there has been a struggle to agree on the substance of what this involves. The original members of the EEC had very different ideas of what this involved largely because, despite their common allegiance to liberal democracy and market economics, they had different economic systems and were at different stages of economic development. However, as Freidrich observed:

> "It is possible to deduce from the treaties the regulatory policy model of an open social market economy. This is a guiding principle for economic policy pursued at the national level. The basic regulatory policy principles are stable prices, healthy public finances and monetary frameworks, a sound balance of payments, and high levels of employment and social security" (Friedrich 2002: 2).

The failed Constitutional Treaty is the starting point for the most recent attempt to update the economic constitution. The term social market economy' had often been used with respect to trying to define the nature of the EU's economic constitution, but had not appeared in Treaty documents until the launch of the Constitutional Treaty. Duff (2005) makes the point that at the heart of the European Convention (the forum for debating the content of the Treaty), there was no agreement about what might be the most desirable model for managing the economic constitution. The working group on eco-

nomic governance chaired by Klaus Hansch seemed divided on traditional lines. There was no great momentum to revise the Maastricht Criteria governing EMU, and the debate about the centralizing of fiscal policy revealed the difference between those who were essential centralist and the economic liberals such as the UI<. In essence therefore, the contrast between the Rhenish model of social market economy and the Anglo-Saxon model.

In the Final report of Working Group VI on Economic Governance it was stated that:

> "Some members of the group have emphasised the importance of including a reference to sustainable growth and competitivity. Others attach more importance to highlighting full employment, social and territorial cohesion and progress, and a better balance between competition and public services in a social market economy." (The European Convention 2002:2).

The Working Group on Economic Governance felt that economic and social objectives should be built into the Constitutional Treaty, which of course was a situation that had existed for some time. What they were not clear about was the mix between economic and social factors.

The Reform Treaty, currently going through the ratification process, is not the same as the failed Constitutional Treaty, in the sense that it does not attempt to refound the existing treaties, it largely amends existing treaty provisions. Most of its provisions with respect to the economy appear to be doing not much more than offer a tidying-up exercise with respect to this phase of the EU's development. Examples of this tidying-up include the formal recognition of the Fisheries Policy and the updating of the chapters of the Treaty dealing with EMU. However, the failure of the Constitutional Treaty revealed an underlying tension with respect to the adoption of the neo-liberal model of economic integration that relies excessively on market forces. The notion of what a "highly competitive social market economy" was present in the Union's objectives, as laid out in the Constitutional Treaty, and was retained for the Reform Treaty.

Assuming that the Reform Treaty is ratified, the introduction of the phrase 'social market economy" suggests that will be important in maintaining the social achievements of the EU and the member states. Article 3 calls for a "...Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress," and the phrase "free and undistorted competition" was dropped from the draft of the Reform Treaty at the Intergovernmental Conference on 21 June 2007 (BBC 2007). Article 5 (3) of the Treaty suggests that

the Union may take initiatives to ensure coordination of Member States' social policies. Significantly article 9 takes things further by declaring that:

> "In defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."

There can be no doubt that the social references were particularly important to the French, who had rejected the Constitution Treaty in 2005, partly because it was thought to be too market-orientated.

At the Brussels summit in June 2007, the French President Nicolas Sarkozy suggested that:

> "Competition as an ideology, as a dogma, what has it done for Europe? It has only brought fewer and fewer people who vote in European elections and fewer and fewer people who believe in Europe." (Gow 2007).

Article 3 of the Reform Treaty sets out the objectives with respect to economic aspects of the relationship between the member states and the EU. Article 3 (1) suggests the importance of the well-being of EU's peoples, article 3(2) confirms the right to free movement of persons and article 3(3) calls for the establishment of an internal market. (This being an essential ongoing process which started with the signing of the European Coal and Steel Community Treaty (ECSC) in 1951 and the EEC in 1957). Significantly, Article 3 (3) of the Reform Treaty then goes on to call for the:

> ".. .sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."

The form of words above is almost identical to that which is to be found in the Constitutional Treaty (The European Convention 2003a). An earlier draft of the Treaty in February 2003 talked about

> "Europe with a free single market, and economic and monetary union, aiming at full employment and generating high levels of competitiveness and living standards." (The European Convention 2003b).

However, there were amendments proposed to the 6 February draft (The European Convention 2003c) where the phrase 'social market economy' was proposed by a number of delegates. Then by May 2003, the phrase became embedded in the Constitutional Treaty (The European Convention 2003d).

The Reform Treaty then makes reference to the promotion of scientific and technological advance and economic, social and territorial cohesion, and solidarity amongst the Member States. Article 3(4) refers to economic and monetary union.

The Reform Treaty negotiations highlighted the role of the European Central Bank. Should it become democratically accountable as an institution of the European Union? Why would this matter? In one sense it could be argued that this would simply be part of the démocratisation process, which is a substantial part of the EU's agenda. However, it would represent a blurring of the constitutional guidelines between the EU and the member states. In this respect we see that President Sarkozy was in favour of such a development because it would make the ECB more sensitive to the need to promote economic growth rather than trying to contain inflationary pressures. The tough anti-inflation stance of the ECB, with its relatively high rates of interest, had the effect of driving up the value of the Euro against the US dollar. As the Euro drifted into the politically sensitive range of €140 to 145 against the US$, so the complaints became more intense (Charlton 2007).

The expectations of member states politicians in the case of exchange rates can lead them to place their own national interest ahead of that of the overall European economy. The EU did not settle who was in charge of exchange rates within the Treaties, so this is contested ground. However, controlling exchange rates to gain a competitive market is very difficult to do within a very open economy. The Eurozone's main trading partners as a whole are with the rest of the EU which is outside the Eurozone. Attempts to avoid the consequences of a rising Euro against the US$ simply disadvantage other EU members. In this respect, politicisation of the ECB and exchange rate policy simply runs contrary to established relationships. It is also difficult to see where such a policy might be pitched, when we remember that the trade weighted value of the Euro was no higher in 2007 than it had been for periods of time in the 1990s and in 2004 (Munchau 2007).

Conclusions

The shared competence over economic issues has caused problems for the European Union since its launch with the Treaty of Rome. The interdependence between the economies and domestic economic governance has meant that progress over such central issues as the Internal Market

has been slower than might have been hoped for. The tensions in trying to maintain a balance between the economic and social aspects of governance are also not new. Whilst the economic objectives of the Reform Treaty appear to have moved forward little since the adoption of the Nice Treaty, the phrase social market economy' within the Reform Treaty is new and reveals once again the problem of trying to ensure that economic aspects of the integration do not displace the important social progress that the EU has made.

The recovery of the European economy in the middle part of the first decade of the new millennium has been an important stimulus to retain a strong link between the economic and the social aspects of governance. However, it is difficult to see how, given the diversity of the member states' economies; there can be a true understanding of what the social market is and how it can be achieved in any kind of legal sense.

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Debating European Citizenship: Market Citizenship and Beyond

With adoption of the Treaty reforming the European Union, also known as the Lisbon Treaty, a debate is taking momentum whether the concept and substance of European citizenship - one of the least understood and most important dimensions of European integration - has been improved to the extent that we can clearly see *iunctim* between a new legal construct and supranational, European civil identity. In order to be able to answer this question one should define precisely the scope of the very notion of European citizenship as it has been subject of constant improvement within *acquis communautaire* and confront this legal narrative with expectations manifested by the citizens themselves.

It has been frequently emphasised that European citizenship derives from a notion of *market citizen:* a national of a Member State entitled to exercise a body of rights and freedoms established by the Community law.[1]

But there has always been striving for a much deeper connotation attached to this legal construct. In the Preamble of the Rome Treaty of 1957 the Member States expressed their will to unify the "peoples of Europe". For that reason four fundamental freedoms were installed, namely: free movement of persons, services, goods and capital.

The Economic and Monetary Union, in its current form, would be hardly imaginable without this catalogue of civic freedoms. On the other hand, one should mention a strive for *ever closer Union of citizens* as one may call a number initiatives undertaken by the European Commission as well as representatives of Member States.

It was in this context that in 1985 Carlo Ripa di Meana, member of the Adonnino Committee, coined the idea of introduction of local voting rights understood as a "decisive step toward involving the Community's ordinary citizens in their common destiny."[2] In 1990, the Spanish Prime Minister Felipe Gonzalez advocated the idea of adoption of the new chapter on European citizenship that was to be incorporated into the body of the Treaty establishing the European Union. As it has been put convincingly by one of the researchers in the field: "In Felipe Gonzales' terms, introduction of Euro-

[1] See especially: R. Koslowski, *EU Citizenship: Implications for Identity and Legitimacy,* [in:] T. Banchoff, M. P. Smith, *Legitimacy and the European Union,* 1999; J. Shaw, *The Interpretation of European Citizenship,* "Modern Law Review" 1998; J. H. H. Weiler, *The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration,* 1999.

[2] See: Commission of the European Communities, "A People's Europe: Reports from ad hoc Committee, Bulletin of the European Communities", Supplement 7/85.

pean citizenship had a both symbolic and legal purpose. Symbolic, because European citizenship would have a chance to become an element of the European consciousness on European integration, thereby fostering a sense of belonging to a certain community. This would provide greater political legitimacy to the actions of the European Community and thus respond to accusations of a democratic deficit. As regards the legal purposes, European citizenship granted certain rights to be enjoyed by nationals of the Member States - European citizens"[3]

In its dual form, as proposed by Felipe Gonzales, European citizenship has been included into the body of the Treaty establishing the European Union.

The fundamental provision that depicts the essence of European citizenship as expressed in the Maastricht Treaty is formulated in the Article 8, which stated that "Every person holding the nationality of the Member States shall be citizen of the Union." The Amsterdam Treaty amended this provision by enforcing a principle of complementary status of European citizenship since "The European citizenship shall complement and not replace the national citizenship" (art. 17).[4]

The 1996-97 Intergovernmental Conference that elaborated an amended version of the Article 8 was inspired by the European Commission Report for the Reflection Group, in which one of the chapters was entitled "Heightening the Sense of Belonging to the Union and Enhancing its Legitimacy."

The rationale of European citizenship in light of the Amsterdam Treaty was to "deepen European citizens' sense of belonging to the European Union and make that sense more tangible by conferring on them the rights associated with it".[5]

These rights constitute par excellence supranational, that is to say a truly European code of civic rights as:

- a right to move and reside freely within the territories of the Member States (Art. 18 of the EU Treaty)

- a right to take part in local elections as well as European Parliament elections guaranteed to every citizen residing in the Member State, other than its own, under the same conditions as enjoyed by the nationals of the Member State (Art. 19 of EU Treaty)

- a right to diplomatic and consular protection in the territory of a third country in which the Member State of which a citizen is not represented, to

See: A. Bodnar, *Legitimacy of European Citizenship*, [in:] *The Emerging Constitutional Law of the European Union*, eds. A. Bodnar, M. Kowalski, K. Raible, F. Schorkopf, Berlin-Heidelberg 2003, p. 290.

' See: Article 17 (ex. 8) of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, source: Europa, http://ue.eu.int/Amsterdam/en/treaty/treaty.htm).

Ibidem.

be protected by diplomatic or consular authorities of any Member State (Art. 20 of the EU Treaty)

- a right to petition to the European Parliament and right to apply to the European Ombudsman (Art. 21 of the EU Treaty).[6]

In light of these provisions it is becoming more evident that European citizenship has been constructed to complement member-state national citizenship by expanding a scope of rights in distinct spheres of public life. As Rey Koslowski rightly observed: "This extension of rights creates a divergence between nationality and citizenship - categories that traditionally coincide in the context of nation states. This divergence corresponds with the co-existence of multiple political identities, national and European. Moreover, by extending democratic participation, EU citizenship represents a potential source of legitimacy for the integration process as a whole; it is therefore more than empty symbolism."[7]

However, European citizenship being based upon a code of rights alone cannot be acknowledged a sufficient platform for creation of European civil identity. There arises a problem of common value system that could be considered a sine qua non condition for genuine societal and legal recognition of a code of European civil rights.

A Treaty establishing a Constitution for Europe. Toward a coherent constitutional space within the European Union

Constitutions could be considered the consequence of ideological, thus axiological underpinnings as well as political preconditions marking the fundamental rules of the social order within a given community. Some legal doctrines, especially in Italy, Spain and, to a lesser extent, Germany, identify a specific term to describe the constitutional rules aimed at making the ideological project underpinned by the constitution concrete. Take for instance the Italian forma di Stato, Spanish forma de Estado/forma del poder, German Staatsform or Austrian Baugesetze/Grundlagen verfassungsmässigen Ordnung, etc. Those principles depict divergence between public authority and civilian freedom, the correspondence between the goals of the legal system and the organisation of public powers that have to implement them. In other words, the legal/constitutional system is not only what it is, but also what it ought to be. It is the way of being (the Weltanschauung) of the State, thus affecting the concrete exercise of public powers.[8]

[6] *Ibidem.*

[1] See: R. Koslowski, *op. cit.*, p. 155.

[8] See: F. Palermo, *Integration of Constitutional Values in the European Union*, [in:] *European Constitutional Values and Cultural Diversity*, eds. F. Palermo, G. Taggenberg, Bolzano 2003, p. 108.

Taking into account the aforementioned remarks, one can formulate the following question: do the recently undertaken reforms of the EU constitutional foundation provide a window of opportunity for collective identification of EU citizens as active participants of a European civil society building process?

The Preamble. What does it mean to be a citizen of the European Union?

The Treaty establishing a Constitution for Europe adopted by consensus by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome on 18 July 2003 is an outcome of extremely passionate axiologically-oriented constitutional debate concentrated on the ontological status of values and their identification. The character of axiological debate on the essence of European citizenship the European Convention has been the forum of, revealed a clash between two distinct perspectives: absolute (or cognitional), and relativist (or non-cognitional). The debate within the European Convention became an arena of confrontation between the proponents of objective nature of moral values deriving from a transcendental source: God's will, and the advocates of cultural determinism as framework for conscious and rational human choice within the sphere of axiological identity construction. These two perspectives, prevalent within European societies, constituted a bone of contention in the process of drafting of the Constitutional Treaty. It was the overwhelming spirit of inclusive axiological pluralism and not so much competing value choice perspective that prevailed in the European Convention, which opened up room for consensus over the axiological foundations of the Constitutional Treaty. However, one should not overlook a complex process of reaching this consensus through matching overlapping sets of values such as for instance:

(a) Christian-democratic (religion, nation, tradition, law),
(b) Liberal-democratic (ownership, liberty, law tolerance),
(c) Social-democratic (labour, equality, tolerance).

A great deal of attention paid by the public opinion to the Convention's debate - seen especially in the accession countries, like in Poland for instance - was focused on the problem of reference to Christian values (Invocatio Dei) as one of the key sources of European identity. This problem has already been addressed in the Polish constitutional discourse in 1997 over the new Constitution of the Republic of Poland. The Preamble of the current Polish Constitution became a subject of a fierce ideological dispute between proponents of cognitional and non-cognitional perspectives on the axiological source of commonly binding regulations.

The compromise that was reached in the constitution-making process took a form of inclusive axiological pluralism, or an ecumenical *Invocatio Dei* as one may put it. The axiological consensus in this case was built upon the recognition that:

"We, the Polish Nation - all citizens of the Republic,

Both those who believe in God as the source of truth, justice, good and beauty,

As well as those not sharing such faith but respecting those universal values as arising from other source [...]. Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, co-operation between the public powers, social dialogue as well as on the principle of subsidarity in the strengthening the powers of citizens and their communities."[9]

Among other arguments expressed in the Polish public discourse concerning the mission of the European Convention and primary goals EU should fulfil, it was most often pointed to the following:

- strengthening of self-identification of EU citizens with the common institutions and values they represent;
- strengthening of both formal and informal legitimacy of the EU;
- reinforcement of public and external security understood as interdepending spheres of the Union's competence;
- reinforcement of EU sectoral policies related to advancement of social welfare;
- reinforcement of EU international role in economics and politics;

To meet these expectations and goals the EU was expected to:

- clarify in which matters the unanimity of the member states will be necessary, and in which the decisions of a majority will be binding;[10]
- adopt the European Constitution in the form of the Basic Treaty the Charter of Fundamental Rights should be the foundation of;
- adopt a cross-pillar approach to reform of EU institutional architecture aiming at making the second and the third pillar legally binding, which should increase their effectiveness;

[9] The Preamble of the Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997, Warsaw, The Sejm Chancellery 1997.

[10] Defining such procedures and competencies within the EU institutional architecture was seen as crucial since the EU citizens want to know what they can expect from various EU bodies. This is especially the case of strengthening of the European Commission's legitimacy. The key question in this context was how to elect the president of the Commission and the Commission itself - whether by the citizens themselves directly, or by the European Parliament? From the perspective of a legitimacy as well as checks and balances imperative, it was postulated to choose the president of the Commission on the motion of the Council, i.e. national governments, whereas the Commission should be chosen by the European Parliament or in direct elections.

- expand a majoritarian voting and cooperation with the European Parliament;[11]

- simplify the Master Treaties in order to make them easily understandable for citizens;

- encompass the European Parliament and national parliaments with more power to influence decision-making within the EU;

- deepen a subsidarity policy;

- be the Union of “closer cooperation” but not “Europe of different speeds”.

The axiological compromise that was reached by the European Convention with regard to the essence and substance of a Draft Treaty establishing a Constitution for Europe was not so much a result of political bargaining as in the aforementioned case or in most cases of national constitution-making, but a deliberate recognition that a credible axiological foundation of supranational, European civil identity can only be obtained by adoption of inclusive perspective on inspiration of European identity construction. It is precisely this mode of reasoning that made the European Convention - inspired by Thucydide to legitimately claim that “Our Constitution... is called a democracy because power is in the hands not of a minority but of the greatest number”. Thus, the constitutional credo of the EU sounded logical when referring to the following construction...

“Conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason,

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law [...] (Preamble of the Draft Treaty).

Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competencies to attain objectives they have in common [...] (Art. 1).

The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights.

[11] The expansion of majoritarian voting was seen as crucial with regard to the false but popular opinion that the EU enlargement would undermine its effectiveness. It was argued here that the broader the membership, the lesser the relative weight of any one member, and thus the lesser the ability to block the decisions of the members. According to this logic, the expansion of majoritarian voting along with the number of EU members may very well increase decision-making power within the Union.

These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination (Art. 2).

When trying to find an explanation for the constitutional compromise that resulted in adoption of a Draft Treaty it seems plausible to point to a certain awareness prevalent among the members of the European Conventions that axiological debate over the core values underlying the very nature of European citizenship cannot be settled by political compromise. The code of the European citizenship found its expression in the provisions of the Part II of the Draft Treaty. The enumerative catalogue of values attached to European citizenship was put in the following structure: Dignity (Title I), Freedoms (Title II), Equality (Title III), Solidarity (Title IV), Citizens' rights (Title V), and Justice (Title VI). Adoption of such a wide catalogue of both ethical and praxeological provisions could only be possible by the way of recognition of centrality of human individual as a subject of normative constitution-making. Article II-1 of the Title I leaves no doubt that: "Human dignity is inviolable. It must be respected and protected."

It was precisely this awareness that had already been present in the process of drafting the Charter for Fundamental Rights, which - later on - were adopted into the body of the Draft Treaty. In the Title VII of the Draft Treaty entitled "Interpretation and application of the Charter" the status of the Charter had been settled so that the scope and interpretation of rights and principles had been known to the institutions, bodies and agencies of the Union. The crucial provisions in this context had been laid down in Article 11-52, points 2-4, namely:

"Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts (p. 2). Insofar as this Charter contains rights which correspond to rights guaranteed by the convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection, (p. 3). Insofar as this Charter recognises fundamental traditions common to the Member States, those rights shall be interpreted in harmony with those traditions" (p. 4).

One can expect certain ideological disputes to continue even after the formal completion of the ratification process of the Reforming Treaty. Thus, the European Convention adopted a relativist, non-cognitional approach to constitution-making, which was hoped to provide a wider window of opportunity for axiological consensus.

Interestingly enough, one observed a divergence in the public perception of constitutional debate in the new and old EU countries. In current mem-

ber countries a great deal of attention was paid to political, social and economic values attached to civil rights and freedoms, whereas in the new member countries, in Poland particularly, the focus was mainly on ethical values. This, in itself, constitutes the biggest challenge for the citizens of new Europe: how to merge the two distant perspectives on the same code of rights and freedoms into a single sphere of European civil society? However, it would be wrong to suggest that constitution-drafting is influenced solely by values that are ethical in nature. Other values that are praxeological, political, and economic in nature play important roles in constitution-making. The praxeological considerations are designed to ensure that public authority is structured so that it functions effectively.[12]

Praxeology of European citizenship

The most visible manifestation of the praxeological dimension of European citizenship as defined in the Draft Treat could be found in the catalogue of political rights, which had been put in the form of provisions of the Title V. The centrality of political rights attached to European citizenship could be explained in terms of a constant efforts undertaken by the European Union institutions to limit so-called "legitimacy/democratic deficit". The previous code of rights as settled by the Maastricht Treaty with subsequent changes had been enriched by the establishment of a right to good administration, which guarantees every person ...''the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union" (Article 11-41). The overall code of political rights includes: right to vote and stand as a candidate at elections to the European Parliament (Art. 11-39), right to vote and stand as candidate at municipal elections (Art. 11-40), right to good administration (Article 11-41), right of access to documents (Article 11-42), right to refer to the European Ombudsman (Article 11-43), right to petition (Article 11-44), right to move and reside freely within the territory of a Member State (Article 11-45) and right to diplomatic and consular protection (Article 11-46).

As has been already pointed out, the evolution of European citizenship that can be observed from the adoption of Maastricht's code of rights until the elaboration of a Draft Treaty by the European Convention should be seen in light of a permanent striving of the Union to increase its popular legitimacy. If legitimacy is defined not exclusively in terms of a lawfulness of procedure that leads to establishment of democratic political representation, but also in terms of societal recognition, then the deepening and widening of the European citizenship certainly enhances the legitimacy of the European inte-

[12] See: 7, p. 65.

gration process. Let us now consider the legitimacy-building potential of European citizenship through the analysis of impact that European citizenship has on emergence of European demos or European civil society.

European demos, identity and legitimacy

As I have argued already the restructuring of scope and interpretation of the European citizenship code in the Constitutional Treaty and more specifically in the Charter for Fundamental Rights may lead to consolidation of the European demos or European civil society as one may put it. The result of the European Convention diligent work opened up a chance for emergence of European civil identification, in which there co-exist overlapping political communities and where there appear many channels of interest advocacy within the domain of public governance. It is plausible to expect a slow but firm dismantling of the long-lasting symbiosis between the nation-state and civil identity/loyalty. As Joseph Weiler put it convincingly, the normative or in that sense constitutive aspect of European citizenship dissolves interdependence between citizenship and nationality within the supranational constitutional sphere, which in turn leads to establishment of the Union composed by citizens, who by definition do not share the same nationality''[13] From this perspective, "The substance of membership (and thus of the demos) is in a commitment to shared values of the Union as expressed in its constituent documents, a commitment, *inter alia,* to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly opposites of nationalism - those human features which transcend the differences of organic ethno-culturalism."[14]

Consequently, European citizenship denotes what Jürgen Habermas defines as "post-national constitutional patriotism"[15] as well as a precise allocation of citizens' rights and obligations within the distinctive domains of Member States jurisdictions and the body of the Union's law. Popular identification with the values embodied in the EU's constituent documents - in the Charter for Fundamental Rights in particular - provides a normative source of legitimacy whereas the complementary source is to be found in day-to-day implementation of European citizens' rights code within the jurisdictional spaces created.

[13] J. H. H. Weiler, *The Reformation of European Constitutionalism,* "Journal of Common Market Studies" 1997, No. 35, p. 119.

[14] *Ibidem.*

[15] J. Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe,* "Praxis International" 1992, No. 12.

By way of conclusion, it can be stated that just as the very notion of citizenship was constitutive for the state itself in the Aristotelian times, national citizenship was deeply interwoven with the idea of democratic nation-state, the emergence of European citizenship symbolises a new understanding of democracy in today's Europe.

DISCUSSION

- Professor Manfred Weiss, PhD - Frankfurt University

If I may refer for a moment to today's judgement, which we get from the European Court of Justice on the Volkswagen case: the question which really has to be discussed I think seriously referring to all of those freedoms is the question of the extent to which protectionist policies are still necessary, and how far can the freedoms really be implemented. This is still a tension which is very delicate, very problematic, in particular if we integrate in this picture the social dimension, the question what about, for example in the case of investments, takeovers and so on, what about the workers' side in this picture.

- Professor Harald Kundoch, PhD - Gelsenkirchen University of Applied Sciences

The Fortress VW, we talked this morning about this word "Fortress" will be turned today probably, and I will explain it to you now. The "Fortress" means it is a case European Commission against Germany. This is not very spectacular in itself, because we have more cases against other big countries like the United Kingdom (British Airport Authorities), the Netherlands with telecommunication, and also we were talking this morning about Hungary, which is a prospective case, not at the moment actually at the court, but it will come to this case. Let me first explain the Volkswagen case. Why is it a case? In 2002 we had a case against the French company Elf Aquitaine. All of the companies I mention are state-held companies, and now going to be privatised. So this is the situation. And the essential word for this is "golden shares". In the case against France referring to Elf Aquitaine, this expression has been used for the first time. What does it mean? Golden shares means that the state has still the possibility to block decisions. Why? We have free movement of capital, and equally, as you told us, equal treatment, Chairman, every shareholder should be treated equally. But there are some shareholders who have double votes, more votes than only the shares they obtained. This is quite surprising. The idea is that the state in its mind believes in its special responsibility for certain branches, for instance energy, telecommunications,

cars (Daimler Benz, the same thing, and now Volkswagen), and in Hungary also energy.

Referring back to my speech, it is only the question of Articles 56-60 that we have an internal market, but the responsibilities go further, they concern also the relations between the companies in the European market with investors from outside. And who are those investors? What do you think about investors from outside? You have heard about Gazprom, the Russian energy company, or Chinese companies which with a lot of money who take businesses over behind the curtains: they keep buying shares and at a certain moment they have the majority. This is why we have the cases I mentioned, Elf Aquitaine, British Airport Authority, and now Volkswagen. We have a special Advocate General handling it. All I can tell you is what the lawyers in Germany always say before the court: "at the high sea we are all in Gods hands". This holds true also today. Normally the Court will follow the proposal of the Attorney General, who today is M. Damoso Ruiz-Jarabo Colomer.

- Professor Manfred Weiss, PhD - Frankfurt University

I think again we have here the conflict between a sort of protectionism, which was defended unanimously by quite a few member states, and the freedoms which are embedded in the Treaty.

If you remember the referenda in the Netherlands and in France, I was in France at that time, and I can tell you that the constitution did not play a role whatsoever in the referendum, it was absolutely irrelevant. What was relevant for most people was the question: what does Europe mean socially for us? Workers were afraid - it was the time of the first draft of the service directive - that the impact might be that they all lose jobs and so on, that people would come from other countries and so on.

- Professor Harald Kundoch, PhD - Gelsenkirchen University of Applied Sciences

Yes, but the question is, do we not have to dig deeper to find what we think could be the soul of the project? I will dig deeper, and I refer to Ludwig Erhard, I am very proud that my English colleague, Ian Barnes, quoted Ludwig Erhard. One of Erhard's very simple sentences was: Social is when we have full employment. When we have full employment, this is social. In my opinion, this is right. But I will come back to social in another way.

When we talk about identity, soul, then we need, and this had not been the case, to talk about the European Parliament. The European Parliament - in the first beginning of the EU it was named Assemblee Parlementaire, not a parliament, that's a difference. And it should be the representation of all European citizens. The fact is however that (I was dealing with this topic in 1973, and

I worked on the first direct election) we have no common law to elect this parliament.

I will focus on two subjects: the soul and the identity. I have got this morning in your institute this folder. And this is named EuroCulture, and this is a very good folder. Culture is one of the symbols. Dennis de Rougemont, a citizen living in Geneva started with this, but also a Polish professor, Jerzy Holtzer, who wrote a very important book about the relation between Poland and Europe. And I could fill another speech with remarks of Jerzy Holtzer. And there is a second possibility to achieve identity, after culture, common Euro culture: it is sport. I will tell you about a personal experience with the Commission. I was responsible in 1989 for the Universiada in Germany, in Duisburg. Every two years students from all over the world come to a different place, to Sheffield for instance, we were talking about that. And so I asked the Commission in a written paper why we had at the Olympic games no common sports team? We do not have a common sports team, we have national teams. Universiada is something you have here in the University College, *Gaudeamus Igitur*. This is the answer for the Universiada and what every sportsperson gets when they obtain the first place: we hear this anthem. But what has happened now in the Reform Treaty? No symbols. Nothing common, European. So this is a step back to the nationalised situation. And I apologise, but there are some signs in Poland in the previous government which had been also putting more efforts into the more nationalised situation. We have this situation, we must keep an eye on it, and perhaps this might be a lecture for next time but I think if you understand what I said, this is in my opinion, the key notes for identity: culture, sports and common spirit, and also in this matter I wish you all the best.

• Professor Rolf Grawert, PhD - University of Bochum

The expression “European identity” derives from the Treaty in connection with defence and foreign affairs of the European Community, not with the interior of the Union. Therefore the expression “European Community is a vision”, as you declared. And therefore I may ask, we have as a whole of the Union the rights of the citizens, the migration, the living in the EU, education (or should it be education?), or - it would be my thesis - the euro? Because we had our German soul in the *Deutschmark*, and therefore perhaps, and we discussed it very often with French friends, perhaps the euro can become a secret soul, from the euro to the industries and to education and so on. That was like the beginning of the community and the Union and perhaps the identity will work something like this.

And the last question to the citizenship, and perhaps the next speaker in the afternoon can answer this question too, the expression “nationality” derives from the 19th century. And since this time nationality means that a per-

son is owned by the state totally. They must die for the state, they must give everything for the state, but they can expect also what is necessary to live in the state: security (now we speak more of security than of defence and liabilities). And therefore my question: what are the bases of this European citizenship, what so to say "intelligent design" is behind this citizenship compared to nationality?

- Professor Reiner Arnold, PhD - Regensburg University

Just a short question, although I do not know if the answer could be so short. What are the characteristics of an identity, both national and supranational identity? In the Reform Treaty and in the Constitution you will find a guarantee of national identity, already expressed by Article 6 paragraph 2 of the EU Treaty, which is now taken over by the Reform Treaty. It is defined somewhat, for example the fundamental constitutional structures are part of this identity. Could we transfer these ideas, that is to say that common values which are of constitutional character which shall be common to the member states as well as to the Union, on the basis of Article 6 par. 2 of the Union Treaty, are these common values maybe such basic constitutional structures which can give in part identity for the EU? Identity by values, so to say. You spoke of symbols. The Dutch did not like symbols. Yet possibly the symbols are not as important as values?

- Professor Dieter Kugelmann, PhD - Harz University of Applied Sciences

First question. Citizenship is linked to participation in elections, and to Article 17 and 18, the free movement, but what the European Court made out of it is a fairly social citizenship, because most of the judgements given by the Court concern access to social assistance, which Professor Grawert mentioned. So is the definition of citizenship in a European context necessarily a social one?

And the other question to Professor Barnes, concerning the economic side of it. While you are right, there are a lot of contradictions in the text now, there used to be a lot of contradictions in the old text too. So if we read Article 2 now, it is more or less the same - still plenty of contradictions. And we live with that, and maybe it is a good thing to live with only one world, "social" In Germany we only have one word, "social" and the fundamental law and we made out of thee two our social system. But that is a decision of politics, not decision of law, that is what politicians can afford, or they think they can afford, and perhaps that is also the way. So my question: who will decide on this, is it wise to leave it to the European Court, to say "The Court will decide what social market economy means"? The Court will probably be reluctant and we will rely on the com-

mon market. Or is it just an anchor, a key issue to evolve, a dynamic concept of social market which may change with the years?

- Pamela Barnes - University of Lincoln

One of the themes that I noticed coming through the discussion of identity very strongly has been an emphasis on education. I think what is important for us to remember is that in the Laeken declaration the whole reason why the Treaties should be reformed, and the reason for our search for a constitution, is that we should make things simpler, more open and transparent, and in particular the European Union should become more relevant to the young. And we have been talking about education, we are in an education establishment, yesterday we had speeches which were looking at questions like the democratic deficit, I remember one particular phrase, “a common mentality of European jurists”, through education, through the way in which we open the debate and the discussion about European law. My question is just a very quick one: One of the things that I have not noticed during the discussion of our first speaker when he was talking about education and translational programmes and projects was reference to the Bologna process. I wondered to what extent he felt that it would feature in the development of more openness for the young?

- Professor Manfred Weiss, PhD - Frankfurt University

We have heard from Professor Kugelmann that citizenship actually is linked to the social concept and to the educational concept. I am just coming from a conference on migration in South Africa, and there were mainly non-Europeans. And the big worry of these people is what is the impact of what we do in Europe. When we are strengthening the concept of citizenship in this dimension, what does this mean for non-citizens who might consider perhaps one day also going to Europe? May I add this question to you. Please start, and then we go around the table.

- Grzegorz Pozarlik, PhD - jagicllonian University

I will try to be very brief. If I understood your questions properly, the question concerns the relationship between national and European citizenship. I believe, and this is also a contribution to other questions that are perhaps related to that, we are now debating the future of democracy in Europe. Democracy is being challenged by the very need to redefine its boundaries, also social boundaries. That is to say, democracy, as has been rightly pointed out in terms of the organic connection between nation and state, democracy is now transcending the boundaries of the nation state, and loyalties are being dispersed. I would say that European citizenship provides a modest but nonetheless real chance, an opportunity for adaptation of many aspirations

and desires. Many Europeans seem to not find this in the reactions of nation states, Poland included especially. We are now constructing a post-national state understanding of democracy. Democracy is no longer organically bound to the nation state. I would say that we need European citizenship, especially we need to give the chance to millions of Europeans to get involved in decision-making, in creating a European public sphere, for this very purpose: to finally find an appropriate and full alternative, a wide spectrum of possibilities to allocated our dispersed loyalties. So I would say, yes, Europe is offering a space for multiple identities, local, national, pan-European and even global. So once again, the real question is what is the future for democracy, and in Europe this political system is offering a chance to overcome this organic, 19th century born concept.

The European Court of Justice and its understanding of citizenship is indeed mainly of a social character. Yes, yes. But I would not say that every aspect of our life is social. It is also political, economic, cultural. In a way you are right saying that the euro is becoming now a common denominator for millions of Europeans to call themselves "Yes, we are Europeans" Yes. Romano Prodi was outspoken in arguing that the euro is now becoming a real material denominator of European identity. However, let me refer once again to Schuman and Monnet. An ever-closer union of citizens of Europe reduced only to common currency is a bit too modest a project. The euro is important as a starting point for building a European public sphere, European public authority, European public identity. Let me conclude by saying that European citizenship is offering at least a modest window of opportunity to finally overcome the boundaries of nation state as the genuine depositary of democracy.

• Professor Zdzisław Mach, PhD - jagiellonian University

Of course it is not possible to give a full discussion in this very short time, but let me say a few things. The way I see identity is as a process of construction of the collective image of who we are. And this can only be done contextually in relation to partners, Others, who give meaning to the relation, who give meaning to our own image. It very much matters in relation to whom we are building our collective identity. This is what makes it difficult, of course, in the European context, to build a collective identity, because the question remains who are these Others. Are they the Islamic people, the Chinese, the Americans, the Russians?

In the old days it was simple, because whatever other reasons to integrate Europe or the EU or the Communities, the Iron Curtain was a boundary which served as a context-making boundary. There was another Europe, in relation to which the European Communities could build their own iden-

tity as market-oriented, respecting human rights, freedom, democracy and so on because there were others. And now we have to find the context or redefine the context.

As far as national identity is concerned, we know better, because this issue has been studied for generations, and in Europe there are at least two different models of national identity, one is based on ethnic identity, common culture, common heritage, common origin, and the other one is based on citizenship, and this other model which I think is much more relevant to the project of European identity. It is kind of distinguish conceptually between nationality and citizenship, like in France, where the French national is a French citizen and vice versa. In Poland for example everybody understands the distinction, because we know very well because of our history that one can be a Polish national without being a Polish citizen. Of course an ethnic model of identity is not suitable for European identity, we cannot do it, and even if we could, we should not, I think, because it would be excluding others, and if we want to develop further, if we want to build new relations with neighbours, and if we want to open up to newcomers, to new members perhaps, then we cannot exclude from the start. In fact, the least problematic border of Europe is the northern one because there is nobody on the other side to whom we say "No, you do not belong any more".

As I am looking for a soul of Europe, of course I know it is provocative and it is not easy, but I think the soul is in mobility, dialogue and negotiation. If we define ourselves collectively as a community, then the community is characterised by the ability and intention to negotiate, to undertake dialogue, to encourage mobility, not only in the physical sense, but also broadening horizons, inviting others to dialogue. This makes us much more inclusive than exclusive, but also allows us to negotiate values, to negotiate a framework of reference. This is essential, because on the one hand nobody is excluded from the start because of what one is. The door is open, but it is not so open as to say that anybody is European, because you must be able and willing to negotiate and to contribute and to be active. Therefore, I would even be inclined to deny European identity to people who have been in Europe for ages as long as they think they have the absolute truth and they are not able or not willing to open up and not negotiate. And of course I am not going to name names, but it would be possible if one wanted to.

Referring to the question about Bologna process, I think this is one of the projects that is contributing to European identity, because it is mobility, negotiation, dialogue, it is also looking at oneself from the outside through the eyes of the others. It is comparing, but also building something common. It is not to replace one's local or national or different still identity by something else, it is negotiating and taking in brackets and seeing one's own identity, one's own

heritage for instance in the context. And I know it was deliberately done this way, but it is also in fact working this way. Millions of students of course take part, and this of course is an economic project, but there are many other projects involved. So yes, this is what I am talking about.

• Professor Ian Barnes, PhD - University of Lincoln

About identity - a really interesting question, actually. Probably like our previous speaker, I always knew what the EU was all about, up to that night in 1989: it had been always about the fact that we were different from what was on the other side of the Iron Curtain. And this is really what you were alluding to. I guess it was that kind of certainty where everybody knew: it was about East versus West, really quite clear. There wasn't any big intellectual debate about this of the kind that we look at today; we actually knew.

I would like to say two brief things which relate to the economic maters. The first thing is steps. Steps. If you look at the sort of economic map of Europe, you can see steps. Top of the steps, rich countries. And then you go down the steps until you get to the poor lot. Basically I think Europe is being defined by steps to a certain extent. We would very happily welcome the Swiss, because they are rich, and by the way they are quite good at exploiting others, but we of course would not welcome the poor people who live further east. And to a certain extent you can see it as a kind of overall sense in which the EU defines itself. It is not a very comfortable thing to say, and of course there is also political steps and so on, but the economic aspect really does matter. And if you look at it as a whole, it really strikes you: are they good enough, are they rich enough to join us. It is a disturbing fact, we define ourselves very much in economic terms as well as in political terms. The only problem is of course that it is not very polite to actually say that, and that is a very interesting point in itself. So this is just to take things somewhat further.

The second point is about the euro and identity. We have all been about the euro in recent times, and one thing you have got to remember is that all the stuff that the Treaty says about requiring the new member states to join the euro may not come to a very great deal, and just a quick health warning here: yes, there is a requirement for new member states to join, but many of them will choose not to qualify. Just simply take the Swedish model. The Swedes are obliged to join. Yet the fact of course is that as time goes on, less and less people feel the enthusiasm.

So it may not be that the euro will become a symbol, because we may not be certain that people actually choose to qualify, because although it is a Treaty commitment, there is no time set on it, and that again in itself is a very interesting matter. People always ask us "When will the British join the euro as a symbol of our European commitment?" It is quite simple, ladies and gen-

tiemen, we will not. The reason why we will not of course is because if we are doing badly, they will not have us, and if we are doing well, we would not want to join anyway. Moving on to the issue of what the notion of the social market economy means in practical terms, and who will interpret it. It is quite clear that if you look at the idea of the social market economy, back to the years when Ludwig Erhardt was really a genius, he was absolutely extraordinary, he was the finance minister and later the chancellor of Germany. His version of the social market economy was very different to this that exists in Germany now. And I think what happens with these phrases is that they are useful, in that they set a tone, they set a series of ideas, they remind us of what the European Union has got to be, it has got to balance a purely economic gain and a social responsibility towards the fellow members. On the other hand, our ideas will change; at the moment the notion of the social market economy seems really good because the European economies are doing quite well at the moment. What we tend to find is that once the economies go through a downturn, as it was 4-5 years ago, you would get a real sense of doubts, and then of course this scurrying back to national objectives and then the European mission tends to come into fashion again. You can see it to a certain extent even now, particularly the French at the moment are going down that line, looking for national solutions to things. We already heard about German solutions to things as well, and what always strikes me is that it is useful to keep these phrases because it reminds us that there must be a degree of solidarity within the Treaties and within the membership. So, my bet is that social market economy will be reinterpreted several times, as it has been already in Germany; it used to mean something very substantially different than it does now.

• Professor Manfred Weiss, PhD - Frankfurt University

I will neither take an effort to draw conclusion from what we did this morning, nor will I comment the different interventions. I only can say, it was a real, to come back to your sports picture, it was a real marathon we had this morning, with speeches starting from human rights, going through liberties, through identities, citizenship, freedom of capital... It really was something which, if you look at the different topics, might rather lead to a sort of confusion than to a sort of consistency. But I think everything has shown to be linked together and we are talking about what to do after this Reform Treaty with this European project. Can we be optimistic, do we have to be sceptical, and so on. Now we have a lunch break until 15:30, sharp. When you will be here again, you will be relieved; I will not be the chair person, so the democratic deficit will be overcome! But please try to be here in time, because we have again quite a few speeches and want to have some discussion. Please join me in thanking all our speakers of this morning and the participants of the discussion.

Part 3

ZBIGNIEW CZUBINISKI, PhD - jagiellonian University

European Citizenship - How Far Can We Depart from Member States Nationality?

Usually I prefer to express myself in Polish of course, because that is my mother tongue. However, because I have to formulate a couple of provocative questions to all my British and German colleagues, as well as colleagues from other new member states, and because I am a part of the common project, which was started two years ago, and there are people from the UK, Germany, Austria and the Czech Republic involved, I will rather express myself in English. I would like to present to you only five points, which lead me to only five conclusions.

Point number one: during the long process of preparation for EU membership we were asked to fully harmonise our domestic laws with community law, and in addition we were asked also to prepare a draft of the new Polish constitution. It was understandable that the contemporary constitution, the so-called “small constitution” was not enough, because it actually only amended a few provisions from the 1952 constitution, which was the constitution of the Polish People’s Republic. It simply could not work.

The new constitution was prepared in 1997, it was adopted in April, and at that time obviously a majority of my colleagues at home and aboard thought it was a wonderful constitution, and actually we had solved all the problems and the new law is fully harmonised. It turned out not to be so. Let me point out to you a couple of things only. From the beginning, certain aspects were mixed, including terminology, which is extremely import for continental Europe. When to use the term “national” and when to use the term “citizen”? In our 1997 constitution unfortunately those two terms are used interchangeably to cover the same meaning. And I will not try to present to you all fourteen rather serious mistakes, but I would like to refer to Article 55, which reads: No Polish national can be extradited. Later when we were asked to prepare this article

for the institution of European arrest warrant, it caused us a lot of problems, but fortunately, it was solved.

Why did I start with the state level? Simply to find the answer: can we really depart, speaking about European citizenship, from state citizenship? I shall now take a leap straight to my conclusion, because what I am going to tell you is: not really, we cannot depart from it. It is a very gradual process which we have to take step by step. We begin with constitutional state level. Later we have to go to international public law, international private law, and finally we are entering the EU law, which was actually what happened when European citizenship was introduced by the Maastricht Treaty. What do we have to refer to? And what is our source of information, institution and, let us call it using Professor Usher from Edinburgh's terminology, the orientation point?

First of all, how can we classify each individual? Each member state of the union provides us with certain terms. But the naming is different. We have to define what is a citizen of the state. But on the other hands, in some constitutions we have a kind of equivalent for citizen, which is a national. Another problem: a resident, legal resident and illegal resident. When we go a step above, on a higher level, it is difficult because definitions of a resident are completely different in different constitutions of member states. Migrant and immigrant - the same story. I tried to compare constitutions from six member states, and also I could not find on the constitutional level a common ground. Alien and foreigner - the same story. And quite frequently we have suddenly different terms such as a person, physical person, and individual, and definitely the last category which is not desired by any state, i.e. the stateless person.

Can we find solutions? Yes, we can. We can, in international public law. Because as a matter of fact, international public law mentions that the traditional subject of international public law, that is to say the state, actually provides and is supposed to give the full definition for citizens, and furthermore, international law says that it is up to the state to define how we are going to treat its individuals. Moreover, it was written in the 1933 Montevideo convention that it is also up to the state to determine the scope of right and duties for its citizens. There were some controversies, because the best method just to classify all individuals went to the states and immediately the international community found that in some cases it is not enough, because we have the situation that one individual person might be connected with two or even more states. So there were some rules to define, because it was up to the states to decide and it was the state's responsibility to take care of each individual. So now we have the rules. For instance, the Notebon case, by International Court of Justice, when we had a definition of the so-called effective citizenship, the real legal political and economic bind with the state and also not taking citizenship simply by convenience. Furthermore, we have at-

tempted successfully, and we have several conventions, what to do with people who are not lucky, homeless, stateless? So we invented a special kind of passport for them, plus also the development of humanitarian law, the Geneva convention, where we find provisions referring not only to citizens but also to people without citizenship.

Let me now come gradually to another level, which would be the level of international organisation, the level which slowly will lead to the European Communities and later on to the European Union. What would be the turning point? I think that the best example which might be served here is the Count Bernardotte case, an advisory opinion expressed by the International Court of Justice in 1948, in the case for reparation for injuries suffered in the service of the United Nations. Let me just refresh your memory of what happened: a citizen of Sweden came to Palestine and was supposed to help solve certain cases of deaths and problems connected with how to divide Palestine, etc. And he was killed. When the family referred to the Swedish government, the government declared that it had not sent him there as a civil servant of the Swedish government; he was in Palestine as a high-ranking officer of the United Nations. Since this advisory opinion the United Nations finally was treated as an international entity, it had rights that we call *ius tractatus*, and also the special protection for all individuals working for the United Nations.

This is why it was relatively easy when the Treaty of Rome was introduced and later on finally when we had the "international political earthquake" when the Treaty of Maastricht introduced European citizenship - because it was in fact just to meet wishes of all the European Union countries. Why? Because of the different forms of the European identity. And in Europe, actually, and that is my question to all of you, I think that we can agree and hopefully it is not very controversial, that forms of European personal identity exist on different levels. First, the level of the city, the level of the region, later on definitely identification with the nation state, later on, identification - and it is growing, particularly what I am observing right now among my students, among Poles, among all those new members of the EU - identification with the European Union. But also, there is another aspect of identity, identification with the larger Europe, the whole Europe as a continent. What was the answer for all those wishes, all those demands? It was the introduction of European citizenship.

At the beginning there was no political will to give such a long list of rights. And also, because there was such a great demand for such a positive aspect of this identity, it was proposed just to cut links between what we have in all constitutions, links between rights and duties. So just give only a certain limited amount of rights. It would be wonderful, and people really would support the Union. That is exactly what happened. At first in Article 8, and later on

in Articles 17-22, we have a long list of all those wonderful rights. Wonderful rights which are, as a matter of fact, strictly connected with domestic citizenship, with state citizenship, and with state responsibility. Let me mention only one. The right to move. Is it not connected with citizenship in a state? Later - diplomatic and consular protection. Regulations concerning the right to be elected in municipalities where we reside? In any case, it was enthusia-

However, states and also practitioners (and I have to speak partly as a practitioner) were also afraid. Why? Apart from written law, convention law, treaty law, we have in the system of the EU also a very important role played by the European Court of Justice. The Court in about 20 cases expressed its position. Particularly one judgement, concerning the so-called Micheletti case, was really dramatic. In brief, what was the case about? It was an Argentinean who moved to Italy, he was not so successful economically but he gained Italian citizenship relatively quickly. Later he moved to Spain and in Spain he was treated as an illegal alien. Spain wanted to expel him. He proved that he had Italian citizenship and according to European law Spain has absolutely no right to expel him. However, the Spanish authorities claimed that he had obtained Italian citizenship in a manner which was not fully legal. Who has the authority to determine legality of citizenship, and how each individual may obtain citizenship in another member state? The Court said clearly that it is only up to a member state to determine how, when and in what time an individual obtains citizenship. Other states, and also according to European law, they have simply to accept that. In some countries there were a lot of worries, because they noticed that they had to grant privileges, but had no influence on what other countries, and also those newcomers to the EU, did with their state citizenship. That was problem number one. Problem number two which I am going to point out briefly was that with political rights, there was also another couple of judgements, making European citizenship a gateway for social benefits. Other member states have to accept legally and provide a legal status to European citizen. They are not only obliged to provide full political rights, but also social rights as well. That was a real problem.

In spite of all the difficulties, which were quite significant, there were some achievements. The greatest achievement is simply what we call in one phrase Schengen *acquis.* In spite of some minor difficulties it is a great achievement. Visa policy strictly connected with state security. Common asylum policy, which causes problems, but nevertheless is something good. What I think is an achievement of the Polish delegation is that we can speak about identity and we can speak about common points for European identity in the policy of the new neighbourhood, towards countries in the vicinity. And that was done: common policy towards residents from third countries.

Time for conclusions. Conclusion number one. I believe that writing down the idea, the concept of European citizenship is still *in statu nascendi.* And it should rather follow, I would rather say follow a few steps behind, what is going on with the mainstream of the EU law. Number two: this concept of rights and duties which is always in each state constitution for the citizen should be also transferred to the EU. It should not only privileges, rights, without duties. Another point which I would like to make quite clear: responsibility. We cannot develop more rights for European citizens without giving responsibility to the EU. Otherwise we will be at a loss. Another point: jurisprudence of the European Court of Justice. It plays a very important role, but can put member states in a very difficult situation, and in a couple of cases created more controversy than it solved. And the last comment is that at the current stage of European integration, the concept of European citizenship is still deeply rooted in the state tradition and it requires institutional experience and also legal solutions both from domestic law and from international law.

ARTUR GRUSZCZAK, PhD - jagiellonian University

Area of Freedom, Security and Justice in the European Constitutional Debate

Introduction

One of the fields of European integration most affected by the constitutional reform has been the area of freedom, security and justice. The commitment to abolish the pillar structure of the European Union was widespread, while the question how to translate the actual provisions on justice and home affairs into a new constitutional/reforming treaty gave rise to a lively discussion. The results of constitutional debate, from the European Convention to the IGC 2007, have confirmed the strong political will to reinforce the fundamental rights of EU citizens, introduce new forms of parliamentary scrutiny and strengthen the legal and institutional framework for the EU area of freedom, security and justice. Despite the importance of these changes, this paper puts forward the argument that the constitutional reform could bring about relatively limited practical changes to EU policies in the area of freedom, security and justice. Moreover, some provisions of the Reform Treaty may have a negative impact on the capacity and efficiency of cooperation in the area of freedom, security and justice and may further encourage the Member States to transfer most advanced forms of common actions outside the European Union.

Area of Freedom, Security and Justice - a brief description

The Maastricht Treaty on the European Union erected a three-pillar edifice of European integration whose third pillar comprised various forms of cooperation in justice and home affairs. Many of them had existed much before 1992 and their inclusion into the new organisation was a kind of cosmetic surgery. That face-lift of cooperation in justice and home affairs had obvious consequences for the nature of the third pillar and the overall balance of EU policies. The third pillar was a strictly intergovernmental area where the EU Member States kept their sovereign right to decide upon their home affairs and judicial cooperation, as well as regulate migration flows and safeguard their national borders. EC institutions had not much say in those matters and any progress of cooperation depended on consensus among the Member States.

In 1995 seven of the EU Member States abolished their internal borders and allowed for free movement of their citizens and legal third-country nationals across their territories. The emergence of the so-called Schengen area was a great leap forward since persons staying within this area could tra-

vel freely without border controls, yet at the same moment new advanced forms of visa, asylum, police and judicial cooperation were put into motion. The most impressive element of the Schengen structure was a huge computer network called the Schengen Information System, gathering lots of personal and material data and checking them against delivered items (alerts'). Obviously enough, the Schengen version of cooperation in justice and home affairs made a considerable difference in comparison with limited and meager results in the EU third pillar.

Such an incompatibility and in a sense perplexity of justice and home cooperation provided the inspiration to enact the Amsterdam reform. Although the Amsterdam treaty reforming the European Union was intended to improve the functioning of numerous policy fields, its provisions concerning justice and home affairs were controversial. First of all, a relatively simple and transparent structure of third-pillar cooperation was replaced by a multi-level asymmetrical and entangled cross-pillar construction in an "area of freedom, security and justice." Provisions relating to free movement of persons were transferred to the Community pillar, although full communitarisation of immigration, visa, asylum and other policies related to free movement of persons was placed under 5-year quarantine. The third pillar was reduced to police and criminal justice cooperation. The strength of Community institutions was much bigger, although in the third pillar still limited due to the unanimity principle in the Council, "national security clauses" and special arrangements in decision-making and jurisdiction of the ECJ. The Schengen *acquis* was inserted into the framework of the European Union, although its provisions were granted special autonomy. Since the communitarisation of free movement of persons was opposed by the United Kingdom, Ireland and Denmark, the Amsterdam treaty established special derogations, the so-called opt-outs, for the three Member States, allowing them to opt in with respect to secondary law in immigration, asylum, visa, border control and civil justice policies. Adding a special Schengen association agreement of Norway, Iceland and - more recently - Switzerland, as well as Council decisions concerning Irish and British participation in some parts of the Schengen *acquis,* one could feel lost in this complex and entangled legal and institutional construction of the EU area of freedom, security and justice.

Step forward, step back...

Evidently, the need for simplification and legal-institutional rearrangement of that area has been well visible in the developments of EU reform since the Laeken European Council. A special Working Group X had been formed in the Euro-

pean Convention[1] and worked out a set of important proposals,[2] of which many were struck out by the Member States during the 2004IGC. Overall consent on abolishing the pillar structure of the Union went together with the Member States' reservations concerning specific cooperation fields in the third pillar matters. Regardless of particular stipulations voiced by some of the Member States, the Treaty establishing the Constitution for Europe (the 'Constitutional Treaty') formally abolished the three pillars and replaced them with a single legal and institutional framework. Hitherto 'horizontal' forms of cooperation and - quite often - policy shifts were given up as well. The treaty gave the principle of primacy of EU law constitutional sanction, and strengthened the role of the European Parliament, admitting at the same time national parliaments to some forms of scrutiny over certain aspects of EU internal security policy. A 'solidarity principle' was introduced in order to better share by the Member States costs and responsibility for managing migration, controlling borders and preventing terrorism. The incorporation of the Charter of Fundamental Rights,[3] confirming the right to freedom and personal security, to move and reside freely within the territory of the Member States, to asylum, to protection of personal data, and containing principles of proportionality and *ne bis in idem* in criminal justice, was another novelty.[4] Yet formal abolition of the pillar structure was partially undermined by special provisions concerning first of all internal security matters, especially police cooperation and criminal justice.[5]

Despite the importance of these changes, this paper puts forward the argument that the constitutional reform could bring about relatively limited and practical changes to EU policies in the area of freedom, security and justice due to the following factors:

[1] See Final Report, doc. CONV 426/02.

[2] British opt-out and Polish unilateral declaration would significantly limit the scope for the Charter.

[3] The list of the most relevant innovations includes:
- Legal integration of the area of freedom, security and justice (formal scrapping of the third pillar);
- Increased parliamentary control on the supranational (European Parliament) and national levels (national parliaments);
- Strengthening of the European Court of Justice;
- Binding character of the Charter of Fundamental Rights for EU institutions, bodies and agencies as well as for the Member States;
- Evaluation by the Council of the implementation of the Union policies in AFSJ by Member States' authorities with the view of full application of the principle of mutual recognition;
- Principle of solidarity and fair sharing of responsibility regarding free movement of persons;
- Optional establishment of a European Public Prosecutor's Office.

[4] See J. Monar, *Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the Area of Freedom, Security and Justice'?,* "European Constitutional Law Review" 2005, Vol. 1, No. 2, p. 226.

[5] The 'Reform Treaty" was signed in Lisbon on 13 December 2007 as the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

1) Minor changes to legal measures and decision-making procedure,
2) Continuity in legal effects of old' third-pillar acts,
3) Upholding of the general 'national security' clause,
4) Emergency brakes in policing and criminal justice,
5) Institutional orchestration,
6) 'Protocolarisation' and opt-outs.

Ad 1) The present Community legal instruments will replace the wide range of measures applied in the area of freedom, security and justice. Regulations and directives should predominate in the legislative output of EU institutions. It would not make difference in policies relating to free movement of persons, subject to the first-pillar 'hard' instruments since 1999. Likewise, it should not bring about significant change in the now third-pillar legislative toolbox. For a couple of years the most frequently adopted, feasible and relatively efficient instrument has been a framework decision. There is a widespread belief that they are just a mirror of directives: binding as to the result to be achieved upon each member state to which it is addressed yet leaving to the national authorities the choice of form and methods. Convention, the strongest legislative measure in the third pillar, is practically dead. The last convention adopted by the Council was the 2000 Convention on mutual legal assistance in criminal matters. In a similar vein new 'decisions' would have the same binding force as 'old' decisions adopted by the Council to issues of a more narrow, specific nature.

The Reform Treaty upholds the Community method, renaming it 'ordinary legislative procedure'. This procedure is valid in Chapter IV of the Treaty on the Functioning of the European Union (TFEU) in the area of freedom, security and justice, however with some exceptions of certain areas where measures are taken in accordance with a special legislative procedure, i.e. following unanimous decision by the Council after consulting the European Parliament. That 'special legislative procedure' to:

- measures concerning passports, identity cards, residence permits or any other such document;
- minimum rules with regard to the definition of criminal offences and sanctions in the area concerned;
- regulations on establishing a European Public Prosecutor's Office from Eurojust;
- decision to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension;
- measures concerning operational cooperation between police, customs and other specialised law enforcement services;
- conditions and limitations under which the police, customs and other specialised law enforcement services of the Member States may operate in the territory of another Member State.

As far as measures concerning family law with cross-border implications are concerned, the Reform Treaty allows for a 'passerelle' consisting in applying ordinary procedure to certain aspects of family law following unanimous decision by the Council after consulting the European Parliament. Interestingly enough, national parliaments shall exercise control over any extension of ordinary procedure to family law.

Although legal migration, currently governed by unanimous voting in the Council, would be put under ordinary procedure, the Member States would nonetheless keep the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Ad 2) A new protocol on transitional provisions, adapted from the Constitutional Treaty, provides that the legal effects of the acts of the institutions, bodies, offices and agencies adopted on the basis of Title VI of the Treaty on European Union prior to the entry into force of the Reform Treaty shall be preserved until those acts are repealed, annulled or amended in accordance with the Treaty. As Steve Peers rightly concludes: "This clause would mean, for instance, that third pillar measures adopted before the entry into force of the Reform Treaty (or at least, Decisions and Framework Decisions) have no direct effect."[6] The recent case C-119/05 Lucchini Siderurgica[7] confirms that.

Ad 3) Starting from the Schengen Convention of 1990 and the Maastricht treaty, cooperation in justice and home affairs was subject to 'national security clauses' entitling the Member States to adopt measures to safeguard internal security and public order and to reinstitute national border checks at internal borders.

The Reform Treaty preserves those clauses. According to Article 4 TEU, the European Union shall respect "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State". New Article 66 TFEU confirms that the provisions on the area of freedom, security and justice "shall 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"

Likewise, the politics of internal security may be exempted from the jurisdiction of the ECJ. According to Article 240b TEU, in exercising powers regarding the provisions on police and criminal justice the Court of Justice

[6] S. Peers, *EU Reform Treaty analysis 1: JHA provisions*, August 2007, downloaded from: http://www.statewatch.org on 25.07.2007.

[7] Case C-119/05 Ministero dell'Industria, del Commercio e dell'Artigianato *v.* Lucchini SpA, formerly Lucchini Siderurgica SpA, Official Journal of the EU C 211, 8 September 2007, p. 3.

"shall have no jurisdiction to review 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 Member States with regard to the maintenance of law and order and the safeguarding of internal security." The draft Treaty upheld thereby restrictions imposed on the ECJ from the outset of justice and home affairs cooperation in the EU. Moreover, under pressure from some Member States, the Reform Treaty introduced transitional period of five years after the entry into force of the Treaty before the European Court of Justice can extend its jurisdiction over measures of EU judicial cooperation in criminal matters introduced prior to the ratification of the Treaty. Hence the powers of the ECJ under the present Title VI of the TEU shall remain the same, including where they have been accepted under Article 35 (2) TEU.[8]

Ad 4) Since the Reform Treaty decides to enshrine police cooperation and judicial cooperation in criminal matters in the single legal framework and ordinary legislative procedure, the Member States secured "emergency brakes" in especially sensitive areas of that cooperation.[9] This is a classical sovereignty safeguard introduced into EU law under pressure from some Member States afraid of too deep penetration of EU norms and rules into their national criminal justice and police systems.

This mechanism, in relation to the approximation of criminal laws and regulations of the Member States, is as follows: Where a Member State represented in the Council considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine of the Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

[8] Any Member State may accept by a declaration the jurisdiction of the ECJ to give preliminary rulings on the validity and interpretation of framework decisions and decision, on the interpretation of conventions and on the validity and interpretation of the measures implementing them.

[9] See S. Garcia-Jourdan, *Le traité établissant une Constitution pour l'Europe: quels apports pour la coopération judiciaire et policière en matière pénale?*, R.A.E. - L.E.A. 2003-2004, No. 3, p. 380.

The ‘emergency brake’ may be used with regard to minimum rules of judicial cooperation concerning:

- mutual admissibility of evidence between Member States;
- the rights of individuals in criminal procedure;
- the rights of victims of crime;
- any other specific aspects of criminal procedure which the Council has identified in advance;
- definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension such as: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Another variant of ‘emergency brake’ refers to the situation of the lack of consensus in the Council necessary to adopt a proposed measure. It provides for the possibility of a group of Member States applying a ‘flexibility’ procedure. In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. Next the above-described procedure applies. This kind of‘flexible emergency brake’ is applicable to a regulation concerning the establishment of a European Public Prosecutor's Office and to measures concerning operational cooperation between the police, customs and other specialised law enforcement services of the Member States.

Ad 5) Coordination within the Council of the post-Maastricht third pillar cooperation between the Member States in the organisational framework made up of working groups and committees had been the task of the Coordinating Committee (so-called K.4 Committee) whose competencies were defined in Article I<.4 TEU. Post-Amsterdam AFSJ was covered by the wide range of working groups, high-level groups, expert groups, committees and networks. The strategic Committee on Immigration, Frontiers and Asylum (SCIFA) was responsible for the ‘communitarised’ cooperation while the Coordinating Committee (CATS) continued to be in charge of police and judicial cooperation in criminal matters.

The Reform Treaty upholds a coordinating body though limits the area of its activities to internal security matters. Without prejudice to Coreper’s prerogatives, a standing committee shall be set up in order to ensure that operational cooperation is promoted and strengthened within the Union as well as to facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned (like Europol or Eurojust) may be involved in the proceedings of this committee.

What draws our attention in the Reform Treaty is the enhanced position of the European Council as institution of the EU. Heretofore, the European Council has been entitled to provide the Union with the necessary impetus for its development and define the general political guidelines. The Reform Treaty highlights the strategic role of the European Council.

According to the proposed provisions, the European Council would keep providing necessary impetus and define general political guidelines (article 9b TEU) but moreover "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" (article 62 of a new TFEU). That "legislative and operational planning" may confirm the strategic role of the European Council, not only in the context of long-term strategic programs of strengthening and developing cooperation in the area of freedom, security and justice, but also in regular quarterly practice of its meetings.

The European Council acting unanimously seems to be the additional governmental institution guarding the guardians of the Treaties and watching over sovereignty of the Member States.

In the context of sovereign rights of the Member States, we have to stress that the member states retain a right of initiative in police and criminal justice co-operation alongside the Commission, which enjoys a monopoly of initiative under the community method. To be sure, the right of initiative would no longer be exercised on an individual basis, in order to avoid free riding and unreasonable legislative proposals surging next in the Council, it would be a collective initiative of a quarter of the Member States.

Ad 6) The Amsterdam treaty had introduced to the then established area of freedom, security and justice special regulations stemming from reservations of some Member States about communitarisation' of policies regarding free movement of persons as well as the decision to insert the Schengen *acquis* into the EU legal framework.

Numerous protocols attached to the main text of the Treaty brought about further differentiation of AFSJ and special treatment of certain Member States whose derogations from some parts of the TEC were approved and given normative sanction.

The draft Reform Treaty makes no changes to the practice of 'protocolarisatiori except for minor technical amendments. The JHA-related protocols (on the Schengen *acquis*, on British and Irish opt-out from Title IV TEC and Danish opt-out from most of Title IV TEC, on asylum for EU citizens, on British and Irish border controls, on the external competence over border controls) are still annexed to the Treaty.

The most important new derogation concerns the UI< and Ireland as well as Denmark which got a new opt-out from any individual proposal regarding poli-

cing and criminal law. Therefore, adding the present opt-outs of the three Member States, they managed to extend derogations to the entire AFSJ.[10]

Final remarks

The Reform Treaty in a sense is a step back, since it acknowledges numerous sovereign competencies that the Member States retain in their internal security policies and gives them wider room for manoeuvre in the field of internal security outside the legal and institutional framework of the EU. CEPS experts Carrera and Geyer pose a slightly rhetoric question: "did we scrap the pillars only to construct a 'mosaic' (a 'patchwork') in the Areas of Freedoms, Securities and Justices?'[11] Monica den Boer, referring still to the Constitutional Treaty, considered it the 'proof of the lack of vision about the long-term objectives."[12]

Indeed, the complex and entangled EU area of freedom, security and justice as erected in Amsterdam would after the present reform of the Treaties still be as complicated as before, with new provisions having in some cases a retrogressive effect. For instance, widened parliamentary scrutiny may discourage Member States from sensitive undertakings in the field of internal security, border management and migration. Introduction of a specific 'emergency brake' in some areas of judicial cooperation in criminal matters makes any progress in this area hostage of Member States.

Another evidence of the lack of progress in the third pillar area, or even false meaning of advancement in this field, is the arrangement of prerogatives and power of Europol and Eurojust. The role of both major EU bodies involved in internal security cooperation was kept limited to being an information clearinghouse and a coordinator of national activities in a support capacity. The question of assignment of operational powers to Europol indicates insurmountable barriers to a qualitative advancement in EU internal security cooperation. A commitment to endow Europol with operational powers was already present in the Amsterdam treaty. The Reform Treaty does nothing else than repeat this promise. Instead, national parliaments were tasked with the political monitoring of activities of Europol. Although some experts see this proposal as an example of exception clauses advocated by the proponents of intergovernmentalism,[13] we would rather consider it another brake restraining in

[10] Denmark's opting out does not include some provisions on visa policy (common visa list, single visa format).

[11] S. Carrera, F. Geyer, *The Reform Treaty & Justice and Home Affairs. Implications for the common area of freedom, security & justice*, "CEPS Policy Brief" No. 141, August 2007, p. 2.

[12] M. den Boer, *Crime and Constitution: a Brief Chronology of Choices and Circumventions*, "Maastricht Journal of European and Comparative Law" 2004, Vol. 11, No. 2, p. 143.

[13] W. Wagner, *Guarding the guards. The European Convention and the communitisation of police co-operation*, "Journal of European Public Policy" 2006, Vol. 13, No. 8, p. 1230-1246.

the name of national sovereign interests further practical collaboration unfolding on transnational level.

The logic of the reform in the area of freedom, security and justice is quite perverse. It seems that it could reinforce the tendency to develop novel forms of justice and home affairs cooperation outside the EU. The Reform Treaty explicitly acknowledges the opportunity to launch and develop certain forms of cooperation outside the Union. “It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security” (article 66a draft TFU). Variable geometry of internal security cooperation between the EU Member States is thereby sanctioned. The gap between intergovernmentalism and communitarism cannot be closed overnight.

EVA KOCEIER, PhD - University of Hamburg

Fundamental Social Rights in the German Constitution and in Community Law - Equivalent Rights?

Constitutions tend to be more than symbols; in the case of fundamental rights, they also have to provide means for the balancing of conflicting interests. In recent years it has become clear that, as a consequence of its role in protecting the fundamental freedoms, it will be up to the European Court of Justice to outline and define certain social rights - even in the absence of a binding constitution and community charter of human rights. The following paper will try to show what this may mean for the interrelationship between national constitutions and Community social rights.

I. Fundamental social rights in German law

The German Social Model has many specific features, such as the famous *Mitbestimmung* and codetermination by Works Councils. One of the most characteristic features of this model may be the coexistence of codetermination at the shop floor level and autonomous collective bargaining at the industry level. The constitution protects the latter. The German Constitution protects miscellaneous fundamental social rights and sets out the basic pillars for collective bargaining, but does not provide a complete picture of the German social model.

The basic pillars are found in Arts. 12 and 9 (3) of the Constitution. Art. 9 (3) provides the constitutional basis for the freedom of association, and which has been interpreted as including the right not to join an association; this article also protects the autonomy of collective bargaining.[1] Art. 12 protects the freedom of professional and wage-earning activities, thus guaranteeing a certain core of entrepreneurial freedom. Based on these rather barren provisions, the Federal Constitutional Tribunal as well as the Federal Labour Court, in the course of extensive case law, have been trying - and overall succeeding - to strike a balance, reconciling these rights and establishing a more complete picture of collective autonomy.[2]

The following is a summary of the basic features of this system of rights protection. The German constitution most notably protects the autonomy of the social partners in collective bargaining and industrial action. Collective bargaining between the social partners is characterised by a high degree of autonomy,

[1] Federal Constitutional Court (BVerfG) 24 May 1977, BVerfGE 44: 322; BVerfG, 27 April 1999, BVerfGE 100: 271.

[2] See, for example, the overview Dieterich gives in Erfurter Kommentar, 7th ed. 2007, Art. 9 GG.

free of interference by the state, with the legislator's competences being restricted to regulating the procedural framework.[3] One recent and important example: The decision of the Federal Labour Court of 24 April 2007[4] adopted and specified an interesting aspect of this collective autonomy. This case concerned a strike against a company which had declared an intention to relocate part of its production. The trade union that called for the strike had demanded negotiations on its claim for a comprehensive social compensation plan. The company considered the compensation claim as prohibitive, and viewed the strike as being directed against the relocation itself (a trade union leaflet calling for the strike and arguing against the relocation contributed to this standpoint). Nevertheless, the Federal Labour Court confirmed that it was not the task of a court to assess the level of claims made in collective bargaining; the strike was legal to the extent the objective of the claim was compensation.

On the flip side of collective autonomy are, first of all, the strict requirements imposed on trade unions that want to participate in collective bargaining. As a legal requirement for collective bargaining, employee associations must demonstrate a certain amount of social power and capacity to exercise pressure.[5] Second, the Federal Labour Court, backed by the Constitutional Court, firmly links industrial action to collective bargaining. Any industrial action that is not aimed at supporting a collective bargaining claim is considered illegal. As a consequence, strikes that are not supported by a trade union as well as strikes protesting dismissals and political strikes are considered illegal.[6]

2. Fundamental social rights in community law

Community law has increasingly acknowledged fundamental social rights. The spectrum and content of these rights accounts for three main pillars: solidarity and collective rights, individual rights, and a referral to international conventions signed and ratified by all the member states - with international conventions most importantly guaranteeing free association, collective bargaining and collective industrial action.[7]

The right of collective bargaining and industrial action is enshrined in Art. 28 of the Community Social Charter, while Art. 27 guarantees workers' rights

[3] Federal Constitutional Court (BVerfG) 24 May 1977, BVerfGE 44: 322; BVerfG, 27 April 1999, BVerfGE 100:271; BVerfG, 3 April 2001, BVerfGE 103: 293.

[4] Federal Labour Court (BAG) 24 April 2007, 1 AZR 252/06, Der Betrieb (DB) 2007:1924.

[5] BAG 28 March 2006, 1 ABR 58/04, Arbeitsrechtliche Praxis (AP) No 4 § 2 TVG Tariffähigkeit.

[6] BAG 21 April 1971, Arbeitsrechtliche Praxis (AP) No 43, Art. 9 GG Arbeitskampf BAG 5 March 1985, Arbeitsrechtliche Praxis (AP) No. 85, Art. 9 GG Arbeitskampf; BAG 12 January 1988, Arbeitsrechtliche Praxis (AP) No. 90, Art. 9 GG Arbeitskampf; BVerfG 26 June 1991, BVerfGE 84, 212; Zachert 2001a: 401.

[7] Zachert 2000; Zachert 2001 overviews; see also Schiek 2005; Bercusson (ed.) 2006; Däubler 1999.

to information and consultation within the undertaking. In comparison with the German Constitution, the rights enshrined in the Community Social Charter are far more specific and extend beyond collective bargaining, including the right of individual employees to information and consultation.[8] Art. 29 to 31 of the Community Social Charter also sets out a further set of individual rights, such as the right of access to a free placement service (Art. 29), the right to protection against unjustified dismissal (Art. 30) and the right to working conditions which do not compromise the health, safety and dignity of workers (Art. 31).

The Community Social Charter of 1989 is not the only instrument that provides a paralegal[9] basis for the European social model. According to Art. 136 (1) of the EC Treaty, "the Community and the Member States [had] in mind fundamental social rights such as those set out in the European Social Charter [...] and in the 1989 Community Charter of the Fundamental Social Rights of Workers". Art. 6 (2) of the EU Treaty refers to the European Convention on Human Rights as well as the constitutional traditions common to the Member States.[10]

Although there are a variety of legal grounds to be considered, the legal quality of these rights is not yet clear, since none of these legal instruments are binding under Community law. This is becoming increasingly problematic. There are a growing number of cases before the European Court of Justice that address the question of the exact nature of the relationship between fundamental freedoms and social rights. While fundamental freedoms (such as the freedom of establishment or the freedom to provide services throughout the Community) are essential and judiciable rights upon which the common market is founded, social rights are not given the same legal protection. Cases of conflict between fundamental freedoms and social rights are, thus, always hard cases.

The next cases relating to this issue, which will be decided by the ECJ, are the *Viking* and *Vaxholm* cases.[11] In both of these cases, industrial action was taken in accordance with Finnish or Swedish domestic law. However, since these claims concerned a company planning a transnational relocation of an undertaking or workers, the action affected the company's freedom of establishment or freedom to provide services.

[8] Zachert 2001:1045.

[9] The Charter is not legally binding.

[10] Zachert 2000.

[11] Case C 438/05 (Viking, AG Maduro's opinion was delivered on 23 May 2007); Case C 341/05 (Laval/ Vaxholm; AG Mendozzi's opinion was delivered on 23 May 2007; before these cases, see also ECJ 21 September 1999 (C-60/96, Albany), E 1-5751; more on Albany, Brentjens und Drijvende Bokken: Blanke 2000: 28; Bruun/Hellsten 2001: 63.

Rightly, the Advocates General in the Wh'wgand the *Vaxholm* cases upheld social rights in the face of a possible conflict with the fundamental freedoms of the common market. I agree with them insofar as they state that "the right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract."[12] We cannot build a legitimate legal European order without social rights capable of compensating for certain consequences of the application of the fundamental freedoms.

3. Possible conflicts?

One strong argument for the fundamental legal relevance of collective rights in community law is Art. 6 of the EU Treaty. According to paragraph 2 of this provision, "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law." The assumption underlying this provision is basically a correct one: social rights and, primarily, collective social rights arise from the constitutional traditions of the Member States; and, in a way, these traditions are common to the Member States.

However, it is a mistake to deduce that the Member States will define the scope and content of these social rights in similar ways. This was one of the main reasons why collective industrial relations were excluded from the competence of the European Community under Art. 137 (5) of the EC Treaty. Although those rights may be equivalent in substance, diverging interpretations are possible. This is also true of the various legal instruments at the European level: They represent similar and functionally equivalent Member States' traditions on one side and diverge in text and content on the other side. Advocate General Mengozzi had to put great effort into interpreting each of these instruments as forming a coherent basis for European social rights. In the light of the supremacy of Community law over national law, conflicts and diverging interpretations of equivalent rights in national law and Community law are particularly problematic.

a) Reconciling fundamental freedoms with the exercise of fundamental social rights

Differing interpretations of equivalent provisions in Community law and in national law occur particularly in the area of industrial action. The *Viking* and *Laval* cases, which are still pending before the ECJ, are good examples of the interpretative questions at issue in this area. At the heart of these cases lies the need to strike a fair balance between the fundamental social right

12 AG Maduro, 23 May 2007, Case C 438/05 (Viking), § 60.

to take collective action and the freedom to establish and provide services. The application of the fundamental freedom of movement guaranteed in the Treaty must be reconciled with the exercise of fundamental social rights.[13] In such cases, the question arises as to which criteria and tests should be applied for an industrial action that conflicts with a fundamental freedom. The tests employed by the European Court of Justice are bound to shape the scope and limits of transnational industrial action in Europe.[14]

The Advocates General in the *Viking* and *Laval* cases have presented two different approaches that could be applied in such conflicts. Advocate General Maduro in the *Viking* case holds that Art. 43 EC Treaty precludes a coordinated policy of collective action taken by a trade union or an association of trade unions if this has the effect of *partitioning the labour market*[15] or impeding the hiring of workers from certain Member States to protect the jobs of workers in other Member States.[16]

Advocate General Mengozzi, in the *Laval* case frames this issue by asking whether the collective action is motivated by *public interest objectives.*[11] In addition, he wants to apply a test of proportionality and demands from the national courts in this context:[18] When examining the proportionality of the collective action, the national court

> should [...] verify whether the [conditions the trade union had demanded] involved *a real advantage*[19] significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.

These tests put the level of a trade union's demands under legal scrutiny, and in doing so clearly diverge from the German Federal Labour court's decision on a strike for a compensation plans to be established by collective bargaining.[20] In the German context, autonomy of collective bargaining means

[13] AG Mengozzi, 23 May 2007, Case C 341/05 (Laval/Vaxholm), § 85.

[14] See Körner 2007.

[15] My italics.

[16] AG Maduro, 23 May 2007, Case C 438/05 (Viking).

[17] My italics.

[18] AG Mengozzi, 23 May 2007, Case C 341/05 (Laval/Vaxholm).

[19] My italics.

[20] See above footnote 4.

that courts must respect those demands put forward by a trade union in the context of collective bargaining. The Federal Labour Court explicitly acknowledges that demands in the context of collective bargaining have to serve different goals, among them political mobilisation of members. The courts may not question an organisation's political aims.

The difference between the opinions of the Advocates General and German law, in this context, is an important one. However, such diverging interpretations of equivalent rights to industrial action are not easy to identify - and even harder to reconcile.

b) The scope of a negative right of association

My second example concerns the "negative right of association." The German Constitutional Court has had various opportunities to affirm this right on the one hand, and to establish limits on the other.[21] One feature of the German interpretation of the right to associate includes the right not to join an association. Here, a distinction has been made between membership in an organisation and subjection under a collective agreement. One of the most important effects of membership in an employers' association in Germany is the members' participation, through the association, in collective bargaining and their undertaking to be bound by any collective agreement concluded by the association (Art. 4 (1) Tarifvertragsgesetz - Collective Bargaining Act). However, while membership in a social partner organisation typically entails subjection under collective agreements, this is not true for the converse position.

The ECJ, on the other hand, has also recently ruled in the *Werhof case* that freedom of association, as part of the Community legal order, entails a right not to join an association or union. This case concerned Article 3 (2) of Directive 98/50 amending Directive 77/187 on transfers of undertakings. The ECJ was asked to determine the meaning of a contractual clause that referred to a collective agreement after the transfer and in a situation where the transferee was not a member of the employers' association that had concluded the agreement. The ECJ rejected the claimant's argument that the clause must necessarily be 'dynamic' and referred to collective agreements concluded after the date of transfer of the undertaking. The terms and conditions in the collective agreement were only binding until the date of its termination or expiry, or the entry into force or application of another collective agreement. An important argument in this case was the negative right of association: "If the 'dynamic' interpretation [...] of the contractual reference clause [...] were applied, that would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental

[21]BVerfG, 11.07.2006, Neue Juristische Wochenschrift (NJW) 2007, 51.

right not to join an association could be affected."[22] In contrast to the German Constitutional Court, the ECJ did not make a distinction in the case between membership in an organisation and subjection under a collective agreement.

4. The process of designing fundamental rights of the Community

a) Legal sources and inspirations

The *Werhof* decision is interesting for still another reason. In its decision, the ECJ not only refers to Art.ll of the European Convention for the Protection of Human Rights and Fundamental Freedoms to support its decision;[23] it also invokes decisions by the European Court of Human Rights, which established the right not to join an association.[24] There are good reasons for this, as the Convention is, first of all, a binding legal instrument, and second, the only instrument explicitly mentioned in Art. 6 (2) of the EU Treaty.

However, upon closer examination, the European Court of Human Rights itself in the *Sigurjonsson v Iceland* decision recognised a negative right of association by referring to a range of instruments of international law (e.g. Art. 20 (2) of the 1948 United Nations Universal Declaration of Human Rights as well as Art. 11 (2) of the Community Charter of the Fundamental Social Rights of Workers of 1989, which provides that every employer and every worker shall have the freedom to join or not to join professional organisations or trade unions). Accordingly, the court found that Art. 11 of the European Convention must also be viewed as including a negative right of association.[25] We see the ECJ referring to the ECHR for an interpretation of the Community Charter, and the latter referring back to the Commnunity Charter: We could call this a circular argument, or we could also view it as cooperation. In any case, the reciprocal references contribute to the creation of a core of rights, which, at times, appear to be quite independent from the specific legal sources, with the European Court of Justice juggling to find an adequate balance between these sources in the Community legal order. This is inimitably expressed by the Advocate General Mengozzi in his opinion of the *Laval* case, when he states:

> Even though, in terms of international instruments, [Art 6 (2) EU Treaty] mentions only the European Convention for the Protection

[22] ECJ 9 March 2006 - C-499/04 (Werhof), E 1-2006, 2397; Stafford 2006.

[23] ECJ 9 March 2006 - C-499/04 (Werhof), E1-2006, 2397 (Art 11 is one of the fundamental rights which, in accordance with the Court's settled case law, are protected in the Community legal order, as is stated in Article 6(2) EU).

[24] European Court of Human Rights, Sigurjonsson v Iceland, judgment of 30 June 1993, Series A, No. 264; Gustafsson v Sweden, judgement of 25 April 1996, Reports of Judgments and Decisions, 1996-11: 637.

[25] European Court of Human Rights, Sigurjonsson v Iceland, judgement of 30 June 1993, Series A, No. 264, § 35.

> of Human Rights and Fundamental Freedoms [...], its wording is inspired by the case law of the Court of Justice to the effect that that Treaty has 'special significance,' in order to enable the Court to identify the general principles of Community law. The Court is entitled, in so doing, to *draw inspiration*[26] from instruments for the protection of human rights other than the ECHR.[27]

One important instrument providing *inspiration* in this regard has always been the Community Charter of Fundamental Rights, which the European Court of Justice regularly (and rightly) takes into account when interpreting community law.[28] Advocate General Mengozzi has declared:

> Admittedly, the Charter of Fundamental Rights is not a legally binding instrument. However, the Court has already emphasised that its principal aim, as is apparent from its preamble, is to "reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe, and the case law of the Court [...] and of the European Court of Human Rights."

Drawing upon this range of instruments also affords the court some flexibility when interpreting each of these provisions.[29]

b) Inspiration from the Member States?

However, what role do national legal systems, the "common constitutional traditions" and national fundamental social rights play in this game? How far do they inspire and should they inspire the interpretation of community rights?

In this vein, I will only briefly outline the German perspective. European and community law increasingly inspires German law. However, as far as social rights are concerned, the German Federal Labour Court almost exclusively refers to the European Social Charter of 1961. The German Federal Labour Court has taken the European Social Charter into account when delivering decisions on the right to industrial action. When filling lacunae of the law and establishing the limits of industrial action, the German labour courts are bound

[26] My italics.

[27] AG Mengozzi, 23 May.2007, Case C 341/05 (Laval/Vaxholm), § 64.

[28] For example: ECJ 9 March 2006 - C-499/04 (Werhof), E 1-2006: 2397, § 32.

[29] See also Buckel 2007.

to have regard for the European Social Charter.[30] For example, in light of Art. 6, No. 4 of the European Social Charter, the German law on the right to strike has been questioned, thereby restricting the right of trade unions to strike by only permitting such action in the narrow context of collective bargaining.[31] This year saw the first decision in an industrial action case, in which the court explicitly modified its former position on solidarity strikes and secondary industrial action, using the European Social Charter as a basis for its ruling. According to the German Federal Labour Court, it would not be in accordance with Art. 6 No. 4 of the European Social Charter to restrict the right to strike to the only company and branch where the collective bargaining has occurred.[32]

In view of the supremacy of Community law and the binding character of the European Social Charter, influencing between domestic legal orders and the community order tends to be one-sided. However, important arguments back the view that Community social rights law should only be developed by taking into account the social rights granted in the Member States' legal orders. One argument supporting this position is that national legal systems are far more specific and experienced with possible conflicts between social rights and entrepreneurial freedoms.[33]

Second, according to Art. 137 (5) of the EC Treaty, the Community still does not have full competence to support the activities of the Member States in the fields of pay, the right of association, the right to strike or the right to impose lockouts. The striking disparity between the activities of the European Court of Justice and the development of a European social order calls for a new approach to the question of competence and acknowledgment of Community social rights[34], but also calls for a restoration of the comparative method.[35] That is why I would not subscribe to the following statement in Advocate General Mengozzi's opinion in the Laval case.[36] Regarding the constitutional traditions of the Member States, he is

> not of the view that they must be examined exhaustively, in view of the fact that [...] the Charter of Fundamental Rights, although not

[30] BAG 12 September 1984, 1 AZR 342/83, BAGE 46: 322; BAG 10 December 2002,1 AZR 96/02, BAGE 104:155.

[31] Council of Europe's ministerial committee, 3 February 1998, published in Arbeit und Recht (AuR) 1998:156.

[32] BAG 19 June 2007, 1 AZR 396/06, Der Betrieb (DB) 2007: 2038.

[33] Zachert 2001.

[34] Weiss 2007.

[35] Papier 2007.

[36] AG Mengozzi, 23 May 2007, Case C 341/05 (Laval/Vaxholm), § 77.

> binding, is principally intended to reaffirm the rights resulting from those traditions.

But the Charter is still in need of interpretation and concrétisation, and this task cannot be accomplished without regard for the legal systems of the Member States, at least in the area of social rights.

A third reason for the necessity of taking close account of the domestic legal orders in the area of social rights is that the ECJ has repeatedly affirmed that community law is to be interpreted according to its own logic, independently of equivalent provisions in national constitutions. In the *Fogasa* decisions, in particular, the ECJ reaffirmed the binding nature of the ECJ's interpretation of the general principles of equality and non-discrimination in Community law. Member States are bound by these interpretations "even when the national rules at issue are, according to the constitutional case law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system."[37]

Recently, the German Constitutional Court implicitly affirmed the same principle of coexistence side by side without direct interferences.[38] When a German court considers a particular rule as contrary to a fundamental right, which is established as a Community fundamental right as well as a German constitutional right, national courts now have the discretion to decide if they will refer the case to the European Court of Justice for a preliminary ruling - or if they prefer to refer to the Federal Constitutional Court. Thus, diverging interpretations of equivalent rights are explicitly acknowledged. The German courts, in the case of equivalent rights, are competent to choose between the European Court of Justice and the Federal Constitutional Court.[39]

Therefore, there are many reasons to reinstate the comparative method in the interpretation of fundamental social rights - and help avoid the common constitutional traditions falling apart from the developing European constitution.[40]

[37] ECJ 12 December 2002, C-442/00 (Rodríguez Caballero); ECJ 16 December 2004, C-520/03 (Olaso Valero); ECJ 7 September 2006, C-81/05 (Cordero Alonso); Kocher 2007.

[38] Federal Constitutional Court (BVerfG) 11 July 2006,1 BvL 4/00, Neue Juristische Wochenschrift (NJW) 2007: 51. The Court builds on the decisions confirming the constitutionality of the community law's supremacy (BVerfG 22) October 1986, BVerfGE 73: 339 ("Solange IF'); BVerfG 12 October 1993, BVerfGE 89:155 ("Maastricht").

[39] Preis/Ulber 2007; Kocher 2007. See also Classen 2007: 60 f.

[40] See doc. CONV 258/02.

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DISCUSSION

• Professor Jo Carby-Hall, PhD - The University of Hull

I would just like to comment on Dr Eva Kocher's intervention, and Professor Arnold, you have also touched upon the subject. You were talking, Dr Kocher, about the Laval case, and the Viking case, which are very import cases to be judged by the European Court of Justice. It is interesting to see that in the industrial action stage, there are a lot of things that have come out of this case which are very important, especially to the UK where we do not have a written constitution. We are one of the few countries that do not have a written constitution. We have a constitution, but it is not written down. There are other documents and that is about it. When it comes to industrial action, most of your constitutions give a right to strike, or a right to take industrial action short of a strike. We do not have this right, we have a freedom, whatever that means, and there are four areas which come out of the Laval case: first thing is political strikes, they are prohibited under our freedom to strike. Secondly, we have very strict procedures, perhaps stricter than in the rest of the EU member states, as to how we can go on strike, and if we do not follow these procedures, we have an illegal strike which makes the union liable in tort, in delict. So that is the second perspective. The third perspective is that we are not allowed to take secondary industrial action; I cannot sit down and explain it because that would be a lecture. Secondary industrial action is not allowed. Industrial action must be between the employer and the trade union in dispute, to put it very briefly. And lastly, to support an action in a foreign country is also illegal. We have no constitution on that, we do have laws on that. And what I am worried about: because we are very strict on industrial action laws, what I am worried about is that it looks as though the European law will have an effect eventually, not at this stage, on British law, and we may have to change our laws. I would like to ask Dr Kocher what is the situation in Germany: do you think that these two cases will have an effect on German law?

- Professor Dieter Kugelmann, PhD - Harz University of Applied Sciences

My question goes to Dr Gruszczak, concerning his sceptical view of the progress we are making in the area of freedom, security and justice. I shall try to attack a little bit your scepticism. In my opinion it is not as bad as you think it is. Already in the Treaty of Amsterdam I think there was no cross-pillar construction, I think it was a one-pillar construction, meaning that the emigration and asylum policy is completely shifted to the first pillar: applicability of the community method, applicability of legislation, Commission, Parliament and so on. So that is what we have and that is what works. And now about changes. You talked about the public order clause. In my opinion it will probably not be applied, just like in the past, it was never applied as far as I know, so it will not really be a problem for the progress of a closer policy in this area. And I also would say it is not probable that states like in Schengen will hop over to a construction of treaty law. The Reform Treaty is of course not a revolution, but we have never seen revolutions during the European integration. Still, in this area there is progress, because originally the whole system stems from the pillar construction, from the inter-governmental side, and now I think what is happening is evolution towards the community method, even if we have this brake system, but this emergency brake system is a system within the organisation of the institutions, within the institutional frame, because it is the Council finally who has to take the decision. So in the end, what I am really trying to ask is whether your scepticism is legitimate?

- Professor Rolf Grawert, PhD - University of Bochum

I have a special question to Mr Czubinski. The European citizenship: is it functional citizenship like in private international law, or better to be fulfilled in a political sense as a basis of something equal to the state community? Second, also to you, how does the citizenship of the union influence the scope and elements of nationality and national citizenship? For instance, can - I will not say here Poland - but can Germany nationalise all people of Greenland, or of China, we have a very good connection with the Chinese, I think there is two billion of them or something: is it possible? Or could the courts of the other member states say “no“? Therefore, is there not in citizenship of the Union a new element of community? What if the Court has to decide who the Union may protect against third states? A new decision in a new Notebon case will be necessary, or a regulation or something like that, or an opinion, to have an effective Union citizenship, or to prevent states from doing whatever they want?

• Zbigniew Czubiriski, PhD - Jagiellonian University

Professor Grawert, thank you very much for two very important questions. Actually before I try to answer the first one, I would like to tell you something. I participated in the Hague Conference on International Private Law, representing the Polish Ministry of Justice. Later I wrote a report and I was strongly criticised, because the question was: what is the position of the EU? And it was a convention concerning some items connected with civil law procedure. And I said there were three positions: the position presented by the person who represented the Commission, the position represented by the person who came from the European Parliament, and we have also had a member of the European Parliament whose opinion was completely different from the two previous ones. So far in international private law we are looking for special linkage between two legal systems, right? So it could be residence, domicile, or citizenship. And we are in this process of gradual unification of European international private law, it is not yet ready, so still we are operating just like in the classic international private law.

The second question, should we have something like the Notebon case in the EU system? I think I share entirely your point of view: there is a need for it. Because so many years ago when I was studying consular law, I never thought that we would have something like marriage of convenience in Poland, but we have now, and it is on the increase. Plus we have some people coming here establishing businesses, and asking for a quick pass to Polish citizenship. And when a year ago I expressed my opinion in a small article published in the Polish Journal of International Public Law, that as a matter of fact we will not have a problem with German minorities in Poland from the legal point of view, due to the fact of European citizenship, so all those other aspects connected with minority status from another member of the EU are solved.

But I have a question, and I ask you for a short comment: both of us, both our nations, we have a problem, because you have Germans living abroad in third countries and you have a very specific regulation in your law concerning citizenship. And we have this problem, we are now working on a new law on citizenship, and we have quite many Poles living abroad, and I am thinking of the countries created on the territory of the former USSR. So far, let me tell you in brief, the problem is partially solved. We introduced a new law about “karta Polaka”, identity card of a Pole, by which means we are giving rights to nationals, citizens of a third country, and to some extent, I am sorry to say because we have the goodwill, we are acting partly against regulations of European law stemming form the primary source, European law. How to solve it? I do not know, so I am asking you: how did you solve this in the German legal system?

• Artur Gruszczak, PhD - Jagiellonian University

I am just wondering what this constitutional reform, the treaty reform is for. And I guess it is for making the EU more efficient, more citizen-friendly, more transparent and more governable in the sense of making decisions and enforcing them. And I would not totally agree with you: let me keep my sceptical position on this. Because first of all, I have been talking about the area of freedom, security and justice, which is a whole range of different policies, form of cooperation and even some external linkages, external forms of coordination, going to such issues as global migrations, like trans-national crimes, activities of cross-border criminal gangs or organisations, and let us say the global war on terror, however we take this concept and this political process. So the community method of the ordinary legislative procedure which is defined in this Treaty is not the same as the community method in the present EC treaty. Moreover, the present community method is only a sum of policies on migration, asylum, visa or judicial cooperation in civil matters. It did not manage to grasp the whole range of issues which were defined in the treaty, there are some exceptions, like internal legal migration, like some aspects of asylum policies, and some question of civil law like family law.

Moreover, there are some issues which cannot be just closed within the community method, they are still horizontal or cross-pillar, like for example the problem of securitisation of migration policies or securitisation of migrants, or just the question of preventing and fighting terrorism, which involves a lot of different measures, like detention of telecommunications, which now were put on the Directive, which is the community measure, some second pillar undertakings, in different forms like military surveillance of electronic space, trying to eavesdrop on some data transmitted among potential or real terrorists, and there are different third pillar measures, like police cooperation, like judicial cooperation.

My other point was that we have witnessed a strong tendency to shift some areas of cooperation outside the EU, to launch some initiatives outside the legal and institutional framework of the Union. Why is that? Well, because this cooperation in internal security matters for example, attempts at constructing internal security governance in the EU has been heretofore ineffective, or not as effective as was expected, because of certain deadlocks in this legal procedures, especially at the level of working groups, expert committees, so it seems like those “epistemic communities” in the case of security polices were too much in conflict, couldn’t work out a common approach, consensus, what is the EU security and what are the real needs for securing the EU.

That is of course a question of the very concept of security, security is not a one-dimensional concept, this is a kind of a Moebius' strip, inside and outside, a holistic concept, so dividing it into foreign security or security policy identity in the second pillar and in the third pillar is a little bit artificial, and that goes into the practical moves, it really involves just operations or some undertakings of special bodies or secured agencies, which every member state just has in its institutional framework.

The last remark: how to measure progress in this area of freedom, security and justice? In the number of acts approved by the Council or in the co-decision procedure? In the number of hits set to the Schengen Information System, number of Europol employees, which are now about half a thousand people working for what? Sorry for asking these questions, but what does Europol do in this matter, comparing to Helmut Kohl's famous "European FBI"? Europol would have to be the European criminal police, but it is nothing like that. This is the so-called "data police", or just a clearinghouse.

• Eva Kocher, PhD - University of Hamburg

Well, there is only one question I have to answer, but in fact it is not easy to answer, it is about the effects of the Viking and Vaxholm cases on German law. It has already had some effects, the discussion about these cases of conflict of fundamental freedoms and social rights has already had the effect of kind of renaissance of the European Social Charter, the Council of Europe's European Social Charter of 1961. It is interesting that these events have shown that you cannot have a legitimate legal order with fundamental freedoms if you do not establish complementary social rights. So it has become clear that even without a constitution, without the Reform Treaty, with only the community charter at hand, the European Court of Justice will have to develop some kind of functional constitutional rights. So that these cases will have to develop some kind of rules on conflicts of these rights.

In the German context the renaissance of the European Social Charter has led to some effects already, I would say. It is very indirect effects. You said in the UK the freedom to strike is quite limited in certain aspects. I could say it is also limited in the German context with the constitutional right to strike. Possibly the fact of a written constitution existing may not be the decisive factor, I am not sure about that. We have this prohibition of political strikes, no strikes without a trade union, very strict limits on secondary action or solidarity strikes, and the strict limits on solidarity strikes, already broken down now in a decision of July this year, where the federal labour court used the European Social Charter explicitly as an important argument to modify the jurisdiction. So this is one indirect effect I think, but an important one.

The second possible effect is the decision on the Vaxholm and Viking cases. If you look a little bit closer at the Viking case, you will see that it is a parallel one to the one that the federal labour court decided in April this year. The decision of April this year, the German decision, was on a case of relocation of business within Germany. The Viking is on trans-national relocation of business. And the German decision of April 2007 has just established some quite clear rules on the criteria that you use if you have to assess a strike against this kind of relocation, emphasising the autonomy of collective bargaining. The Viking decision will be a decision establishing some rules; there may be a different rule for strike against national relocations and strikes against trans-national relocations, and it will create problems, so there will have to be some kind of communication.

EUROPEAN UNION
AND STATE POLITICAL SYSTEMS

Chairpersons:

Professor Rolf Grawert, PhD

Professor Zbigniew Maciąg, PhD

Part 1

Professor JO CARBY-HALL, PhD - The University of Hull

Parliamentary Supremacy: a British Perspective

/. Introduction

Limitations of space do not allow for a full discussion, analysis and evaluation of a very important doctrine, namely, "Parliamentary Supremacy" which is fundamental to the British constitution. Taking into account these limitations, it has been decided to treat in a brief manner the former European Union Constitutional Treaty, now replaced by the Reform Treaty of October 2007. The discussion on that topic should provide the European legal framework of the principle of "primacy" of European law over British law in specified fields only.

There will then follow a brief discussion on the meaning of the doctrine of Parliamentary Supremacy, British style.

Following some background notions and an explanation of "monism" and "dualism", the step-by-step development of the primacy of European law over British law (and other Member States') laws, will be analysed through the European Court of Justice's judicial pronouncements in its jurisprudence.

So as to show the legal basis of the primacy of European law over British law in specified fields, an analysis will take place of a key British Act of Parliament.

This will be followed by an evaluation of the relationship between European Union law and British law on supremacy. The key question will be asked and answered on whether or not the primacy of European Union law impinges upon the supremacy of the British Parliament. The consequences of the British European Communities Act, 1972, will then be briefly treated.

Some concluding thoughts will follow.

Before plunging into this programme, it is important to define what is meant by the title of this work, namely "Parliamentary Supremacy" and contrast it with the word "sovereignty" Authors and judges often use the expres-

sion "Parliamentary sovereignty"[1] rather than "Parliamentary supremacy". Although the two expressions appear to be synonymous, it is submitted that they are not! The word "sovereignty" is more relevant to territorial disputes or issues, such as the issue between Spain and the United Kingdom over the sovereignty of Gibraltar, or the dispute between Argentina and the United Kingdom over the sovereignty of the Falkland Islands or, as termed by Argentina, the Malvinas. T.R.S. Allan, on of the power and resilience of positivism talks of the "...separation of legal from political principle". He states that "...The political notion of the ultimate sovereignty of the electorate must be distinguished from the legal doctrine of legislative supremacy; the courts owe their allegiance to the latter and recognise no "trust" between Parliament and the people."[2]

For the avoidance of any doubt, the preferred expression, namely "supremacy" will be used in this work. Where a quotation is used which contains the word "sovereignty" then this word will be used for purposes of authenticity.

2. The former Constitutional Treaty and the Reform Treaty on supremacy

The Treaty establishing the Constitution for Europe, which is now in the waste paper basket of history, provided that the "Constitution and law adopted by the Union's institutions in exercising competences conferred on it shall have primacy over the law of the member states."[3]

It will be noticed that Article 1-6 of the Constitutional Treaty expressed clearly the principle of supremacy of European Union law, but that "supremacy" was, and is, limited to the European Union not operating *ultra vires* its

[1] E.g. Professor, Sir Neal MacCormick, [in:] *Questioning Post Sovereignty*, ELR 2004, p. 852 talks of "sovereignty"; T.R.S. Allan, *The Limits of Parliamentary Sovereignty*, "Public Law" 1985, p. 614; The Hon. Sir John Laws, *Law and Democracy*, "Public Law" 1995, p. 74; H.L.A. Hart, *The Concept of Law*, where he talks of "sovereignty of Parliament" or "Parliament is sovereign" 1961, p. 145-146; R.E.V. Heuston, *Essays in Constitutional Laws* (2nd ed., 1964),who talks of "Sovereignty" as a legal concept; Marshall, *Constitutional Theory* (1971) who talks of "sovereign Parliament" and "the Sovereign... is the British Parliament" particularly at pp. 42-43; H.W.R. Wade, *The Basis of Legal Sovereignty*, "Cambridge Law Review" 1955, p. 172; Lord Pearce in *Bribery Commissioner v Ranasinghe* [1965] A.C. 172 (JCPC) talked of the legislature being "sovereign". Similarly, The Lord President Cooper in *MacCormick v Lord Advocate* [1953] S.C. 396 in the Scottish Court of Session, Inner House talked of "unlimited sovereignty of Parliament"; V.C. Megarry in *Manuel v Attorney General* [1983] Ch. 72 (Ch.D) talks of Parliament's "sovereign power". H.W.R. Wade, *Sovereignty - Revolution or Evolution?*, 112 L.Q.R. 1996, p. 568. T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics, and Revolution*, 113 L.Q.R. 1997, p. 443.

[2] In *Limits of Parliamentary Sovereignty*, "Public Law" 1985, p. 614. See also Dicey, quoted by T.R.S. Allan who expressed the same sentiment. He said "The judges know nothing about the will of the people except in so far as that will is expressed by an Act of Parliament" Although this differentiation has been made between political "sovereignty" and legal "supremacy", Allan appears not to have understood the distinction he clearly makes! On numerous occasions, the learned author uses these two words as being synonymous by talking of "Parliamentary sovereignty"!

[3] (2004) O.J. C 310 Art. 1-6.

sphere of competence.The word “competences” in Article 1-6, was, and is, therefore of crucial importance. The German Constitutional Court in *Brunner v European Union Treaty* [1] posited that “...because of the principle of limited powers... no power to extend its powers is conferred on the European Union, and the claiming of further functions and powers by the European Union ...is dependent on supplementation and amendment of the Treaty and is therefore subject to the affirmative decision of the national parliaments.”[5]

This was the first time that a Treaty provided expressly for the primacy of European Union laws over national laws. A protocol attached to the Constitutional Treaty made it clear that Article 1-6 is intended to consolidate the existing case law as has been developed over the years by the European Court of Justice.

However that provision of the Constitutional Treaty had been the subject of criticism[6] and proved problematic in other areas, in spite of eighteen Member States ratifying it. One of many of these problematic issues was whether Article 1-6 was, in fact, a consolidation of existing case law and not a licence given to the European Court of Justice to treat *all* matters relative to the Constitution. If that were the case, there would clearly be an extension of the European Court of Justice’s jurisdiction.

At the Inter-Governmental Conference (IGC) under the German presidency (June 2007) it had been decided not to reproduce in the Treaty of the European Union the article on the supremacy or primacy of European Union law over national laws. Rather the IGC agreed on the following Declaration, namely "The Conference recalls that, in accordance with well settled case law of the EU Court of Justice; the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States under the conditions laid down by the said case law.”[7]

[4] (1994) 1 CMLR57.

[5] Para. 33 of the judgment.

[6] See Wyatt and Dashwood’s *European Union Law*, 5th Edition (2006). Sweet and Maxwell at pp. 379-380 where examples of critical comments are given, some of which are that “the principle of supremacy without also alluding to the principle of direct effect, the Constitution offers only an incomplete and... potentially misleading description of the relationship between Union law and... national legal systems” See also *ibidem*, at chapter 5. See too A. Bonnie, *The Constitutionality of Transfers of Sovereignty. The French Approach*, (1998) 4 EPL 517; P. Craig, *UK Sovereignty after Factortame*, (1991) 11 YEI 221; M. Kumm, *Who is the Arbiter of Constitutionality in Europe?*, (1999) 36 CMLR351; S. Peers, *Taking Supremacy Seriously*, (1998) 23 EL Review 146; G. Marshall, *Parliamentary Sovereignty - The New Horizons*, (1997) PL 1; C. Schmid, *All bark and no bite: Notes on the Federal Constitutional Court’s “Banana Decision"*, (2001) 7 ELJ 95.

[7] See Conference of the Representatives of the Governments of the Member States - Brussels, 5th October, 2007, CG 3.01.2007, REV, Draft Declaration 27 (Declaration concerning primacy). The Conference also decided to attach as an Annex to the Final Act the Opinion of the Council Legal Service on the primacy of EC law (as set out in 11197/07 (JUR 260) of 22nd June, 2007, that “It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law Costa/EbJEL, 15th July 1964, (Case 6/641) there was no mention of primacy in

Thus this "primacy" features, not as an Article in the Reform Treaty itself, but as a *Declaration* to that Treaty. It is worth noting three matters with regard to the former Constitutional Treaty (and now the Declaration to the Reform Treaty). First, that the Constitutional Treaty (and now the Declaration to the Reform Treaty) was the first Treaty to mention expressly the primacy of Community laws over Member States' national laws. Second, the former Constitutional Treaty and the Declaration to the Reform Treaty do no more than consolidate the existing case law of the European Court of Justice on this issue. Third, that "...after two years of uncertainty over the Unions treaty reform process, the time has come to resolve the issue and for the Union to move on. The period of reflection has provided the opportunity... for wide public debate and helped prepare the ground for a solution."[8]

3. The meaning of the doctrine of Parliamentary supremacy in the United Kingdom

The legislative supremacy of the British Parliament (or Parliamentary supremacy) expresses the central legal concept of the doctrine in British constitutional law.To put it in another way, under British constitutional arrangements Parliament is legislatively supreme.

Much has been written on this subject. This work is not intended to repeat the various views expressed by learned authors and judges. For a deeper analysis of this doctrine, the reader is referred to the relevant texts.[9]

The doctrine of Parliamentary supremacy is one of the most important and controversial aspects of the British constitution. In this part it is proposed to treat the traditional doctrine and the attitude shown by the British courts by making use of precedents from the cases heard by British courts. Whether or not the doctrine of Parliamentary supremacy is affected by European law is a separate issue. The European jurisprudence on the subject will be evaluated in the next part of this work. It is well known that the United Kingdom does not have a written constitution. This being the case, once the original rule is traced back to an Act made by Parliament, the court has the

the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any case change the existence of the principle and the existing case law of the Court of Justice". The draft Declaration was submitted to the IGO (Foreign Ministers) on 15lh October, 2007 and was finally adopted at the IGO (Heads of State or Government) which met under the Portuguese presidency in Lisbon on 18th/ 19th October, 2007.

[8] See Council of the European Union, Brussels 23 June, 2007, 11177/07 CONCL. 2 (Presidency Conclusions), para. 8, p. 2.

' For the legislative supremacy of Parliament doctrine seen as a "rule of recognition" see H.L.A. Hart, *The concept of Law*, (1961) at pp. 89 to 107. In its political context, see the Right Honourable Lord Woolf of Barnes, *Droit Public - English Style*, "Public Law" 1995, p. 57; The Honourable Sir John Laws, *Law and Democracy*, "Public Law" 1995, p. 74; and T.R.S. Allan, *The Limits of Parliamentary Sovereignty*, "Public Law" 1985, p. 614.

duty to interpret it since it is the law of the land and only Parliament has the power to make laws. Such laws cannot be questioned by the courts. Parliament achieved its supremacy through a process of gradual development. The Tudor and Stuart monarchs ruled by Royal Prerogative but gradually, as a result of Parliamentary struggles, it was recognised that the consent and advice of the House of Commons and the House of Lords was required.

The Bill of Rights of 1689[10] provided "...that the pretended power of suspending of lawes or the execution of lawes by Royal Authority without Consent of Parliament was illegal". Thus from that date onwards, only Parliament - which consists of Commons, Lords and the Monarch - is able to make laws. What needed to be clarified was whether or not there were any restrictions or any limitations on Parliament's power.

Suggestions were made in the seventeenth century that any Acts of Parliament which were repugnant and unreasonable could be declared invalid by the courts. The reason why those suggestions were made was because of the influence, which existed at the time, of the philosophy of natural law. Such natural law being the standard by which human law was judged against the standards set by God-given law, namely the ultimate ideal. This philosophy did not survive and was replaced by the standard of positivism which enables the courts to accept the fact that if the proper parliamentary procedure was gone through, then Parliament was the supreme body to make laws.

4. The Diceyan meaning of Parliamentary supremacy

What does "Parliamentary supremacy" mean under the British constitution? The classical meaning of the doctrine will be found in the works of Dicey,[11] an Oxford University professor in the nineteenth century. The doctrine of Parliamentary supremacy under British law means (a) that Parliament alone can make laws; (b) that such laws can be made on any topic; (c) that all British courts are compelled to obey any laws made by Parliament; (d) that a current Parliament may expressly repeal any law made by a previous Parliament; (e) that a later Act which is inconsistent with a previous one impliedly repeals that latter; (f) that, with regard to any constitutional legislation, the above may not apply; and (g) that no other body has authority to rule on the validity of Parliament's enactments.

[10] 1 Wil & Mary Sess 2, ch. 2, p. 1.

[11] Particularly in *Introduction to the Study of the Law of the Constitution* published in 1885. Professor Dicey's ideas proved to be influential over a period of two generations, but De Smith, in his book entitled *Constitutional and Administrative Law* published in 1998, considered that Dicey's views "no longer warrant detailed analysis" At the time when De Smith expressed his opinion, Dicey's views may have been out of fashion, but there is little doubt that Dicey's pronouncements on the supremacy of the British Parliament are now favoured by senior members of the British justiciary.

It is proposed to analyse briefly some of the "components" which make up the doctrine of parliamentary supremacy enumerated above.

First, it has been said that Parliament is the supreme law-making body. The historical struggle to achieve this supremacy is paramount in this context. By the fourteenth century Parliament emerged as the supreme law-making body. In the seventeenth century James I wanted to rule by the use of the royal prerogative. The conflict between the King and Parliament for supremacy was fought in the courts. In the Case of Proclamations in 1611[12] Chief Justice Coke stated that "...the King cannot create any offence which was not an offence before, for then he may alter the law... by his proclamation..."

In 1689 the claims by the Stuart Kings to rule by royal prerogative and thus suspend[13] and dispense[14] with laws were resolved by the Bill of Rights,[15] which stated, *inter alia*, "That the pretended power of suspending of lawes or the execution of lawes by Royal Authority without consent of Parliament is illegal."[16] The Bill of Rights also stated "That the pretended power of dispensing with lawes or the Execution of lawes by regal authority as it has been assumed and exercised of late is illegal."[17]

The power of the monarchy after 1689 was subject to parliamentary consent. C.R. Munro[18] said that "Parliament was to be its own master and free from interference... Parliaments were to be held frequently, and the election of their members was to be free. The Crown's power to levy taxes was made subject to parliamentary consent... and powers of suspending and dispensing of laws... were declared illegal". Thus in 1689 the doctrine of parliamentary supremacy was firmly established![19]

[12] 12 Co. Rep. 74; 77E.R. 1352. Chief Justice Coke consulted two Chief Justices, Chief Baron, and Baron Altham "upon conference between the Lords of the Privy Council and them".

[13] The prerogative power of the Stuart Kings to "suspend" laws meant that these laws could be made inoperative for an indefinite period of time.

[14] The prerogative power to "dispense" meant that persons who offended against the laws were given a dispensation from paying the penalties imposed by an Act of Parliament.

[15] 1689 1 Will. & Mary Sess. 2, ch. 2.

[16] *Ibidem*, para. (1).

[17] *Ibidem,* para. (2). James II made great use of his prerogative of suspending laws of a penal nature relating to religion in his Declaration of Indulgence in 1687 and 1688 which led to the Revolution of 1688. By the time of Edward I, direct taxation was firmly in the domain of Parliament. The consent of Parliament was thus required for the levying of direct taxation. The Stuarts however used the Royal Prerogative to levy taxes under their prerogative of foreign affairs. They regulated trade by imposing duties on imported goods. *The Case of Impositions (Bate's Case) 1606* 2 *St. Tr.* 3 is a notorious constitutional example of such practices. The Royal Prerogative to defend the realm at times of emergencies was also used as a a reason to raise money to build military ships. See *The case of Shipmoney (R v Hampden) (1637) St. Tr. 82S.*

[18] In "Studies in Constitutional Law" 1987, p. 80.

[19] See D. Judge, *The Parliamentary State*, (1993) and consider Ungoed-Thomas J's judgment in *Cheney v Conn [1968] 1 All ER 779.* "What the Statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law which is known in this country. It is the law

Second, it was said above that Parliament can make laws on any topic. Its legislative power is thus unlimited. Of course, Parliament acts reasonably and responsibly when legislating and does not intend to legislate in derogation of international law.

With regard to this latter issue, namely conflict between international and national laws, there are some pronouncements made by the courts. In *Mortensen v Peters*[10] the High Court of Justiciary in Scotland concluded that Scots law relating to fishing limits prevailed over international law. Lord Killachy said "A legislature may quite conceivably, by oversight or even design exceed what an international tribunal ...might hold to be its international rights. Still, there is always a presumption against its intending to do so". In this case it was only a "presumption". The express words of the Scottish Legislature were conclusive![21]

Thirdly, a parliamentary enactment cannot be challenged by the courts and thus make it invalid.[22] This has been firmly established since the Glorious Revolution in 1688 which made Parliament supreme. Cockburn said[23] "there is no judicial body in the country by which the validity of an Act of Parliament could be questioned. An act of the legislature is superior in authority to any court of law... no court can pronounce a judgment as to the validity of an Act of Parliament."[24]

Fourth, it was stated that a current Act of Parliament may expressly repeal any law made by a previous Parliament and a later Act which is inconsistent with a previous one impliedly repeals that latter. Maugham[25] said clearly "The legislature cannot, according to our Constitution, bind itself as to the form

which prevails over any other form of law, and it is not the court to say that parliamentary enactments, the highest law in the country is illegal"

[20] (1906) 14 SLT 227 (High Court of Justiciary).

[21] The court was unanimous in dismissing the appeal. See too, *Burmah Oil Co. v Lord Advocate [1965] AC 75 (HL)* where the War damages Act, 1965 was passed by Parliament *retrospectively* to deny compensation being sought for damage lawfully caused, namely the destruction of Burmah Oil installations upon orders of the commanding officer of the British forces to prevent the advancing Japanese forces from capturing these.

[22] In countries with a written constitution, the constitutional court or the ordinary courts are able to determine whether the legislative enactments are constitutional. See e.g. *Marbury v Madison (1803) 1 Cranch. 137 in the Supreme Court of the United States.*

[23] In *Ex parte Canon Selwyn (1872) 36 JP 54.*

[21] See also Sir Robert Megarry VC's judgment in *Manuel v Attorney-General [1983] Ch. 77,* where he said that the duty of the court is "to obey and apply every Act of Parliament, and... the court cannot hold any such Act as ultra vires" Statutory instruments and other subordinate legislation can however be held to be *ultra vires.* Contrary to the view that the courts cannot question the validity of an Act of Parliament, see Chief Justice Coke's judgment in *Dr. Bonham's Case (1610)8 Co. Rep. 114. He* said that "the common law will control Acts of Parliament and sometimes adjudge them to be utterly void *(atp. 118).* This dictum was before 1688 and is therefore considered to be obsolete. See Lord Reid's dictum in *Pickin v British Railways Board [1974] AC 765.*

[25] In *Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590 (CA).*

of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If a subsequent Act of Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature."[26]

Of significant importance from a constitutional law point of view, much case law has come about with regard to Commonwealth issues. Lack of space does not allow a discussion of parliamentary supremacy in this sphere.[27]

5. "Pilgrim's Progress" in the development of the primacy of European Union law

Background

The European Community Treaty is "silent" on the issue of which law should take priority in case of conflict. Is it national law or Community law? The explanation for this "silence" can only be twofold in nature. First, that it was considered unnecessary to make this matter explicit at the time of signature of this Treaty, and/or, second, that it was a diplomatic omission!

Thus no guidance whatsoever or hint was given by the Treaty on that issue. The matter had to be decided by the courts in the Member States assisted by the European Court of Justice and its jurisdiction under Article 234 of the European Community Treaty. The European Court of Justice proved to be most influential in developing the law and in establishing the principle of primacy of European Community law over national laws.

A matter of priorities - Monism versus Dualism?

The question of priorities between directly effective international law and domestic law is normally seen as a matter of national law to be determined in accordance with the constitutional rules of the State concerned. Incorporation of international law will depend on whether a State is *monist* or *dualist* in its approach to international law. If *monist*, international law will be translated automatically into national law from the moment of ratification with-

[26] See H.L.A. Hart, "The Concept of Law" 1961, pp. 145 and 146 on whether or not Parliament can limit the power of its successors. See too G. Marshall, *Constitutional Theory* (1971) at pp. 42 and 43 and R.E.V. Heuston, *Essays in Constitutional Law* (1964, 2nd ed., pp. 6 to 8), where some interesting modern views are expressed on the subject. See too W.R. Wade, *The Basis of Legal Sovereignty*, 1955, CLJ172.

[27] The reader is referred to a modest selection of cases relevant to parliamentary supremacy. See *Attorney-General for New South Wales v Trethowan et al. [1952] AC 526 (JCPC) and MacCormick v Lord Advocate [1953] SC 396 Inner House of the Court of Session.* See too Lord Denning's dictum in *Blackburn v Attorney-General [1971] 1 WLR137* at p. 140. Lord Reid's dictum in *Madzimbamuto v Larner-Burke [1969] AC 645;* Lord Sankey's dictum in *British Coal Corporation v The King [1935] AC 500* at p. 520; and Megarry VC"s judgment *in Manuel v Attorney-General [1983] Ch. 77 (ChD) and Slade LJ in the Court of Appeal.*

out the need for further measures of incorporation. If *dualist*, international law will not be binding under domestic law until incorporated by a domestic Act of Parliament.

In the case of the United Kingdom, which operates a *dualist* system, incorporation by statute needs to take place. In the case of those countries which operate a *monist* system, as for example France, adoption takes place automatically. In either of these two systems the "adoption" which takes place does not solve the question of priorities.

As far as European Union law is concerned, *"peu importe"* whether the system is *monist* or *dualist*, for these do not solve the necessary uniformity problem in the application of the European Union Member States' laws and the primacy of European Union law over Member States' national laws. It is because of this problem, namely that of uniformity, that the European Court of Justice has developed its own constitutional rules on the supremacy or primacy of European Union laws over the laws of the Member states in certain fields only.

The contribution and pronouncements of the European Court of/ustice in the step-by-step development of the primacy of European Union law

In *Van Gend en Loos* in 1962[28] the European Court of Justice held, *inter alia*, that "...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields."

By talking of a "new legal order" the European Court of Justice wanted to point out, it is submitted, three matters. First, that the European Community (as it then was), was not merely an international law organisation. Second, that the European Community enjoyed a more independent status, and in the third instance, that, arguably, the European laws had a greater impact on the laws of its Member States than did international law.

In *Costa v ENEL* in 1964,[29] the notion of primacy of European law over national law was robustly affirmed by the European Court of Justice, which found that "The integration into the laws of each Member State, of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them... Such a measure cannot therefore be inconsistent with that legal system.

[28] *Van Gend en Loos* v *Nederlandse Administrativ den Belastingen (26/62) [1963] ECR 1; [1963] CMLR 105 (ECJ).*

[29] *Costa v Ente Nationale per I'Energia Ellettrica (ENEL) (6/64) [1964] ECR 1141; [1964] CMLR 425 (ECJ).*

The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty ...The obligations undertaken under the Treaty establishing the Community would not be unconditional... if they could be called in question by subsequent legislative acts. It follows ...that the law stemming from the Treaty... could not... be overridden by domestic legal provisions... without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".

The European Court of Justice went even further in the case of *Internationale Handelsgesellschaft* in 1970,[30] which found that "...the law stemming from the Treaty ...cannot because of its very nature be overridden by rules of national law, however framed... Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

Similarly in *Simmenthal* in 1977[31] the European Court of Justice considered that "a national court which is called upon to... apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing... to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means"

In the *Factortame case* in 1989[32] the European Court of Justice applying the same principles as those expressed in *Simmenthal* posited "...the full effectiveness of Community law would be ...impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule"

[30] *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermitte (1/70) [1970] ECR 1125; [1972] CMLR 255 (ECJ).*

[31] *Simmenthal SpA v Amministrazione delle Finanze delo Stato (70/77) [1978JECR 1453; [1978] 3 CMLR 670.*

[32] *R v Secretary of State for Transport Ex parte Factortame Ltd (c-221/89) [1991] ECR 1 - 1305; [1992] QB 680; [1992] 3 WLR 228.*

An epitome

To epitomise the situation as developed by the European Court of Justice, it may be said that the primacy of Community law over national law is now firmly established. Thus, if there is a conflict between national law and Community law, this latter has to prevail and any national law which is incompatible with Community law, even if it be of constitutional significance (for countries with a written constitution), would be inapplicable.

The reason for such primacy of Community law is that without that primacy, Community laws would be ineffective, as there would be no uniformity in the application of Community laws in the Member States of the European Union.

This research shows that the domestic courts of the Member States have generally accepted the notion of primacy of Community law as from their entry into force, provided the domestic courts regard it as directly effective.

6. The legal basis of the primacy of Community law over British law

Unlike other European Union States, the United Kingdom does not have a written constitution! Furthermore it will be recalled that the United Kingdom operates a *dualist* system. As such, for the British courts to give effect to the principle of primacy of Community law, an enactment by the British Parliament becomes necessary.

The European Communities Act, 1972 contains two important sections (and their sub-sections) within its provisions which treat the notion of primacy or supremacy of Community law. These are sections 2 and 3. Apart from some discreet topics which have the effect of excluding Community laws[33] section 2 (1) of the 1972 Act provides for the *direct effect* of Community law in the United Kingdom. The section states "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies"[34]. Section 2 (2) talks of the implementation of Community ob-

[33] Namely the freedom to impose increases in taxation, the introduction of retrospective the creation of new offences under the criminal law. See Schedule 2 to the Act of 1972 legislation and the creation of new offences under the criminal law. See Schedule 2 to the Act of 1972.

[34] "Section 2(1) makes the concept of direct effect a part of the UK legal system. It deems law which under the EC Treaties is to be given immediate legal effect to be directly enforceable in the UI<. Accordingly UI< courts,

ligations by means of secondary legislation. Although the Act does not specifically[35] state that Community law is supreme over British laws, sub-section (4) of section 2 provides that "...any enactment passed or to be passed... shall be construed and have effect subject to the foregoing provisions of this section." These "foregoing provisions" being duties and obligations imposed by Community law[36].

The 1972 Act furthermore provides support for the primacy of European Union rights under section 3 (1) which states, "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto)"[37].

7. *The Relationship between European Union law and British law on supremacy*

It is proposed to treat two matters in this part of the essay. The first matter proposes to answer the question of whether or not the primacy of European Union law impinges upon the supremacy of the British Parliament. The second matter will treat the consequences of the European Communities Act of 1972.

Does the primacy of European Union law impinge upon the supremacy of the British Parliament?

The brief answer to the above question is both "Yes" and "No"! A short comment is necessary for a fuller understanding of these two contradictory answers. There exist *dicta* in some British courts' judgments to indicate that the doctrine of Parliamentary supremacy in the United Kingdom remains unscathed in spite of the doctrine of the primacy of European Union law.

Did not Lord Denning in *Macarthy's case* say that the British Parliament could, at any time, repudiate the European Communities Act, 1972? He stated

which on the orthodox domestic approach to international law may not direcdy enforce a provision of an international treaty or a measure passed there under, are directed by section 2 (1) to enforce any directly effective EC measures. There is no need for a fresh act of incorporation to enable UK courts to enforce each EC Treaty provision, regulation, or directive which according to EC law has direct effect." P. Craig, G. De Burca, *EU Law, Text Cases and Materials*, Oxford University Press 2007, p. 366.

[35] Express or specific mention of the primacy of Community law is not necessary for the United Kingdom but is bound by the findings of the European Court of Justice case law (as discussed briefly above).

[36] See the Protocol attached to the Treaty which affirms this.

[37] With regard to state liability in damages, the British courts (namely the Court of Appeal and the High Court) have acknowledged the European Court's decisions. See *Brasserie du Pecheur (46 and 48/93 [1998] 1 CMLR 1353 (ECJ); [1998] 3 CMLR 192 (CA) and Francovich v Italy (C-6 and 9 /90) [1991] ECR 1-5357; [1992JIRLR 84; and [1993] 2 CMLR 66.*

that "...If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought it would be the duty of our courts to follow the statute of our Parliament."[38]

The "Yes" factor

Thus it is argued that the primacy of European law does impinge upon the supremacy of the British Parliament. The case law, as seen above, makes this abundantly clear. The European Court of Justice in *Costa v ENEL*[39] posited "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

The "No" factor

On the other hand, the British Parliament may deliberately and intentionally repeal the European Communities Act, 1972, or may pass deliberate legislation inconsistent with European laws. In such circumstances the supremacy of the British Parliament remains intact.

Looking realistically at the situation it is very unlikely that the United Kingdom will leave the European Union. For political and practical reasons that country is too entrenched in Europe to do so!

It may therefore be said that the doctrine of Parliamentary supremacy exists as a theoretical possibility, despite the fact that the European Court of Justice in its judgments views the European Community Treaty as constituting an independent legal order having primacy over national law in its application in domestic courts and institutions.[40] An interesting opinion has been expressed by Lord Justice Laws in the Court of Appeal. In the learned judge's

[38] *In Macarthys Ltd v Smith [1979] ICR 785 (CA) at p. 789.* See also *Garland v British Rail Engineering Ltd. [1983] 2 AC 751* where Lord Diplock agreed with Lord Denning's opinion as expressed in the Macarthys case.

[39] *Costa v ENEL [1964] ECR 585 at 593.*

[40] See the dicta of the European Court of Justice in part 4 of this work entitled"Pilgrim's Progress" treating the development of the primacy of European Union law.

opinion, changes which have been made to British law have been voluntary and have not been imposed directly by European Union law. The fact that the British courts have changed their approach to the interpretation of British statutes to take into account the European Union enactments in specific fields does not offend against the doctrine of Parliamentary supremacy.

What are the consequences of the European Communities Act, 1972?

Although there was uncertainty in the British courts over a period of some seven years (i.e. from 1972 to 1979) after the United Kingdom joined the European Community, *inMacarthys Ltd* v *Smith*[111] in 1979 a majority Court of Appeal was prepared to accept the European Court of Justice's decision in the *Costa?*[2] and Simmenthal[43] cases. Cumming-Bruce and Lawton LJJ in their judgments based on their interpretation of section 2 (4) of the European Communities Act, 1972, gave European law priority over British law *simpliciter*. The Master of the Rolls, Lord Denning, was more moderate and exacting by using the construction approach and construing the Equal Pay Act, 1970, in accordance with the principle of equal pay for equal work under Article 119 (now Art. 141) of the Treaty Establishing the European Community. Lord Dennings view was that "...we are entitled to look to the Treaty as an aid to its construction..." It is interesting to note however that although "moderate and exacting" in that he construed the case in its context, namely the Equal Pay Act, he was prepared to go further in stating in his judgment "...but not only as an aid but as an overriding force. If on close investigation it should appear that our legislator is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of s. 2 (2) and (4) of the European Communities Act 1972".

The *Factortame case*[11] in 1990, heard in the House of Lords, is considered to be the most important case treating this issue. Lord Bridge was of the opinion that the combined effect of section 2 (1) and (4) of the 1972 Act was "... as if a section was incorporated in... the Merchant Shipping Act, 1988, which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any Member State of the EEC". Thus if the British law infringed the directly effective Community rights of the claimants, European law would be applied over the inconsistent provisions enacted by

[41](1979) ICR 785 (CA).

« Costa v ENEL(C-6/64) (1964) ECR 585; (1964) CMLR425.

[43] Amministrazionedelle Finenze dello Stato SpA (C-l06/77) (1978) ECR 529; 3 CMLR 263.

[44] R v Secretary of State for Transport ex parte Factortame Ltd. (1991) 1 AC 603 (HL) as stated by J. Steiner, L. Woods, C. Twigg-Flesner, *EU Law*, Oxford University Press 2006, pp. 78 and 79.

domestic legislation. In applying the subsequent decision of the European Court of Justice, the House of Lords[45] were unanimous in granting relief.

It is interesting to note that in the *Factortame case* the "construction" approach applied by Lord Denning (in *Macarthys (see above))* was not invoked. Community law thus prevailed. Lord Bridge pointed out that although the Treaty did not provide specifically for the principle of primacy of Community law over domestic law, that principle was "...well established... in the jurisprudence of the Court long before the United Kingdom joined the Community. Whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act was entirely voluntary".

Thus far it may be concluded that the primacy of Community law over British domestic law is now well established in the case of directly effective Community law. That "primacy" takes the form, either by "construing" the domestic law in the light of European law (the Lord Denning approach), or by the direct application of European law over domestic law, thus giving priority to European law (the Lord Bridge approach); this latter being based on the implied interpretation of the intention of the British Parliament resulting from section 2 (1) and (4) of the 1972 European Communities Act.

8. Concluding thoughts

From the brief discussion and analysis which took place in this work, four conclusions may be drawn.

First, as has been shown, there is no doubt that *in practice* European Union law has primacy over British law in specified fields.

Second, there is an undoubted supremacy of the British Parliament *in theory* since the European Communities Act, 1972 may be expressly repealed at any time Parliament wishes to.

Third, the Declaration attached to the Reform Treaty of October 2007 which states, *inter alia* that the case law of the European Court of Justice, etc. have primacy over Member States' laws, is valueless since the present Treaties are silent on the issue of the primacy of European Union laws.

Finally, this being so, it is submitted that the Declaration should have been omitted altogether from the Reform Treaty leaving the principle of primacy of European Union laws to be developed, as has hitherto been the situation, through the jurisprudence of the European Court of Justice.

[45] *Ibidem*, p. 645.

"The strength of our democracy is fundamental
to our strength as a nation. A strong democracy
needs effective, credible institutions, which command
the support and engagement of citizens."

Rt Hon Jack Straw MP
Lord Chancellor and Secretary of State for Justice

JERZY MARCINKOWSKI - Andrzej Frycz Modrzewski Krakow University College

Reform of the House of Lords[1]

Introduction

The origins of the House of Lords can be traced to the Councils summoned by the English kings, some eight centuries ago. But, it was during the reign of Edward III (1327-1377) that the British Parliament became distinctly bicameral. The upper chamber was then composed of aristocrats and high-ranking members of the clergy, and not much has changed in this respect until more recently. The House of Lords evolved, underwent numerous changes and reforms but proved to be durable and adaptable[2] to the changing political reality throughout the centuries. The status of the Lords has, nevertheless, altered dramatically.

At first, it was considered to be the more powerful of the two chambers. With its dominance diminished, the House of Lords was abolished for eleven years in the middle of the seventeenth century.[3] After it was restored in 1660, it subsequently regained its position of the more powerful chamber of Parliament and continued to be considered as such until the nineteenth century.

Over the course of this century, however, the House of Commons' superiority became evident, while the Lords, as a result of industrialisation, grew

[1] The author wishes to thank the Ferens Research Trust of the University of Hull for awarding him a Fellowship which enabled him to pursue his research on the constitutional changes currently taking place in the United Kingdom. This article on the reform of the House of Lords is based on the research carried out during his Fellowship.

[2] The notion of *durability* and *adaptability of* the House of Lords is thoroughly discussed by N. Baldwin in his works, e.g. *The House of Lords: a Study in Evolutionary Adaptability*, Hull Papers in Politics; *House of Lords*, Wroxton College 1990.

[3] As a result of the English Revolution (1640-1660), King Charles I was executed, a republic (the Commonwealth of England) was declared and Oliver Cromwell became Lord Protector of England. Consequently, the House of Lords lost its power and the Act of Parliament of 19 March 1649 abolished the Lords on the premise that it was considered 'useless and dangerous to the people of England'. It was not until 1660 when the restoration of the monarchy took place and the House of Lords assembled again.

more and more out of touch with the changing structure of society.[4] The primacy of the House of Commons was secured with the increase of its authority under the Great Reform Act 1832. Additional reforms between 1867 and 1885 as well as later Acts of 1911 and 1949 strengthened it.[5]

The House of Commons has retained its undisputed primacy in the legislative process until today. This has been widely acknowledged to the extent that when in colloquial speech the term 'parliament' is used it is tantamount to referring to the lower house.[6]

On the other hand, the role and powers of the Lords have been slowly changing with the intention of making it a legitimate and assertive revising rather than rival second chamber. But, until now - after nearly a century since it was stated in the Preamble to the Parliament Act 1911 that the reduction of powers of the Lords was essential, because it lacked the popular and elected principle - the necessary modernisation has not taken place. Hopes for conclusive changes flourished with the Labour Party's attempt to implement reforms proclaimed in their 1997 Manifesto. They appeared promising, but after the initial changes in 1999, unfortunately, little has been achieved.

The late Robin Cook,[7] who was engaged in the reform of the House of Lords, emphasised the fact that the second chamber lacks relevance, legitimacy and representativeness. He urged that a modern House of Lords was needed in order to strengthen parliamentary democracy. Cook was quite disappointed with the government's inefficiency in implementing the reform and predicted still in 2003 that: "Sadly, it will not be a Blair government that carries out that modernisation."[8] It has been recently proposed in the White Paper of 2008[9] that the plan of the reform should be presented in party manifestos before the next general election in order to see which option is chosen by voters.

This approach will again surely delay the whole process, and the responsibility will be passed on to the next government. There are big chances that this time it will no longer be a Labour government.

[4] N. Baldwin, *The House of Lords: a Study in Evolutionary Adaptability*, Hull Papers in Politics, p. 4-5.

[5] The development of the British Parliament is discussed by Polish authors: A. Zięba, *Parlament Wielkiej Brytanii*, Warszawa 2004, or A. Pułło, *Izba Lordów Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej*, [in:] *Izby Drugie Parlamentu*, ed. E. Zwierzchowski, Białystok 1996.

[6] A. Pułło, *op. cit.*, p. 307.

[7] One of the most prominent representatives of the Labour Party, who *inter alia* played the function of the Leader of the House of Commons from 2001 to 2003.

[8] R. Cook, *The Point of Departure: Diaries from the Front Bench*, Simon and Schuster 2004, pp. 280-281.

[9] *An Elected Second Chamber: Further reform of the House of Lords*, HMSO, Cm 7438, July 2008.

Reforms in the twentieth century

The upper house was subjected to a number of attempts to radically modernise it from 1909, but the particular governments did not quite manage to implement the proposed reforms. The first incentive for action stemmed from the fact that, in 1909, the Lords attempted to veto Lloyd George's People's Budget when the Liberal government had a large majority in the House of Commons. The Bill was sent to the House of Lords with an overwhelming Conservative Party majority. Both houses had nearly equal powers and this situation caused a constitutional crisis. The House of Lords could reject Bills and used its power in the case of this very Bill that proposed new taxes, which could have been considered somehow discriminatory against landed wealth.[10] Such a situation led to two general elections in 1910. Consequently, as a result of the deadlock, the House of Commons sought to diminish the powers of the other Chamber. This was achieved by the Parliament Act 1911, which regulated relations between both houses, for the first time. It was also stated that a thorough reform should ensue at some unspecified time in the future, which *inter alia* would have to comprise the removal of hereditary peers.[11] The Act secured the absolute primacy of the House of Commons in relation to financial matters[12] and limited the Lords' veto on other issues by granting them delaying power of three sessions, eventually changed to two sessions under the provisions of the Parliament Act 1949 (the second chamber still retained the right to veto Bills extending the life of a Parliament for periods longer than five years). These two acts are now known as "the Parliament Acts."[13]

Other modifications gradually introduced to the House of Lords included the Salisbury Convention accepted in 1945, which became an important part of the informal running of the House. It relates to the legislation implementing the government's manifesto commitment which the upper house does not reject, nor does it introduce 'wreaking amendments' to the Bills that are in accordance with the government's programme outlined during the election.[14] In 1958, the Life Peerages Act enabled men and women to become Life Peers. It was also one of the few significant reforms in that period. The second chamber, however, has remained partly hereditary and partly appointed, which is still the case nowadays. There are doubts whether such a composi-

[10] E. A. Smith, *The House of Lords in British Politics and Society 1815-1911,* New York 1992, p. 174.

[11] M. Russel, *Reforming the House of Lords,* New York 2000, p. 13.

[12] J. Straw, *The Governance of Britain: An Elected Second Chamber: Further reform of the House of Lords,* Ministry of Justice 2008, p. 1.

[13] See: I. Richard, D. Welfare, *Unfinished Business Reforming the House of Lords,* Vintage 1999, pp. 28-31.

[14] *Ibidem,* pp. 33-35.

tion could be considered as democratically legitimate. Some politicians, like Robin Cook or Tony Benn, maintain that democracy demands election.[15]

In 1968, the Labour government of Harold Wilson took action aimed at radically reforming the House of Lords. The proposals were based on the outcome of a cross-party debate, during which it was decided that the most salient changes planned to be introduced involved removing hereditary peers, granting life peers the right to vote, decreasing the number of bishops and law lords, setting the number of peers with voting powers at 230, and arranging the chamber in such a way that the government party would be the largest party, but would have no majority. There was also a proposal to change the functions of the Lords, which could as well be developed and extended with time. As a result, the government introduced the Parliament (No. 2) Bill in 1968. In spite of the overwhelming support for the reform in the upper house, the Bill failed in the House of Commons following strong opposition in the backbenches on both sides.[16]

During the twentieth century, three different options regarding the future of the Lords were considered by the reforming bodies. First to leave it unaltered, second to abolish it, or third to reform it. Each of these alternatives had fervent supporters and die-hard opponents. Both major parties at some stage were for dissolving the Lords. The Conservatives, when in opposition, advocated this idea in the late 1970s, and the Labour Party introduced this pledge in their 1983 Manifesto in which they proposed to abolish the House of Lords without replacement:

> We shall: (...) Take action to abolish the undemocratic House of Lords as quickly as possible and, as an interim measure, introduce a Bill in the first session of parliament to remove its legislative powers - with the exception of those which relate to the life of a parliament.[17]

Eventually, the Labour Party changed its policy and, in 1992, proposed the idea of replacing the Lords with an elected second chamber as a part of several constitutional reforms.[18] At present, the only option considered is the third one, namely the reform of the House of Lords. There appears to be a wide consensus across the major parties on this choice. It is generally acknowledged that a second chamber is required, because it plays an important role in complementing the House of Commons, though it needs democratic legitimacy, in spite

[15] R. Cook, *op. cit.;* T. Benn, *Democracy means an elected second chamber*, SCGN 1999, December, No. 149.

[16] I. Richard, D. Welfare, *op. cit.*, pp. 45-46.

[17] http://www.labour-party.org.uk/manifestos/1983/1983-labour-manifesto.shtml, 29 August 2008.

[18] J. Mitchell, A. Davies, *Reforming the Lords*, IPPR 1993, pp. 25-27.

of the fact that in the present situation it gets praise for the excellent work which it is doing.[19] It is a foregone conclusion that in a democratic country of the size of the United Kingdom, a second chamber is needed.[20] It plays an important role in checking the executive and alleviates the legislative load of the lower house.

In recent years, especially, after the accession to the European Union, legislation has increased in quantity but decreased in quality.[21] Thus, an assertive and legitimate House of Lords is a priority in order to secure the delivery of a valuable legislature that meets contemporary standards.

Criticism of the House of Lords

Many commentators supplied various reasons justifying the need to change the structure and functions of the House of Lords. One of the most common concerns is that the upper house, consisting of hereditary and appointed peers, has no legitimate right to question the elected representatives from the House of Commons.

Incidentally, the awkward situation in the British Parliament is acknowledged internationally, and may cause some embarrassment to the officials representing the oldest democracy in the world, who participate in various events.

Robin Cook, in a self-deprecating passage in his diaries points, out the fact that Lesotho was the only one other country in the world in which "hereditary chieftains still retain the right to pass laws for the rest of the nation."[22]

He duly recalls one episode that took place during a Europe - Africa Summit, when in his capacity as a Foreign Secretary he spoke in support of démocratisation.

In response, the president of an autocratic African state made a point by stating that he could not be taken responsible for not being able to introduce a full democracy during the fifty years after his country gained independence, when the British Parliament was not able to get rid of the hereditary princi-

" Ibidem.

[20] See: M. Russell, *op. cit.*

[21] After the United Kingdom had joined the European Community in 1973, Europeanisation of the British policy took place. As a result of the increase of legislative burden, even the parliamentary European Committees created to help make European policy are overworked and unable to deal effectively with their tasks. This obviously leads to a situation in which legislation is criticised for being of low quality and poorly implemented. For more on this aspect of Europeanisation see: P. Norton, *The United Kingdom: Political Conflict, Parliamentary Scrutiny,* [in:] *National Parliaments and the European Union,* ed. P. Norton, London 1996; A. Forster, A. Blair, *The Making of Britain's European Foreign Policy,* Longman 2002; J. Mitchell, A. Davies, *op. cit.*

[22] R. Cook, *op. cit.*, p. 33. However, it might be worth adding that it is now observed that because of political pressures legislative powers of the king and chieftains are steadily decreasing in Lesotho.

pie for five hundred years.[23] Political imbalance is another important flaw of the House of Lords, which was invariably accused of being the Conservative Party's own committee.[24]

The Lords had been dominated by this party during the twentieth century, until the removal of the majority of hereditary peers and Mr Blairs nominations granting life peerages.

This enabled them to pass at their convenience legislature of their party and exercise their powers over other parties' Bills by rejection or postponement.[25] Robin Cook pointed this phenomenon out and commented that although the Labour Party had two landslide victories (1997, 2001), the House of Lords was still dominated by the Conservatives.

He also did not leave unnoticed the fact that the second chamber tended to defeat the Labour government more often than the last Conservative government during the eighteen years when they were in office.[26] Richard and Welfare emphasize that the Blair government was defeated in its first session nearly three times more than the Thatcher/Major governments on average.[27]

The table presented below analyses the government defeats in the House of Lords during the period 1970-2001. The record scores were over 100 per year and took place in the years 1974/1975,1975/1976, which, of course, was during the time of the Labour government.

In spite of this unhealthy tendency, it is worth mentioning that the Lords have gained respect, when they displayed a lot of courage and decency during the Thatcher era, for opposing the antidemocratic moves of the "Iron Lady's" administration.

The House of Lords should be given credit for observing its right to criticise the government even at the time, when the House of Commons was dominated by the Conservatives.[28]

[23] *Ibidem*, p. 33.

[24] J. Mitchell, A. Davies, *op. cit.*, p. 29.

[25] N. Baldwin, *op. cit.*, p. 12.

[26] R. Cook, *op. cit., p.* 33.

[27] I. Richard, D. Welfare, *op. cit.*, p. 51.

[28] J. Mitchell, A. Davies, *op. cit., p.* 30.

Table 1: Government defeats in the House of Lords 1970-71 to 2000-2001[29]

Session	Number	Session	Number
1970/71	4	1985/86	22
1971/72	5	1986/87	3
1972/73	13	1987/88	17
1973/74	4	1988/89	12
1974	13	1989/90	20
1974/75	103	1990/91	17
1975/76	126	1991/92	6
1976/77	25	1992/93	19
1977/78	78	1993/94	16
1978/79	11	1994/95	8
1979/80	15	1995/96	10
1980/81	18	1996/97	10
1981/82	7	1997/98	39
1982/83	5	1998/99	31
1983/84	20	1999/00	36
1984/85	17	2000/01	2

According to some commentators the House of Lords could not become a legitimate legislative chamber, because of its undemocratic and anachronistic composition.[30] It is, indeed, the largest upper house in the world; before the first stage of the reform it had over 1200 potential members (size of the house is not fixed - in practice it could grow even bigger). Second chambers worldwide are much smaller. On average, they have no more than 60 per cent of the number of the lower house. For example, Poland (460 members - lower house / 100 members - upper house), the USA (435/100), Australia (148/76) or France (577/321).[31] The number of its members fluctuates constantly, and every month the House of Lords Information Office issues an analysis of its composition. Lord Sudeley recalls that, originally, it used to be a very small chamber. For example, during the reign of Elizabeth I, it consisted of hardly more than sixty peers.[32] With time, as new Lords were nominated, it kept on increasing its size substantially. Thus, Richard and Welfare are right to comment that the British Parliament has been weakened because one of its chambers lost the rationale for hereditary peers and it is unable to perform its duties appro-

[29] http://www.parliament.uk/commons/lib/research/rp2001/rp01-077.pdf, 21 August 2008.

[30] J. Mitchell, A. Davies, *op. cit.*, p. 7; A. Pullo, *op. cit.*, p. 324.

[31] M. Russell, *op. cit.*, pp. 25-28.

[32] Lord Sudeley, *Why Tamper with the House of Lords*, "Monday Papers" 1979, No. 9, December, p. 2.

priately. They stress the fact that the second chamber, paradoxically, functions only because the greater part of its members do not show up, and it wisely does not attempt to make use of its powers, which have their source in its illegitimate composition.[33] In the 1940s, only one eighth of the members of the House of Lords regularly attended meetings.[34] Some commentators have argued that since the average daily attendance was 368, there seemed to be no reason for keeping the upper house bigger.[35] As for the use of its powers, it its worth mentioning as an example that during the legislative process the Lords are able to delay Bills proposed by the House of Commons. As a result, the lower house may be forced to start the whole procedure all over again during the next session because of the discontinuation principle.[36]

However, this power of the House of Lords has been exercised very sparingly, as it was feared that, when provoked by such actions, the House of Commons could put forward arguments for speedy reform of the second chamber or even propose the idea of abolishing it.[37]

The Composition of the House of Lords

Similarly to what was discussed above, Richard and Welfare observe that there are three major reasons underpinning the necessity to reform the second chamber. First, there is no justification for the hereditary principle in the Parliament. Second, the house lacks political balance. And, finally, it does not have legitimacy to perform its duties properly.[38] All of these three reasons demand changes in the composition of the House of Lords, which is an essential part of reform and will be critical for the future of the chamber[39].

The reformers are aiming at enabling it to perform a variety of functions with efficiency and ample legitimacy as a balanced second chamber. Many dif-

[33] I. Richard, D. Welfare, *op. cit.*, p. 49.

[34] G. Pondel, *Z problematyki reformy parlamentu Zjednoczonego Królestwa*, "Państwo i Społeczeństwo" 2006, Vol. 4, p. 145.

[36] A decision regarding the size of the reformed second chamber has not been reached, yet. Presently (summer 2008), the House of Lords has over 700 peers, which still makes it the largest upper house in the world. The government suggests that it should have between 400 and 450 members. The Wakeham Commission, for example, proposed 550. There have also been other suggestions regarding the size but, basically, the reformers unanimously agree that the House of Lords should be smaller. Another aspect is the ratio of an elected and appointed element in case of a hybrid house that the labour government favours. One of the options voted for in the House of Commons in March 2007 and proposed by the present government in White Paper 2008 as suitable is 80% of elected and 20% of appointed members.

[36] According to the principle of discontinuation, the Bills that the Parliament had worked on during one session are not considered by the Parliament in the next session.

[37] A. Pułło, *op. cit.*, p. 314.

[38] I. Richard, D. Welfare, *op. cit.*, p. 48.

[39] See: D. Oliver, *Constitutional Reform in the UK*, New York 2003, pp. 188-202.

ferent views on the composition have been presented as this issue has been widely discussed in the media and during two rounds of consultations (1101 submissions during the first round, several hundred in the second round). A number of choices have been presented. The most often discussed options included appointed, mixed (hybrid) or elected House of Lords. The following are just a few major examples on how members of the House of Lords could be selected.

Advocates of appointment state that this is a way of securing the appropriate number of individuals with specialist knowledge and experience from a wide range of walks of life. In their view, this is necessary in order to supply expertise in the legislative process. Lord Norton of Louth, an academic and Conservative politician, former head of the Department of Politics and International Studies at the University of Hull, who according to the House Magazine is the "greatest living expert on parliament" in the United Kingdom, admits that it would be difficult to sustain the present house and gives reasons why a fully appointed second chamber is the best choice. In his opinion, it is a democratic option, indeed, because it relies on the concept of core accountability.[40] Under the existing system, the argument goes thus, when one chamber is elected the other should not be elected because it would introduce divided accountability that would not be good for public policy. In such a situation, it would be unclear who shall be held responsible for the outcomes of the legislative process.

Moreover, if the second chamber was elected, it would indubitably demand more powers than the appointed chamber would get. Consequently, it could become powerful enough to constrain the work of the lower house. An elected second chamber would not be easy to justify in a unitary state, and above all it would not add any value to the process, because, unlike in a federal state, it would be a repetition of the first chamber as far as the composition is concerned. Thus, there would be no added value to the process. When the house is appointed there is a qualitative distinction and extensive expertise available, which means that the legislators can look at issues from perspectives different from elected politicians in the Commons. In a nutshell, following this train of thought, the appointed second chamber adds value

[40] Lord Norton of Louth argues that the concept of *accountability* is a characteristic feature of parliamentary democracy. It is used in relation with the power of electors to vote against the MPs who do not act in the interest of the electors. He introduces the notions of *core accountability* and *divided accountability*. The former is used in order to describe a situation in the British Parliament, where the body responsible for public policy, which is the government elected through the House of Commons, is accountable to electors. If the second chamber was also elected it could lead to a situation when the legislative outcome becomes a compromise between the two houses. This would create *divided accountability*, because in the case of disagreements between the two chambers and the lack of the outcome of public policy it would not be possible to decide which body is responsible for this situation.

without threatening the supremacy of the lower house.[41] Surprisingly, the former Labour Prime Minister, Tony Blair, also favoured such an approach in recent years, although previously on various occasions he expressed a different preference. Robin Cook stated that it was not long ago when the leader of the Labour Party supported a wholly elected second chamber: "Tony Blair said in 1995, 'We want a properly directly elected second chamber', or, in 1996, 'We have always favoured a wholly elected House of Lords."[42] In spite of these declarations, Tony Blair changed his views with time. He had later emphasised on various occasions that, being strongly against a hybrid upper house, he believed that only a fully appointed chamber would guarantee that the House of Lords became a revising, not a rival, chamber. During the voting process that took place in March 2007, the House of Lords backed the same idea and voted for a fully appointed option rejecting all other alternatives. On the contrary, the House of Commons was in favour of a wholly, or 80% elected 20% appointed second chamber. The then Prime Minister, eventually, modified his views and said that he would support the choice that was reached by consensus. The idea of creating a fully appointed chamber will surely face great opposition from the public, because it would be seen as "Replacing the House of Lords with a House of Cronies (...)" to use the wording of Robin Cook.[43] Lord Norton, however, believes that cronyism can be overcome once a statutory independent appointments commission is set up. Its responsibility would be selecting appropriate individuals for the House of Lords on the basis of certain criteria of which the main one would be outstanding quality, since there would be high quality threshold for the candidates. There should also have to be an across-party agreement that no party should have a majority in the House of Lords, and this chamber would consist of a large independent element. The responsibilities of such an appointment commission, which would have to rely on the transparency and legitimacy of its actions, would thus entail prevention of cronyism and maintenance of the high quality of the house.

But the introduction of a fully elected second chamber, just as it is done in many countries all over the world was also seriously considered. Proponents of this idea bring forward the argument that in their view democracy does require an elected second chamber.

The opponents argue that this option might threaten the supremacy of the Commons, as were stated above.

[41] The views of Lord Norton of Louth ware expressed during an interview that the author of this article conducted on 27 August 2008.

[42] R. Cook, *op. cit.*, p. 52.

[43] *Ibidem*, p. 82.

The next choice taken into account was the abolition of the second house and the introduction of a unicameral system, based on the premise that there are many legislatures that function without a second chamber (Sweden, Denmark, New Zealand, the Scottish Parliament, Welsh Assembly, the Northern Ireland Assembly). This solution, however, does not seem to be a feasible option nowadays. MPs did not support the abolition during parliamentary votes on 4th February 2003 and the majority of them voted in favour of a bicameral system in March 2007.

A serious alternative recommended by the Wakeham Commission was a hybrid upper house. And this turned out to be a very popular proposal. It relies on the combination of an elected and appointed element. The rationale behind it was the belief that appointed peers would provide expertise and their elected counterparts democratic legitimacy. Such a structure of the chamber would also secure the primacy of the wholly elected Commons. Still unresolved, however, is the issue of the proportions of elected and appointed elements. The Wakeham Commission's recommendation was a 50/50 split, but it did not gain political support, although the model of a mixed house is the alternative favoured by the Labour government. Many commentators had argued that it would be a bad choice by lack of synergy that, in their view, would make it worse than a fully elected or appointed house. In the same vein, Lord Norton believes that the hybrid house would be the worst option, because *inter alia* it requires two types of members. Consequently, one type could be seen to be more legitimate than the other. It is difficult to predict what such a house would actually deliver. There are also practical problems connected with this option. Would appointed and elected members be treated in the same way? Would they be paid differently? By asking this kind of questions, Lord Norton also stresses the fact that the greatest problem is the status of members and whether they would all be equal.

Reforms under the Labour Government since 1997

Many officials have explicitly voiced their views regarding the necessity of abolishing the House of Lords, but it, nevertheless, survived until our times and is likely to last as long as the British Parliament. At the turn of the twenty-first century, the debate regarding its role and usefulness is still going on. When the Labour Party took power after the landslide victory over the Conservatives, one of the major objectives in the Blair project to modernise Britain was the reform of the House of Lords, which along with devolution[44]

[44] In the years 1997-1999, as a result of referenda approving the transfer of powers from central government to regional and local bodies, devolution was implemented in the United Kingdom, which resulted in the creation of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly.

aimed at changing the shape of British politics in the new century.[45] The reform of the upper house remained unfinished business for 88 years, as none of the governments until the Labour Party came into office in 1997 was able to introduce radical changes. Every previous reforming administration either failed or left the job incomplete.[46]

The Labour government kicked off quite courageously, and seems to be very busy with the reform. Unfortunately, not much progress has been made since the first stage was implemented.

First stage of reform

The Labour Party in its 1997 Manifesto articulated the necessity to reform the upper house and outlined its proposal for changes meant to be conducted in two stages. By way of modernisation they planned to address the above-mentioned defects of the House of Lords, namely, the need to change the composition and size of the second chamber including the decrease in the number of peers with a view to gaining democratic legitimacy and creating political balance. The following excerpt states the aims explicitly in this respect.

> The House of Lords must be reformed. As an initial, self-contained reform, not dependent on further reform in the future, the right of hereditary peers to sit and vote in the House of Lords will be ended by statute. This will be the first stage in a process of reform to make the House of Lords more democratic and representative. The legislative powers of the House of Lords will remain unaltered.[47]

In the same document, it was mentioned that the second stage of reform would be dependent on the decisions made by a committee of both Houses of Parliament.

By looking at the outline of the composition of the Lords presented below in Tables 2 and 3, which show the situation before the first stage of reform, one notes the overwhelming dominance of the Conservative Party and hereditary peers as well as the fact that the house membership was out of proportion in comparison with the modern second chambers around the world.

[45] *Public Policy under Blair*, ed. R. Atkinson, S. P. Savage, Palgrave 1998, p. 13.

[46] I. Richard, D. Welfare, *op. cit.*, pp. 3, 11.

[47] Labour Manifesto, *New Labour because Britain Deserves Better*, 1997, p. 32.

Table 2: Composition of the House of Lords by party strength as at 13 October 1999 - before the implementation of the first stage of reform[48]

Party	Life Peers	Hereditary Peers		Lords Spiritual	Total
		Of First Creation	By Succession		
Conservative	172	2	297	-	471
Labour	160	1	18	-	179
Liberal Dem.	49	0	23	-	72
Cross Bench	128	5	220	-	353
Other	32	0	80	26	138
TOTAL	**541**	**8**	**638**	**26**	**1,213**

NB The figures in the above table are based on those peers who were eligible to attend the House of Lords (i.e. Peers without Writs of Summons (65) or on leave of absence (52) are excluded.)

Table 3: Composition of the House of Lords by peerage type as at 13 October 1999 - before the implementation of the first stage of reform[49]

Archbishops and bishops	26
Peers by succession (of whom 17 women)	751
Hereditary peers of first creation	8
Life peers under the Appellate Jurisdiction Act 1876	27
Life peers under the Life Peerages Act 1958 (of whom 101 women)	518
TOTAL	**1,330**
Of whom:	
Peers without Writs of Summons (of whom 3 minors)	65
Peers on leave of absence from the House	52
10 persons who had inherited peerages have disclaimed them for life (3 of these now sit in the House by virtue of other titles)	

Consequently, the House of Lords Act 1999 removed anachronistic dominance of hereditary peers. All of them were to be removed, originally, but throughout the process, it was agreed to leave ninety-two, including Royal Office holders

[48] http://www.parliament.the-stationery-office.co.uk/pa/ldl99697/ldinfo/ld03mem/inf3e.htm, 21 August 2008.

[45] *Ibidem.*

- the Earl Marshal and the Lord Great Chamberlain. Tables 4 and 5 present the composition of the interim house, after the changes introduced in 1999.

Table 4: Interim house by party strength - 2 May 2001 (excludes 4 peers on leave of absence).[50]

Party	Life Peers	Hereditary: Elected by party	Hereditary: Elected Office Holders	Hereditary: Appointed Royal Office Holders	Bishops	Total
Conservative	173	41	9	**1**		224
Labour	191	2	2			195
Liberal Democrats	56	3	2			61
Cross bench	131	29	2	**1**		163
Archbishops and Bishops					26	26
Other	6					6
TOTAL	557	75	**15**	**2**	**26**	675

Table 5: Interim house by peerage type - 2 May 2001[51]

Archbishops and bishops		26
Life Peers under the Appellate Jurisdiction Act 1876		28
Life Peers under the Life Peerages Act 1958	(106 women)	533
Peers under House of Lords Act 1999	(4 women)	92
TOTAL		**679**

Subsequently, the Royal Commission was appointed. Its overriding objective was to examine various aspects concerning the House of Lords and make recommendations regarding its role, functions and composition in order to prepare the ground for the second stage of reform. It became known as the Wakeham Commission, and taking the name after its chairman Baron Wakeham.[52]

[50] http://www.publications.parliament.uk/pa/ldl99798/ldbrief/Idanal.htm, 25 August 2008.

[51] *Ibidem*, 28 August 2008.

[52] J. Straw, *op. cit.*, p. 2.

When the general elections of 2001 were approaching, it became evident that the Labour Party would address the issue of the second stage of reform of the upper house in their manifesto in which they presented their support for the Wakeham Commission that prepared 132 recommendations.

> We are committed to completing House of Lords Reform, including removal of the remaining hereditary peers, to make it more representative and democratic, while maintaining the House of Commons' traditional primacy. We have given our support to the report and conclusions of the Wakeham Commission, and will seek to implement them in the most effective way possible. Labour supports the modernisation of the House of Lords' procedures to improve its effectiveness. We will put the independent Appointments Commission on a statutory footing.[53]

Thus, the Labour Party declared that it would complete the process. There seemed to be a good political moment for the changes, since the Conservative and Liberal Democrat parties also wished for House of Lords reform in their manifestos.[54] During her speech on 20 June 2001,[55] the Queen stated that the second stage of reform would ensue following consultations. According to the White Paper, it would involve the removal of ninety-two hereditary peers, establishing an appointments commission and diminishing the number of peers to 600, including 120 representing regions. But these proposals did not get the support of Parliament. The government responded to the recommendations of the Wakeham Commission and published a White Paper on the Lords in November 2001.[56] This was followed in 2003 by a debate and free votes on the composition of the House of Lords. A Joint Committee appointed by the Lord Chancellor and the Leader of the House of Commons set out seven options for the composition of a reformed House.[57] Neither the debate nor the voting were conclusive. None of the proposed options was chosen.

[53] Labour Party, *Ambitions for Britain: Labour's Manifesto 2001*, p. 35.

[54] 2001 Conservative Party General Election Manifesto 'Time for Common Sense' http://www.conservative-party.net/manifestos/2001/2001-conservative-manifesto.shtml, 19 January 2009; 2001 Liberal Democrat General Election Manifesto 'Freedom, Justice, Honesty' http://www.libdemmanifesto.eom/2001/2001-liberal-manifesto.shtml#constitution, 19 January 2009.

[55] http://www.publications.parliament.uk/pa/Id200102/ldhansrd/vo010620/text/10620-01.htm, 29 August 2008.

[56] White Paper, 2001, *The House of Lords: Completing the Reform*, London, HMSO, Cm 5291.

[57] The seven options for the composition of the reformed House of Lords were: (1) fully appointed, (2) fully elected, (3) 80 per cent appointed/20 per cent elected, (4) 80 per cent elected/20 per cent appointed, (5) 60 per cent appointed/40 per cent elected, (6) 60 per cent elected/40 per cent appointed, and (7) 50 per cent appointed/50 per cent elected.

The first steps, that involved the removal of most of the hereditary peers, were promising. This move helped the Blair government finish the dominance of the Conservative Party in the House of Lords and the unprecedented number of nominations for Life Peers that Blair made secured the Labour Party majority in the House of Lords (see Tables 6 and 7). Unfortunately, these changes led to the present "comfortable" situation that seems to have diminished the government's eagerness to implement further reform of the second chamber.

Table 6: Breakdown of Lords by party strength - 6 October 2008[58]

Party	**Life Peers**	**Hereditary: Elected by Party**	**Hereditary: Elected Office Holders**	**Hereditary: Royal Office Holder**	**Bishops**	**Total**
Conservative	153	39	9	0	0	201
Labour	209	2	2	**0**	0	213
Liberal Democrat	69	3	2	0	0	74
Crossbench	170	29	2	2	0	203
Bishops	0	0	0	0	26	26
Other	13	2	0	0	0	15
TOTAL	**614**	75	**15**	**2**	**26**	**732**

NB Excludes 9 peers who are on leave of absence.

Table 7: Breakdown of Lords by type of peerage - 6 October 2008[59]

	Men	**Women**	**Total**
Archbishops and bishops	26	0	26
Life Peers under the Appellate Jurisdiction Act 1876	22	1	23
Life Peers under the Life Peerages Act 1958	456	144	600
Peers under House of Lords Act 1999	90	2	92
TOTAL	594	147	741

[58] http://www.parliament.uk/, 9 August 2008.

[59] *Ibidem.*

The twentieth century was dominated by Conservative governments. This situation might explain why the Lords survived without major changes, since this house had invariably the Conservative majority. Similarly, now, the Labour administration, in its third consecutive term, has not been able to wind up the planned modernisation, although it started reforms, but got on until it achieved majority in the second chamber. They appear, currently, to be satisfied with the situation and do not seem very worried about the second chamber's lack of power because this helps avoid friction in the legislative process. Some critics observing the moves of the Labour government predicted that there would be no second stage of reforms.[60] One of the factors responsible for the little progress seems to be the fact that there is not enough political support for the introduction of the necessary radical changes[61] in spite of political declarations.

Present state of the House of Lords reform - summer 2008

All the major parties (Labour, Conservative, Liberal Democrat) expressed in their 2005 manifestos a commitment towards the further reform of the House of Lords. Below are extracts from their respective texts.

In our next term we will complete the reform of the House of Lords so that it is a modern and effective revising Chamber.[62]

The House of Commons needs to be made more capable of standing up to the executive. We will strengthen select committees and make time for proper scrutiny of all legislation. As part of our drive for efficiency across Whitehall and Westminster, we will cut the number of MPs by 20 per cent. We will seek cross-party consensus for a substantially elected House of Lords.[63]

Reform of the House of Lords has been botched by Labour, leaving it unelected and even more in the patronage of the Prime Minister. We will replace it with a predominantly elected second chamber.[64]

The above passages express the necessity to conclude the process of reforming the House of Lords. This unanimous attitude led to establishing a cross-party commission that discussed the issue of reform and published a governmental White Paper "The House of Lords: Reform" in 2007.[65]

[60] I. Richard, D. Welfare, *op. cit.*, p. 7, or see: R. Cook, *The Point of Departure: Diaries from the Front Bench*, Simon and Schuster 2004.

[61] G. Pondel, *op. cit.*, p. 148.

[62] *Britain forward not back* - Labour Party Manifesto 2005.

[63] *Are you thinking what we're thinking? It's time for action* - Conservative Party Manifesto 2005.

[64] *The real alternative* - Liberal Democrat Party Manifesto 2005.

[65] *The House of Lords: Reform*, HMSO, Cm 7027, February 2007.

After the failure of the free-vote in 2003,[66] regarding the composition of the reformed second chamber, the voting was repeated. This time the House of Commons voted in favour of a fully elected (337 to 224) or 80% elected / 20% appointed (305 to 267) chamber, while the House of Lords voted for a fully appointed second chamber (361 to 121).[67]

Recently, a new White Paper released on 14 July 2008[68] presents the results of the cross-party group work on House of Lords reform. A consensus was reached on a variety of issues. Justice Secretary Jack Straw states that the paper is not a final blueprint for reform, but it rather aims at stirring discussions on the proposals and options that are included in it. The Labour Government believes that the eventual proposals would have to be presented to the electorate for the decision on whichever views should be supported. Thus, the best way to achieve this goal would be including the party ideas regarding the form and role of the second chamber in their general election manifestos.[69]

The White Paper 2008[70] contains information on where agreement had been reached as well as the points that cause differences of opinion. It presents the results of the cross-party group's work. There is a wide consensus regarding the role of the second chamber as well as the relationship between both houses of Parliament. The upper house will complement the House of Commons. The government will be able to pass its manifesto Bills through Parliament and the primacy of the House of Commons will be secured. There will be a mechanism in order to maintain the difference between the composition of each house. This approach shall ascertain the primacy of the Commons and enable the second chamber to exercise its powers. The four major principles that shall help achieve this objective are as follows:

members of the second chamber should be elected on a different representative basis from members of the House of Commons;

- members of the second chamber should be able to bring independence of judgement to their work;
- members should serve a long term of office; and

[66] Both Houses voted on seven options regarding the composition of the second chamber on 4 February 2003. The House of Lords backed a fully appointed chamber, whereas the voting in the House of Commons did not show support for any of the options.

[67] *J.* Straw, *op. cit.*, p. 2.

[68] *An Elected Second Chamber: Further reform of the House of Lords*, HMSO, Cm 7438, July 2008.

[69] J. Straw, *op. cit.*, p. 3.

[70] *An Elected Second Chamber...*

- the second chamber should take account of the prevailing political view amongst the electorate, but also provide opportunities for independent and minority views to be represented."[71]

The White Paper stresses the fact that the primacy of the House of Commons could not be threatened, while the second chamber should become more assertive, which would stem from the fact that it would acquire the electoral mandate. The system of choosing peers is still to be debated since the government would like to gather opinions on the size of the reformed chamber as well as which of the following options are most suitable: first past the post, alternative vote, single transferable vote or an open or semi-open system. The elected members would serve for a term of 12-15 years without possibility of renewing it. One third of them would be elected during each election.

The government believes that in order to preserve a significant independent element in the House of Lords there should be some members who are appointed. It agrees with the result of the voting in March 2007 at the House of Commons that chose a 20% appointed element. In an elected second chamber there would be no church representatives. In order to become eligible for the House of Lords, the candidates would have to fulfil criteria in line with those of the House of Commons and the membership would not be associated with the status of a peerage. Another result of modernisation would be the fact that the members would receive salaries. It is advised that the transition is gradual and the second chamber stays in a transitional phase until its composition becomes totally changed in the course of three electoral cycles.

The impending reform will result in eliminating peerages, and thus it shall become unlikely that the upper chamber retains the name of "House of Lords"[72] In the White Paper 2008 it is called "reformed second chamber" to keep it neutral. Consequently, the government is asking for suggestions regarding the name of the new house. One of the options might be Senate, which had found a wide consensus among members of the cross-party group. It may sound too republican, but seems to be one of the most popular options, too. The issue still remains unsettled, however. Incidentally, the BBC conducted a survey on its website in which it asked for proposals for the new name for the Lords. The current name proved to be the most common response, but other suggestions included: Senate, Upper House, House of Peers, the House that Jack built or House of Straw.[73]

[71] *Ibidem.*

[72] At present the full, official name of the second chamber is: "The Right Honourable the Lords Spiritual and Temporal of the United Kingdom of Great Britain and Northern Ireland in Parliament assembled."

[73] http://news.bbc.co.Uk/l/hi/uk_politics/6341599.stm, 13 August 2008 (the last two refer to Jack Straw

Conclusion

The Parliament Act 1911 stated that the House of Lords lacked a popular and elected principle. A century later the same can be said and still no final reform has been implemented. It is a large, undemocratic, one of its kind second chamber in a country that prides itself on being the oldest democracy in the world. Nicholas Baldwin has stressed on various occasions the fact that the House of Lords was a prime exponent of the British constitutional tradition in respect of its capacity for gradual adaptability to changing environment.[74] He argues that this was possible because the upper house was not created according to a detailed plan of action. In his own words:

> (...) the House of Lords was not established to meet the requirement of any particular theory of politics; it was not created by any national convention; it does not owe its existence to some paper scheme drawn up by politicians, academics or constitutional lawyers. Rather it is a product of history. It has not been made; it has grown.[75]

This romantic idea might have still been valid in the nineties. In recent years, the very process of reform that has been underway indicates inevitable, although delayed, revolutionary modernisation. A wide range of learned, experienced or simple individuals from different walks of life (the very people that Baldwin refers to in the passage above) have had their say throughout all this time by contributing to various commissions, consultations, submissions of recommendations, surveys, etc., in the debate on the reformed second chamber. It becomes clear that the adjustment to the contemporary reality requires a bespoke scheme agreed by "the powers that be" outside the House of Lords.[76] It is not a viable option that the second chamber be allowed to take its time indefinitely. The splendid tradition of evolutionary adaptability will very likely come to an end when the newly created upper house changes its name as well as the rationale underpinning its composition and functions to make it suitable for the modern democratic era.

Obviously, reform will not be concluded during the present term of the government. There seems to be a large degree of agreement about fundamentals, yet the reformers cannot find a clear way forward. The above-mentioned examples show that even though the reform of the upper house has been dis-

- Commons Leader responsible for Lords reform).

[74] See: N. Baldwin, *House of Lords*, Wroxton College 1990; N. Baldwin, *op. cit.*

[75] N. Baldwin, *op. cit.*, p. 13.

[76] See: R. Cook, *op. cit.*, p. 279.

cussed from many angles and all the aspects of changes have been targeted, various governments invariably lacked the determination to conclude modernisation regardless of the unequivocal declarations in favour of reform. After some years of promissing changes that started in 1997, we are now witnessing a period of stalemate. It takes place after the Labour governement introduced the initial changes that helped it achieve its political objective. Once this was acomplished, the government did not seem to be really pushing the modernisation forward. The developmnents demonstrate that the Labour Party is quite happy with ending the Conservative dominance and does not seem to be interested in changing it any further - to put it bluntly.

As far as the future of the House of Lords is concerned, abolishing it is just not considered any more, and there is a wide cross-party consensus about it. The reform will have to be completed, because if the House is to stay it has to be modernised.[77] There may still be doubts about how much of it will be elected or appointed, or even if it shall be fully appointed or fully elected, for that matter.

Nevertheless, the radical change of this undemocratic institution is underway and is performed in a most democratic manner involving cross-party debates as well as widespread public consultations. Once it is finished, it will not be easy to defend Baldwin's principle of adaptability of the second chamber any more, because a new order will be introduced according to a plan made virtually from scratch. This revolutionary approach, however, might be one of the major reasons why reform has been delayed for so long, as people tend to be reluctant to act against tradition.

Composition has become the most contantious issue. Naturally, only once this is settled all other interrelated elements will follow suit, e.g. relations between the two houses, functions, supremacy, etc. It is envisaged that no matter what composition is chosen there will always be pros and cons. After a century of debates, the time is ripe to make changes. But it seems that all that can be done is to evaluate the possibilities and decide which option is least controversial.

First there has to be a political will and courage on the side of the reformers. Each of the three solutions (a fully elected, hybrid or appointed second chamber) have supporters who are able to propose convincing arguments. Interestingly enough, the House of Commons opts for a fully elected or 80% elected second chamber, even though this may be seen by many as a way to threaten their primacy and creating a rival rather than revising upper house. On the contrary, the House of Lords is for the appointed second chamber. This might be understood as a conscious move to prevent reform, because if

[77] J. Mitchell, A. Davies, *op. cit.*, pp. 26-27.

both houses voted unanimously there would be little excuse for not implementing it duly.

If election is considered democratic although, in a democracy not all institutions have to be elected (e.g. judges, juries) the elected House of Lords may have a greater public support than one composed of appointed peers. The latter is problematic because it is not going to be easy to pursuade society that appointment may not necessarily mean creating a "House of Cronies" but shall be a better way of maintaining high standards without threatening the supremacy of the lower house. Thus, the option with the fully elected house is more likely to be introduced in the foreseeable future, because the politicians will probably not go for the appointed house, as it is bound to cause controversies. It will certainly not be easy to pursuade the public that cronyism can be prevented. Unfortunately, people tend to see the appointment as a way of securing the majority of a party in power rather than the creation of a competent body.

It just might happen that a compromise is reached in the form of a hybrid house. The present government is supporting a mixed (80% elected 20% appointed) second chamber. Specialists are against it. Lord Norton stressed the fact that it is the worst option and criticises the White Paper 2008 that introduced it for its low quality. But it just might be politically the easiest way forward. The voters may accept more willingly this idea on the premise that the elected element gives the house democratic legitimacy and the appointed peers would provide expertise. If a hybrid chamber is introduced then it will probably evolve in the British traditional way towards a fully appointed or elected house as with time the faults or advantages of any of these proposals could become discernable. It is a foregone conclusion that whatever the choice is made the second chamber will have to be more flexible than now in order to adapt to the demands of the modern times. The Labour government, opportunistically, does not seem to be interested in taking a responsibility for further reform and it is willing to wait until the next election to see which party's programme for modernisation voters choose. The impending reform will just have to wait a little longer.

On the Reform of the House of Lords as well as Domestic and European Politics

Interview with LORD NORTON OF LOUTH/

- Jerzy Marcinkowski[••]

During the free-vote on the composition of the second chamber in 2007, the House of Lords backed a fully appointed house. Some commentators state that such an option is not democratic and if implemented the House of Lords would be criticised for becoming the 'House of Cronies'. What might be the justification for this attitude in the second chamber?

- Lord Norton of Louth

There are a number of justifications for it. First, in fact, it is a democratic option. People say election of the second chamber is a democratic option. I would say not necessarily. There are different definitions of democracy, but at the heart of the concept of the representative democracy is the concept of accountability. You elect people to act on your behalf, if they do not act in the way that you wish them to, you can then remove them. Thus, accountability is at the heart of it.

Now, you may argue that favours election. It does not, if you wish to retain accountability for public policy. Under our existing system, we have what I term *core accountability*. There is just one body elected to government. There is the party in government that is responsible for public policy in the United Kingdom. And that one body is therefore accountable to electors. In other words, it can be turned out of office at the next election. There is no divided accountability. The government cannot say "it is not us who is responsible, it is another body". In our present system we have the election of government through the House of Commons and that maintains that core accountability. Now, our argument would be if we elect the second chamber then by virtue of election that chamber would be able to say 'we demand more powers

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•• Jerzy Marcinkowski wishes to express his thanks to the Ferens Research Trust of the University of Hull for the award of a Fellowship which gave him the opportunity to interview Professor Lord Norton of Louth on 27 August 2008.

than the existing appointed chamber' It would not necessarily claim to be co-equal with the first - although there would be an argument that it is entitled to - but it would most certainly claim that it needed more power than the existing second chamber. Thus you have a second elected body claiming greater powers than the existing second chamber to limit what the first chamber is doing. Once you have that, you have the potential to end up with outcomes that are different to those put forward by the party in government. The outcome might be a deal between the two chambers. Therefore there is divided accountability: who do the electors then hold responsible for the outcomes of public policy or, especially, for no outcomes of public policy if there is conflict and no agreement? Which body do they hold responsible? With the present system you get the benefit, which is quite unusual, of core accountability, because you have one body in government that is elected through elections to the House of Commons, and yet you get the benefits of a second chamber being able to complement the first without challenging that core accountability. Those benefits derive from the existing system, which we think would be lost if the second chamber was to be elected. Having two elected chambers divides accountability and it delivers nothing in terms of adding value to the political process. You just elect a second body of politicians, which is difficult to justify in a unitary state. You can justify it in a federal state, because people elect the members of the second chamber to speak for a particular state, a subunit of the nation. Now, in a unitary state you do not have that. Electors would be voting for members of the second chamber on exactly the same basis as voting for the first chamber. It would add nothing. The present arrangement means that you have a second chamber that is qualitatively distinctive. It has the extensive expertise, the members can look at issues from a perspective different to elected politicians. It adds value to the process without challenging the fundamental supremacy of the first chamber.

On your second question about the 'House of Cronies', you can avoid that in the way that a number of people suggested. There is a movement on the Lords side that favours reform, but not election. We want some reform of the House of Lords but it not to be elected. One of the reforms is to create a statutory independent appointments commission. It would not comprise members appointed by the Prime Minister. Most members of the current non-statutory commission are independent members or come through nomination by other parties, but the process is not necessarily seen to be independent of the Prime Minister. If you have a statutory independent appointments commission with responsibility for putting forward names on the basis of certain criteria, of which the main one would be outstanding quality - that they would have to have particular merit - there would be a high quality threshold to put names forward. A commission that was independent and would

be seen to be independent, applying a high quality threshold to nominations coming from the parties and being proactive in identifying and putting forward the names of the independent members. There would be a general agreement that no one party should have a majority in the House of Lords. And there should be a large independent element. The appointments commission, statutory based, agreed as being independent would avoid accusations of cronyism and maintain the quality of the House, and doing it through a process that is seen to be transparent and legitimate.

- Jerzy Marcinkowski

Would not in your view a partially elected, partially appointed chamber be a better option?

- Lord Norton of Louth

No, it would be a worse option. Some peers take a view and some MPs take a view that you either have a wholly elected or a wholly appointed house and that a hybrid house would be the worst of both worlds, because you would have two types of members. What would be likely to happen is what happened towards the end of the unreformed house just before 1999 when you had hereditary peers and life peers. Neither was elected, but life peers were seen to be more legitimate, because they were put there on individual merit and not because their forefathers were there. When the government suffered a defeat in the House of Lords the media analysed it. Who made the difference? Was it the hereditary peers? Because they were seen as somehow less legitimate than life peers, if they made the difference then somehow this diminished the vote. Now, if you have a partly elected house and the government is defeated then what would people's comments be? How did the non-elected members vote? Did they make a difference? This somehow would delegitimise the vote, if they did make the difference to the outcome.

It is not clear what value a hybrid house would bring and it would be rather similar, as I have argued before, to putting the two chambers together as one, because you have those that are elected and those who are appointed. It is not clear what a hybrid would actually deliver. There would then also be some practical problems. Would the elected members be full-time politicians - in which case they would probably want paying a salary. Appointed members at the moment only get expenses; there is no salary. Many members have outside jobs. Are they all going to be treated the same? Are elected members going to be paid differently? Would they require bigger offices? There are then practical problems. But, the main difficulty I see is that of status and moving away from the present situation where all members are treated as equal in the house. I think the proposal for a hybrid house is fundamentally challenging without adding value to the process.

- Jerzy Marcinkowski

Nicholas Baldwin, the author of a number of publications on British government and politics, once wrote that: "... the House of Lords was not established to meet the requirement of any particular theory of politics; it was not created by any national convention, and it does not owe its existence to some paper scheme drawn up by politicians, academics or constitutional lawyers. Rather it is a product of history. It has not been made; it has grown." Is the impending reform not going to change this tradition? Will such a statement still be valid when the second chamber's name, composition, roles change radically?

- Lord Norton of Louth

It will be difficult to sustain the present house. Conditions will definitely change. There is a fundamental problem, which Dr Baldwin touched upon. At present, the House of Lords, he is quite right, has evolved and adapted. To some extent the House of Lords has almost reinvented itself to be a chamber that is complementary to the elected first chamber. It does not challenge the supremacy of the elected first chamber - it accepts the supremacy that derives from election. It fulfils tasks that are complementary - that add value to the process - and it draws on the particular strengths of the second chamber: the experience and expertise that is characteristic of its membership. Now, the Lords was not designed in that way. But because of two statutory changes - the 1958 Life Peerage Act and 1999 House of Lords Act - that fundamentally transformed the nature of the institution, the house has adapted to meet the conditions it faced. It has proved itself to be extremely adaptable. Now, if the second chamber were to be elected, you would have problems not just that it would not develop in an evolutionary manner but also that it would then have to be decided what exactly the functions are of the chamber and how will electing it enable it to fulfil these functions. How would their functions be qualitatively distinctive from an elected first chamber? Reformers argue that you just keep the existing functions while electing the membership. However, once you have elections this changes the terms of trade between the two chambers. Why should elected members - who could say 'we are elected so can be as legitimate as the first chamber' - fulfil what can be seen as subordinate functions, and certainly less politically high profile functions than those of the first chamber? Elected members in the first chamber do work that is politically significant and thus enhances their profile. It would be difficult to have elected members of the second chamber doing none of this but carrying on doing what the present second chamber does, which is fairly detailed scrutinising work. You do not get any great publicity usually from doing that detailed work, which is why it is left at the moment to the second chamber. The elected members would probably be seeking to do things

not greatly dissimilar to the elected first chamber. There would be a problem in maintaining the functions. You would have to identify the functions of the elected chamber and I am not sure how qualitatively distinctive they would be. And certainly they would undermine what has been the nature of the house so far, which has been its adaptability, its ability to change in the light of changing conditions and retain - in fact, enhance - its relevance to the political process.

- Jerzy Marcinkowski

Robin Cook once said that: "The constitutional reality is that Britain has a unicameral parliamentary system concealed by an elaborately colourful, but pathetically irrelevant second chamber" when he referred to the undisputed primacy of the Commons due to the fact that the Lords have no legitimacy and thus no real power (p. 280). Do you agree with the view that there is *de facto* a unicameral parliamentary system in the United Kingdom?

- Lord Norton of Louth

No. Robin Cook was completely wrong and wrong on both counts. First of all, the second chamber is legitimate. Legitimacy does not derive solely from election. Legitimacy derives from popular acceptance that people are qualified to do their job. We do not elect judges, we do not elect civil servants and we need not elect the members of the second chamber, who are there to do a particularly distinctive job based on their background, experience, expertise. Members of the second chamber are legitimate for the purpose of undertaking the particular jobs that are ascribed to the second chamber. And there is evidence that it is popularly accepted. We have survey data that to some extent justifies that.

Second point, Robin Cook was completely wrong in terms of what the second house does. It does have powers. What it cannot do is override the House of Commons if the House of Commons insists on getting a measure through. What the House of Lords does is not to challenge a measure in terms of ends but instead focuses on means. So the Lords will accept the vote of the House of Commons on the principle of a bill and instead will look at the detail - can it be improved? And that is what it focuses upon, more so than the Commons. The Lords procedures ensure that the house can look at the every part of the bill that requires scrutiny in a way that the Commons generally does not. And in doing that, the Lords makes more of a difference to the details of government bills than the House of Commons. As far as estimates are concerned, one was that the House of Lords, in the detail of legislation, makes twice as much difference as the House of Commons. So it has a significant impact on legislation. Each year, each parliamentary session, something like 3000 to 4000 amendments to government Bills will be secured in the House of Lords. Without the

work of the House of Lords, the statute book in the United Kingdom would be in a far worse state than it is. Without the House of Lords we would have a mass of, in many respects, undigested legislation getting on to the statute book. It is legitimate to do the task it does, the task it does, it does rather well. It could be even better but what it does, it does well. And this makes the difference.

- Jerzy Marcinkowski

Some say that the second chamber is not interested in reform at all. What mechanisms can the House of Lords use to delay reform?

- Lord Norton of Louth

As I said, the Lords has some interest in reform, but not in election. We argue against election. That is why we voted for the all-appointed option and against all the others, as we did in 2003. Many members expressed their views based on a formulation I developed in the debate in which I declared that I would vote for the all-appointed option and vote against all the others. Other peers followed suit, including the then Lord Chancellor. Thus, we are against election by a fairly clear margin. But, we do favour reform. I drafted the House of Lords Bill that Lord Steel introduced this past session designed to achieve some changes, including a statutory independent appointments commission, getting rid of the by-election option for the hereditary peers, allowing for peers who wish to retire to apply to do so to. There are various changes that we would like to see and are pushing for. So we favour change, we are not against change *per se.*

How do we resist demands for election? Mainly by force of argument and by showing that the arguments put forward by the government are not very good. So, all the documents they have produced by the government, the various white papers on the reform of the House of Lords, have generally been intellectually extremely poor. And the latest one is remarkably even worse than the one that preceded it, which is saying something. We have developed our case by arguing on grounds of principle and certainly on grounds of practice with arguments that resonate with electors, for example that an elected second chamber is likely to be extremely costly and will not add any value to the political process.

All it will add is another body of elected politicians, which people are generally not in favour of, and it would undermine the functions that the Lords presently fulfils and for which there is some popular support. We know from survey data that electors rather like the Lords for being an independent body and one that engages in the detailed scrutiny of legislation. Electors accord higher priority to carrying out these functions than they do to having an elected element in the house: that came only fifth in the list of priorities in

a recent poll. And the higher priorities can be achieved by retaining the House as presently constituted.

There is a political argument as well that there is very little benefit to government for actually going ahead and having elected an second chamber. It would be a lengthy process, it would get in the way of other reforms and it is not clear how government itself would benefit from the process. And since both main political parties in the House of Commons are split down the middle, it is not the best basis on which to bring forward the legislation.

- Jerzy Marcinkowski

The House of Lords Act 1999 removed all but 92 hereditary peers from the second chamber. In the subsequent years Blair nominated an unprecedented number of Labour peers. According to the data I gathered (27 August 2008) now there are 211 Labour peers, 207 Crossbenchers, 205 Conservatives, 77 Liberal Democrats. Can we say that the dominance of the Tories in the House of Lords has ended?

- Lord Norton of Louth

The House of Lords Act 1999 got rid of over 600 hereditary peers. Before 1999, you had a House that was characterised by two features. One was that it was mainly hereditary membership - about 2/3 members were there by virtue of inheriting their title - and second it was a very Conservative body as it has been since the early 19th century. It has been predominantly a Conservative institution. All that changed in 1999. The 1958 Life Peerage Act made it possible for people to be nominated for their lifetime (and not have their titles pass to their heirs). By 1999, you already had about a third of the membership as life peers. So when you got rid of hereditary peers it transformed it into a chamber predominantly of life peers. That changed the nature, fundamentally. By getting rid of most hereditary peers it got rid of that large Conservative element. It produced a House in which no one party has an absolute majority. And, as the figures you indicated show, the Labour Party is now the largest single group in the House, but only just, and there are no objections to that because it is the party in government, so it is quite right for it to be the single largest party. As you mentioned, at the moment the Crossbenchers are the second largest group as a result of recent creations. They were just third but they are currently second. The Conservatives are almost the same. When the Conservative Party is back in government, there will be a few more Conservative creations to make it the largest single party in the house. That will change the situation, but not greatly. We are in a situation where no one party has an absolute majority and therefore when the government wants to get its way it has to persuade other par-

ties in the House to support it. They will look to the Liberal Democrats and/or Crossbenchers for support. The Liberal Democrats have more effect because they vote in greater numbers in relation to their total. Crossbenchers are not so good at voting because they do not have the same sort of political steer on issues. But the government has to persuade those who are in the House to go along with it, otherwise it may lose if anything is pressed to a vote. That is the situation in which the Labour government finds itself. But a future Conservative government will find itself in an identical situation, facing an opposition of almost the same size. So, whichever party is in government, it will face the same situation. And there is a general agreement among the parties that that should be the case that there should be no one party with an absolute majority in the House of Lords. That broad situation is basically accepted across the political spectrum.

- Jerzy Marcinkowski

The term 'eurosceptic' was coined in the United Kingdom to describe those representatives of the Conservative and Labour parties who were opposed to the European Economic Community. Nowadays, it refers to those who do not support the European integration. But eurosceptics differ on both their vision of Europe and on the manner in which it is perceived to fail. What are the characteristic features of euroscepticism in the Conservative Party and how can this phenomenon be described?

- Lord Norton of Louth

I would distinguish different attitudes going beyond simply European scepticism and supporting European integration, which would take into account the points you made about changes over time. I think you can identify four approaches within the party, the same I think would be in the Labour Party. First of all, we have what I would term *anti-Europeans,* you then have *Eurosceptics,* then you have *Euro-agnostics* and then you have *Europhiles.*

Anti-Europeans were those who were opposed to British membership of the European Community. The objection in large measure, I think, was constitutional. They did not want to be a part of some supranational body. They wished to retain British independence. Britain, in their view, should be allowed to go its own way. They wanted Britain to be like Norway rather than an integral part of a supranational decision-making body. So there has always been a group opposed to membership in the first place: people like Enoch Powell and John Biffen, who opposed British membership and therefore argued against the European Communities Bill when it was going through Parliament in 1972.

Anti-Europeans are distinctive from *Eurosceptics* because they are in favour of membership. Their position is not on constitutional grounds, although it comes into it, but essentially economic in that that they favour membership as a means of achieving a single market. It is, if you like, a free market orientation, one of getting rid of barriers and opening up the market. However, *Eurosceptics,* especially following Mrs Thatcher's Brugge speech in 1988, argue that it is the case of so far and no further': 'yes' to the Community as a means of achieving a free market and 'no' to it if it is going beyond that to create some great political edifice where, in a sense, you have a European government rather than simply the erosion of trade barriers. *Eurosceptics* are those who do not want to go beyond the intentions of the Single European Act. That is the distinction.

The *Euro-agnostics* within the party, probably the largest single part in the party, are not strongly for or against European integration. They would probably tend to be sceptical, but would largely go along with the leadership - or allied to that what they see is in British interests, which should be the leadership's position. They support what is in British interests in relation to the European Union. That might mean negotiating the Maastricht Treaty, like John Major did, but being wary of going any further, and looking to the leadership for advice on the issue and being willing to be persuaded. They do not necessarily lean toward *Eurosceptics,* nor toward *Europhiles,* but remain willing to be persuaded to do what they think is in the best interests of the country. They comprise the largest part, and arguably the most important, in the party: it is how this body of opinion swings that determines how far the party can go.

And then you have *Europhiles* who have a principled belief in European integration. They want to take it further, not so much on economic grounds but in political terms of coming together. Many critics would say they are in favour of the United States of Europe. They used to be far more prominent in the Conservative Party, especially when Edward Heath was party leader, but nowadays they are very much in the minority position.

We have thus seen some change within the party. But then we have seen significant changes in both parties. For both main parties, European integration is not a fault-line of British politics, and both are divided on it.

• Jerzy Marcinkowski

What are the most contentious issues in the debate on the European Union within the Conservative Party?

- Lord Norton of Louth

How far integration is taken. I do not think there is any problem with issues like enlargement. The party has favoured that because both sides can agree that is a good thing looking from slightly different perspectives. But that has not ever been a big issue. Things like Eastern expansion including Turkey in general parties have been sympathetic towards. That has not been the issue, it is how far the integration has been taken.

Two elements to that. One political and one economic. The political is the structures within the EU, how much further powers do you give them to create the equivalent of a foreign minister, president, things like that. How much do you then bind that within some sort of a constitutional arrangements, constitutional treaty. There is a resistance to taking that further. That is the political one. The economic one is economic union. Particularly, their resistance to joining the Euro zone. If we go down that route, anyway, a referendum is promised. The government has got itself in a fix, because it probably would not win, therefore it is probably not going to end up going down that route. But in any event there is resistance to greater economic union. That badly split the Conservative party, including during the general election in 1992, when it became an issue whether one should say to the European Union: 'Well, not now' as opposed to those who wanted us to say: 'Never'. And that has caused quite a rift within the party.

- Jerzy Marcinkowski

Some have noticed that the Tories ceased to argue publicly over the European Union. Is this a sign that the eurosceptical faction in the Conservative Party came to terms with the inevitable changes or do not want to lose votes among the pro-European electorate?

- Lord Norton of Louth

The party was divided on Europe, badly divided, and electors do not reward divided parties. The party needed to reduce the significance of Europe or European integration as an issue for political purposes. Therefore, the leaders have played down pledges somewhat and rather emulated the Labour party to some extent by saying that they would not do that without a referendum. That is the way of putting it to one side. Both sides will say we can wait and then we argue our case in those circumstances. So it has been a deliberate approach by the party leadership to downplay the issue because it is not politically rewarding. Even though the party stand may coincide with popular opinion. Nonetheless, it is still politically damaging, because the party is divided and the electors do not reward a divided party. And at times the party also looked a little extreme in its stance. Even if electors agree with the stance

they do not like a party that looks extreme. The perception of being extreme derives from a combination of things, but it is politically unwise for European integration to be such a high profile and divisive issue. And the party badly split on the issue in 1997 and did not really want to go back to that situation.

- Jerzy Marcinkowski

David Cameron once used the term British "broken society". How can this be understood?

- Lord Norton of Louth

Well, I suspect the term depends on who you are asking as to its meaning. There is a problem with British society. I am not so sure the society as a whole is broken but there are elements of society which are problematic. It is a definitional and a relative problem. Is it much more broken than it was? Because some of the social problems we can see now you could see in earlier years, just in a slightly different form. Every generation perceives there is a problem with young people. We have always had the perception of that problem. There is a problem that takes different forms. But, I think, what he is focusing upon is to some extent a lack of social cohesion through the disintegration of groups. It has always been a Conservative axiom that you build up society from what we call little battalions. It is families, social groups, local organisations. They are the means through which people are integrated into society and learn social skills. There has been a tremendous emphasis on bodies like that. And there is a perception that they are diminishing significantly. You need to re-establish them. Move it away from the state which tends to tell people how to behave and adopts a one side fits all' framework for social development. Instead leave it to the locality. Get people involved through local groups and at the same time through that it is a way of integrating and it is a way of developing social responsibility, tackling the dangerous disintegration of the family and too many isolated young people without a sense of social responsibility.

It is really integrating a lot of young people into society when they appear to be isolated from it. We have always had these people. It is a matter of scale, becoming more pronounced, you see it in certain figures - number of broken homes, teenage pregnancies, things like that. It is how you address those problems through restoring local pride and repairing the local bodies through which people can be integrated into society.

I think that is a possible solution. And addressing one of the modern problems like the Internet, which on the one hand is a great communication tool, on the other hand is massively antisocial. People spend their time in front of the screen, they have no social interaction, do not develop social skills. They

are isolated. It also creates problems in the political system that is not geared to that at all. Arguably we get this divorce between individuals, young people and the political process which is not geared to how they now operate. That is how I would see what David Cameron is getting at. There is that broken element which does not mean it is a whole society. But there is a problem and the perception that this is a growing problem. That always has been an issue to which the Conservatives have been very sensitive to the need to maintain cohesive society. And they have always been worried at the signs of discord or problems.

- Jerzy Marcinkowski

To the vast majority of voters, the EU is not an important issue for the country. As far as the Conservative Party is concerned, what are the issues of highest importance for the United Kingdom?

- Lord Norton of Louth

You are quite right. People may have strong views on European Union, but do not give it priority. That has always been a problem. Because there has been a danger of the party looking at opinion polls. But if you ask them what is their priority EU is not at the top of the list, certainly not at the moment.

A range of issues resonate with the electors. These include public services, because there has always been an attachment to things like the NHS and now there seems to be a problem with more and more public money invested in the NHS but delivering less. Thus, the NHS, but public services generally is an issue. Not necessarily giving these priority, but they are certainly seen as more important than European integration. Then there is the fear of crime.

According to official figures, the crime rate is decreasing, but politically what is important is not the figures, but the perception. And people are always worried about crime. So, fear of crime is important. People want to feel safe in their neighbourhoods. Perception that there are people around that make problems.

I think with many education is an issue. How do you improve the quality of the education system: primary and secondary education? Those are particular issues.

At the moment, clearly becoming the big issue is the state of the economy. Once you have an economic downturn, people wonder: how am I going to be able to afford goods, survive, and pay the mortgage? Is my job under threat? There are longer term issues like retirement. Is it going to be more difficult to retire? Problems with pensions and things like that.

The economy, particularly at the moment, is rushing up to the top of the agenda and is certainly causing the government unpopularity. If the economy

continues badly the Labour government stands little chance of winning the next election. The economy is very much coming to the foreground.

- Jerzy Marcinkowski

The Conservative Party that played a major role in British politics during the 20th century suffered a landslide defeat in 1997. Is it legitimate to say that the issue of Europe led to this situation?

- Lord Norton of Louth

No! I shall tell you what did, this is something that I have actually written in terms what made the Conservative successful and what resulted in disastrous defeat.

Why was the Conservative party so successful in the 20th century? There are essentially four variables specific to the party and a fifth that is external to it. The main variable has been that the party has been able to convey that it is *a party of governance.* In other words, it has been able to handle well the affairs of the nation, particularly its financial affairs. It was able to convey - which does not mean it was good at it — but it was effective in conveying that it was good in running the country, it was a party of governance. Now, this first and foremost is the most important variable. As long as the party handled the economy well, it was supported and for most of the century it was in government. But there are still three other variables.

One is a *united party,* another is *strong leadership* and the fourth is *public service.* The party seemed to be working for the public good rather than for self-interest. Over the 20th century, the Conservative Party was generally seen as the best party for handling the affairs of the nation. It was a fairly united party. There were exceptions, like at the beginning of the century over free trade and tariff reform, but generally it has been a fairly united party. Electors prefer a united party to a divided one. Strong leadership has always been a characteristic feature of the Conservative Party, with the party looking to the leader to determine policy and deliver electoral success. And public service on the part of the leader and other parliamentarians was another feature of the party: they were there to serve the nation and not to further their own interests.

Then there is the fifth, external, variable, and that is that the Party has been *very fortunate in its opponents.* They generally split at times that were opportune for the Conservative Party. Those splits (in the Liberal Party in the late 19th century and early in the 20th century, and later in the Labour Party) were extremely beneficial. Now, when those variables have come together the party has done very well. For most of the 20th century it was the ‘in party of British politics.

Now, at the end of the 20th century, what happens? There is the ignominious withdrawal from the Exchange Rate Mechanism in 1992, with a collapse of confidence in the government, with the Conservative Party no longer seen as being the competent party in handling affairs of the nation. After withdrawal from the ERM, public support for the party collapsed. For the first time, when people were asked which party would be better in handling the nation's economy, Labour started coming up out top. This had not happened before. So that was the fundamental thing. At the same time, you got a disunited party divided over Europe and not only over Europe, but especially badly divided over Europe. Related to that, it proved difficult to provide strong leadership at a time when the party was split down the middle. Sleaze also became an issue, with the public perception that MPs were more concerned with making money for themselves than they were with pursuing the public good. The split over Europe, problems with leadership and sleaze were not the cause of the party's unpopularity. What they did, though, was to reinforce it. Fundamentally, it was the perception that the party was not the party of governance that was at the root of the party's problems. There was the view on the part of electors that the party could not be trusted in the handling of the economy. Therefore, they were not voting for it.

When you look at what happened, Labour then became the 'in' party, because it was seen as the party of governance. It replaced the Conservatives as the party of governance. It seemed to be handing the economy well, it could be trusted. It came into power fairly united, with a strong leader in Tony Blair. And what was helping was that the Conservative Party was in disarray. The conditions were completely reversed.

It has taken ten years for the Conservative Party to come to terms with this situation. It is always difficult to show you are a party of governance when you are in opposition, but under David Cameron the party has started to achieve that turnaround. It was not achieved under the three predecessors. William Hague, lain Duncan Smith, Michael Howard were not able to reverse the party's fortunes. David Cameron recognised what needs to be done as a long term solution and is starting to reverse the fortunes of the party, aided by the very fact that Labour is now jeopardising its claim to be a party of governance. The economy is doing badly. Labour is no longer seen as being the party able to deliver economic success. The Conservatives now are overtaking it as the party is seen to be more competent. The party is now coming back to being its old self, the party of governance, a status that was lost in 1992. That is the situation. It is not Europe that is responsible for the party's earlier defeat. It is the collapse in trust in government in handling the affairs of the nation. It did not cause the party to lose. It may have contributed to the scale of the defeat, but not to the fact of defeat.

- Jerzy Marcinkowski

Is it justified to say that 35 years after the United Kingdom joined the EU its traditional constitutional system has been revolutionised? Acts of Parliament are now checked if they do not breach European law.

- Lord Norton of Louth

Indeed. It has changed fundamentally, because it is at odds with the fundamentals of the British constitution. At the heart of the constitution is the doctrine of Parliamentary sovereignty. It means that the outputs of Parliament are binding, they can be set aside by nobody other than Parliament itself. That is intrinsic to our constitutional arrangements and it was confirmed by the Glorious Revolution of 1688-1689. It is a well-established intrinsic feature.

You are quite right to imply that the membership in the European Community fundamentally challenges that. Under the terms of membership, European law takes priority over United Kingdom law. In the event of conflict, that conflict is resolved by the courts and they give priority to European law. The implication therefore, clearly, which was not properly realised when we joined the European Community, was that the courts would be able to strike down provisions of British law that conflicted with European law. That, eventually, happened in the 1990s, e.g. the EOC case in 1994, when a provision of the British law was struck down as being contrary to the European law. It was a natural consequence of membership, but it took quite a lot of people by surprise when it actually happened.

Yes, it does not sit well with the doctrine of the Parliamentary sovereignty. The doctrine itself remains extant because the reason the courts can do what they do is because Parliament gave them the power to do so by passing 1972 European Communities Act which gave effect in domestic law to our membership. Parliament could formally repeal the 1972 Act, the consequence of which would be our withdrawal from the Community. What the courts are doing in striking down acts of Parliament is exercising the power given to them by the Parliament. In that sense, the doctrine remains in place. Parliament could take away the power it has given to the courts.

However, as long as the Act of 1972 stays - in other words, so long as the UI< is a member of the European Union - the courts have this power to strike down the British law. The effect of membership, I have argued, provided a new judicial dimension to the British constitution. It was our membership in the European Community that gave the courts a role they have never had before. It does not sit particularly well with our constitutional arrangements, so there is that inherent conflict as part of our constitutional arrangements.

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Dissonant Federalism, Consonant Nationalism? The Impact of the European Union on the Devolving Constitution of the United Kingdom

Introduction

The purpose of this paper is to examine the way in which EU membership has had a strong impact on the development of British devolution over the last ten years. Limits of time and space only permit consideration of how Scotland and Wales have used their powers with respect to EU policy-making.[1] The author's main contention is that the British model of devolution may develop into a dissonant federalism while simultaneously creating a consonant constitutional nationalism in both Scotland and Wales within the overarching context of European integration.[2]

Spain and Italy already present a type of federalism which is "uneven," "asymmetrical" or "disjunctive" with different autonomies enjoying different sets of rights.[3] A similar effect has been caused through devolution within the United Kingdom since the coming to power of the New Labour government in 1997 and the creation of devolved executives and legislatures following simple majority referenda in Wales and Scotland in September 1997. These devolved authorities exist above the local level but only enjoy a certain degree of constitutional protection and autonomy.[4]

Devolution in the United Kingdom clearly follows a decentralising trend that is apparent in many other EU Member States,[5] partially based on the idea that EU regional policy is best put into effect if strong sub-national govern-

[1] On Northern Ireland, see e.g., B. Hadfield, *Northern Ireland - Political Process: Peace Process?*, "European Public Law" 1998, No. 4, p. 451.

[2] Such discussion naturally falls within the confines of the perennial issue of multi-level governance in the Union: See, e.g., *The Regional Dimension of the European Union: Towards a Third Level?*, ed. C. Jeffrey, London 1997; *The Transformation of Governance in the EU*, eds. B. Kohler-Koch, R. Eising, London 1999; *Governance in the EU*, eds. G. Marks et al., London 1996; N. Nugent, W. Paterson, *The Political System of the European Union*, [in:] *Governing Europe*, eds. J. Hayward, A. Menon, Oxford 2003, p. 92-113.

[3] A. Ross, M. Salvador Crespo, *The effect ofdevolution on the implementation of European Community law in Spain and the United Kingdom*, "European Law Review" 2003, No. 28, p. 210; A. Sbragia, *Italy Pays for Europe: Political Leadership, Political Choice, and Institutional Adaptation*, [in:] *Transforming Europe: Europeanization and Domestic Change*, eds. M. Cowles, J. Caporaso, T. Risse, Ithaca 2001, p. 79—96.

[4] Kottman refers to the UK as a devolving unitary State: J. Kottman, *Europe and the regions: sub-national entity representation at Community level*, "European Law Review" 2001, No. 26, p. 159-160.

[5] J. Hopkins, *Devolution from a Comparative Perspective*, "European Public Law" 1998, No. 4, p. 323.

ment is actively involved in the decision-making process.[6] Nevertheless, the British model is based on peculiar historical and politico-cultural approaches whereby, since devolution, the Westminster Parliament has retained its ability to legislate on all matters for the whole country pursuant to the doctrine of parliamentary sovereignty, a uniquely British solution. The creation of Britain's state-centric system of multi-level governance has generated and will continue to generate a specific set of institutional factors.[7] With the continuing presence of the centre (located in Whitehall) in all aspects of devolved or transferred EU policy, the development of regional input and responsibilities by the devolved institutions[8] must therefore be seen in sharp contrast to those regional governments in other EU States which hold exclusive competence for the generation and/or implementation of EU policy in certain fields (e.g., Austria, Germany, Spain, Italy and Belgium).[9]

Historical nature of dissonance in the British constitutional system

The asymmetrical relations of Scotland and Wales in the United Kingdom are based on history, means of incorporation and developed bureaucratic interrelations

Wales was the first peripheral nation to enter into union with England in 1536[10] (having been effectively taken over by military conquest and royal annexation in the thirteenth century[11]) and followed about 50 years after the coming to the English throne of the Welsh House of Tudor. In the absence of any strong central institutions including a single effective ruler or parliament, Welsh unity - dogged by its mountainous geography - had been based rather on ancient cultural and legal affinities. It was fully integrated into England's administrative structures (including the county system, courts and law), although in the 20th century a legal provision was made to recognise the distinc-

[6] A. Cyngan, *Scotland's Parliament and European affairs: some lessons from Germany*, "European Law Review" 1999, No. 24, p. 483, at 483.

[7] C. Carter, *Making Multi-Level Governance work?*, "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 5, p. 6.

[8] See generally C. Jeffery, *Sub-National Mobilization and European Integration*, "Journal of Common Market Studies" 2000, No. 38, p. 1.

[9] See, e.g., T. Borzel, *States and Regions in the European Union. Institutional Adaptation in Germany and Spain*, Cambridge 2002.

[10] Act of Union 1536, c. 3, 28 Hen. VIII, as further defined and revised by the Act of Union 1543, c. 26, 34 & 35 Hen. VIII.

[11] Wales had been annexed to the English Crown by the Statute of Rhuddlan (Wales) 1284,12 Edw. I.

tive Welsh traditions as regards religion[12] and language.[13] A revival of Welsh national cultural consciousness (along with those in Scotland and Ireland) gathered speed in the late 19th century followed by a successful political nationalist revival in the form of *Plaid Cymru* (the "Party of Wales") founded in 1925, with its first Westminster MPs elected in 1966. One of the Party's present aims is to promote the constitutional advancement of Wales with a view to attaining full national status for Wales within the European Union. Since the 2007 Welsh elections, *Plaid Cymru* has been in coalition government with the Welsh Labour Party.

In comparison, Scotland entered into union with England in 1707[14] as an independent (and ostensibly equal) kingdom within the new Great Britain, having itself provided a common monarch for both kingdoms over the previous 100 years from the Scottish House of Stuart. Under the terms of the Union, Scotland retained its own state church (the Presbyterian or Calvinist Church of Scotland), together with its own laws and legal system, education (including its universities) and local government structures. As with Wales and Ireland, a reassertion of national cultural identity in the 19th century preceded a political renaissance in the 20th with the founding of the Scots National League in 1920 in favour of Scottish independence: this movement was superseded in 1928 by the formation of the National Party of Scotland, which became the Scottish National Party ("SNP") in 1934. At first the SNP sought only the establishment of a devolved Scottish assembly, but in 1942 they changed this to support all-out independence. The SNP now forms the Scottish Government following upon the 2007 Scottish elections and promotes independence within the European Union.

The relationship between the central administration of the British State, located in Whitehall (London), and its territorial departments - the Scottish Office and the Welsh Office - reflected this different pattern of incorporation. Although both Offices - as departments of the British government - enjoyed their own Secretaries of State (cabinet ministers), the Scottish Office had been founded earlier, enjoyed wider discretion in action and was better resourced than its Welsh counterpart. This differentiation clearly indicated the central government's greater readiness to acknowledge Scottish national distinctiveness than Welsh national distinctiveness,[15] a matter which still persists to this day.

[12] Disestablishment of the Anglican Church of Wales: Welsh Church Act 1914, c. 91, 4 & 5 Geo. V.

[13] Welsh Language Act 1967, c.66; and the Welsh Language Act 1993, c. 38.

[14] Act of Union 1707: Union with Scotland Act 1706, c. 11, 6 Ann.

[15] P. Hogwood, *Devolution in the UK: A Step Towards Fédéralisation?,* "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 4, p. 7.

UK-EU policy universe: Pre-devolution Scottish and Welsh input

Before the introduction of Labour's devolution plans, the hallmark of the British approach to EU policy-making was a highly centralised system, focused on and substantially contained within central (national) government centred in London (and particularly Whitehall), comprising a limited number of highly specialised participants that were members of an experienced inner core of actors: this inner core dominated European policy-making within the United Kingdom.[16] The exclusivity of this club in the formation of the UK's position to EU policies is best described by Bulmer and Burch.[17]

> The coordination of policy as well as a measure of oversight was achieved through a small central secretariat in the Cabinet Office (the European Secretariat). Its three or four top personnel plus legal advisers along with key players in the Prime Minister's Office (PMO) and Foreign and Commonwealth Office (FCO) and the UK's Permanent Representative to the European Communities formed the hub of the government's European policy making network. These personnel, both ministerial and official, plus one or two others from the Treasury and the two Departments most consistently and substantially involved in European matters, dealing with agriculture and trade and industry, formed the inner core of the network. Formally speaking coordination was achieved through a tiered system of cabinet committees at both ministerial and official levels. This coordinating net stretched out into Brussels through the UK Permanent Representation to the EU (UKRep), and engaged as the need arose, depending on the nature of the issue, personnel in other domestic Departments. At first, other than those Departments already mentioned, very few others were involved.

In typical Whitehall fashion, this limited policy-making universe started to expand and evolve over time.[18] Thus the Scottish and Welsh Offices were gradually drawn into the European policy-making network as domestic Departments of State.[19]

[16] S. Bulmer, M. Burch, *British Devolution and European Policy-Making: A Step-Change towards Multi-Level Governance?*, "Manchester Papers in Politics: EPRU Series" 2002, No. 2, p. 12.

[17] *Ibidem*, pp. 8-9.

[18] *Ibidem*, pp. 9-11.

[19] S. Bulmer, M. Burch, *Organisingfor Europe - Whitehall, the British State and the European Union*, "Public Administration" 1998, No. 76, p. 601; S. Bulmer, M. Burch, *The Europeanisation of British Central Government*, [in:] *Transforming British Government*, ed. R. Rhodes, Vol. 1: *Changing Institutions*, Basingstoke 2000, pp. 46-62.

Although EU policies had a great impact on key areas within their numerous policy functions, the Scottish and Welsh Offices (two of the "territorial Departments of State") were too small, too far from the centre in Whitehall - sometimes even neglected by it.[20] While ministers and officials in the territorial Departments were part of the UK/EU information net, they had no Departmental lead on European issues of any significance since that lay with the relevant UI< Departments - they were nonetheless part of the collective decision-making process within Whitehall.[21] Despite the disadvantages faced by the territorial Departments, they gradually adopted a more pro-active approach to EU policy formation - with the Scottish Office in particular seeking to expand its participation in Cabinet Office co-ordination mechanisms and in the Brussels arena:

> European Union policies, notably the Structural Funds, encouraged direct links with the Commission and opened up new opportunities for the territorial ministries [to] assert their interests beyond their traditional, narrow concerns with EU agriculture and fisheries policies. While the territorials remained at the periphery of UI< policy making, the 1990s saw increasing recognition on their part of the benefits of dealing independently with Brussels.[22]

As a result, the political appeal of a direct relationship with the EU was to prove significant as the devolution process got underway in the late 1990s.

British model of devolution

Despite the trends of decentralisation of policy-making and implementation evident in other EU Member States, UI< devolution was predominantly driven by domestic factors.[23] The political division of the United Kingdom in the 1980s and 1990s had seen successive Conservative governments unable to command the support of voters in Scotland and Wales, the majority of which voted for the Labour Party (together with the Liberal Democrats and nationalist parties).[24] The feeling of being effectively disenfranchised in-

[20] S. Bulmer, M. Burch, *British Devolution and European Policy-Making: A Step-Change Towards Multi-level Governance?,* "Politique Européenne" 2002, No. 6, pp. 114-124.

[21] *Ibidem*, p. 11.

[22] R. Gomez et al., *European Union Policy Making in the UK: A Brief History*, "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 5, p. 14.

[23] C. Carter, *The Formulation of UK-EU Policy Post-Devolution: A Transformative Model of Governance?,* "Manchester Papers in Politics: Devolution and European Policy Making Series" 2002, No. 3, p. 2.

[24] Generally, M. Keating, *Nations Against the State: the New Politics of Nationalism in Quebec, Catalonia and Scotland,* 2[n<1] ed., Basingstoke 2001.

creased demands for devolved government in the United Kingdom. By addressing this issue on coming to power in 1997, the Labour Government attempted to adapt the British State to the changing political landscape and so try to reinforce the Union against the separatist threats posed by the Scottish and Welsh nationalists.[25]

In so acting, the Labour Party did not consider the introduction of devolution as a step towards fédéralisation of the British Constitution and forms of governance. Although mindful of accommodating claims by the three nations for more effective self-governance, the Party clearly intended to preserve the Union (and with it the principle of parliamentary sovereignty):

> The UI< Parliament will of course remain sovereign, but the essence of devolution is that for the better government of our country, certain powers are passed on to an elected Scottish Parliament. That is what devolution means - that all Westminster MPs decide that they should exercise some of their powers relating to Scottish affairs by devolving them to a parliament set up by them for that purpose. And it follows from that that the devolution legislation will explicitly recognise the fact of parliamentary sovereignty.[26]

Nevertheless, as Bulmer and Burch observed: "In effect, devolution marks an end of the UI< unitary, centralised state."[27] As a result, the design of devolved power and policy-formation in the UK is unique in the European Union.

The British model of devolution was so designed as to secure asymmetrical decentralisation of power in the UK while respecting the principle of parliamentary sovereignty.[28]

Under the devolution legislation of the late 1990s, each nation has a distinctive constitutional arrangement, with the range and nature of powers devolved to the receiving territorial authorities being consistent with the existing territorial relationship built up over the years in relation to central government in Whitehall.[29]

[25] C. Carter, *The Formulation ofUK-EU Policy Post-Devolution: A Transformative Model of Governance?*, "Manchester Papers in Politics: Devolution and European Policy Making Series" 2002, No. 3, p. 2.

[26] George Robertson, June 1996, cited in M. Keating, *What's wrong with asymmetrical government?,* [in:] *Remaking the Union. Devolution and British Politics in the 1990s*, eds. H. Elcock, M. Keating, London-Portland 1998, p. 195-206.

[27] S. Bulmer, M. Burch, *British Devolution and European Policy-Making: A Step-Change towards Multi-Level Governance?*, 'Manchester Papers in Politics: EPRU Series" 2002, No. 2, p. 15.

[28] A. Evans, *UK devolution and EU law*, "European Law Review" 2003, No. 23, p. 475. See Scotland Act, s. 28 (7).

[29] P. Hogwood et al., *Devolution and EU Policy Making: The Territorial Challenge*, "Public Policy and Administration" 2000, No. 15, p. 81; M. Keating, *What's wrong with asymmetrical government?*, [in:] *Remak-*

This asymmetric, disjunctive or dissonant nature of devolution further reflects both historical relations as well as the perceived different demands for power in Scotland and Wales (together with Northern Ireland).

Scotland on the one hand gained the broader and more substantial measure of devolution with a wider range of policy fields transferred - basically in line with the areas previously administered by the Scottish Office - and full power to develop primary legislation in these fields. Moreover, Scotland follows the Westminster model whereby parliamentary and executive functions are distinct. Under the 1998 Scotland Act,[30] the Scottish Parliament is able to make binding laws without seeking permission from Westminster but only in the areas devolved by Westminster. The Scotland Act contains a list of powers reserved for the UI< Parliament, including foreign affairs, and the Scottish Parliament may not pass any enactment contrary to the 1972 European Communities Act: everything not on the list of reserved powers is devolved to the Scottish Parliament. It also remains possible to transfer matters to and from the reserved list if both Parliaments agree. One important power is the Scottish Parliament s possibility of varying the level of UI< income tax in Scotland, by an increase or reduction of 3%.

Wales on the other hand saw a narrower range of functions inherited by its National Assembly[31] from the Welsh Office and only had power to make secondary legislation within the parameters set by the Westminster Parliament. Moreover, the Assembly itself was originally a corporate body where, at least in theory (the practice evolved otherwise) the executive and parliamentary functions were combined. According to the Government of Wales Act 1998,[32] the Welsh Assembly had powers to make secondary legislation. The basic framework of the law was set down in primary legislation in Acts of Parliament, within which the Secretary of State for Wales previously made rules and regulations in secondary legislation. The Assembly possessed no powers over taxation, macro-economic policy, defence and foreign policy, social security, or police and legal affairs. Following a review of the powers and operation for the National Assembly for Wales (“NAW”),[33] the resultant

ing the Union. Devolution and British Politics in the 1990s, eds. H. Elcock, M. Keating, London-Portland 1998, p. 195-218.

[30] Scotland Act 1998, c. 46.

[31] A. Sherlock, *Wales - The Establishment of the National Assembly for Wales,* "European Public Law" 1999, No. 5, p. 42.

[32] Government of Wales Act 1998, c. 38.

[33] A. Sherlock, *Wales - Reviewing the Welsh Devolution Settlement,* “European Public Law” 2004, No. 10, p. 237.

Government of Wales Act 2006[34] formally separated the NAW as a legislature and the Welsh Assembly Government as an executive. In addition, it enhanced the powers for the NAW through a streamlined procedure, enabling the Westminster Parliament to give the NAW powers to modify legislation or make new provision on specific matters or defined areas of policy within fields in which the NAW formerly exercised functions. Moreover, the 2006 Act allows the NAW to gain primary legislative powers following a post-legislative referendum. This could be triggered first by a two-thirds majority of the NAW members and secondly be a vote in the Westminster Parliament.

UK-EU policy universe: Post-devolution Scottish and Welsh input

(a) Devolved administrative and executive input

Importantly from the point of view of EU policy-making, about 80% of the competences that have so far been devolved to the Scottish and Welsh institutions - including fisheries, agriculture, environmental policy and economic development - are policies for which the EU has a competence.[35] Although observation and implementation of EU law are devolved, relations with the EU and its institutions are "excepted" from devolution.[36] The devolved institutions may not adopt legislation dealing with an excepted matter[37] or legislate contrary to EU law.[38] As a result, the UK Government has kept the right to negotiate in all matters (including devolved policies) at the EU level[39] and its legal power to issue secondary legislation for both Scotland and Wales in order to implement or transpose EU law were this to prove to be necessary.

Consequently, while devolution has radically altered the policy-making universe for EU matters in the UI< - with a much greater number of actors jostling for position to provide inputs into that system - nevertheless the British model for handling EU business between the central and devolved institutions arguably remains one defined by an *a priori* state-driven UK Government agenda[40]: thus Whitehall may "control" the devolved institutions in accordance with its own policy preferences.

[34] Government of Wales Act 2006, c. 32.

[35] A. Evans, *UK devolution and EU law,* "European Law Review" 2003, No. 28, p. 475.

[36] Scotland Act 1998, Sch. 5, Part I, para. 7.

[37] Scotland Act 1998, s. 29 (2) (a).

[38] Scotland Act 1998, s. 29 (2) (d). Cf. Government of Wales Act 1998, c. 106 (7).

[3S] Scotland Act 1998, Sch. 5, Part I, para. 7 (1); Welsh Office, *A Voicefor Wales: The Government's Proposal for a Welsh Assembly,* Stationery Office, Cardiff (1997), Cm. 3718, para. 3.46.

[40] C. Carter, *The Formulation of UK-EU Policy Post-Devolution: A Transformative Model of Governance?,* "Manchester Papers in Politics: Devolution and European Policy Making Series" 2002, No. 3, p. 3.

Problems associated with the preservation of effective parliamentary sovereignty in relation to EU matters are prominent in political agreements between London on the one hand, and Edinburgh and Cardiff on the other, known as the Memorandum of Understanding and the Supplementary Agreements ("MoU").[41] These agreements delineate a clear role for the devolved institutions and make it clear that their relation with the UI< Government is to be one of good communication, cooperation and open information exchange. Such relationship rests on a high degree of goodwill at the political level and a high degree of coordination at the level of officials.

The Memorandum of Understanding covers the establishment of a Joint Ministerial Committee[42] on Europe ("JMC(E)") which is chaired by the Foreign Secretary. It is intended as a forum for Scottish and Welsh executive members to be able to discuss EU-related issues with Whitehall colleagues and as a vehicle for resolving any conflicts of interest between the UI< Government and the devolved institutions.

In such circumstances, the Secretaries of State for Scotland and for Wales, still members of the British cabinet, may play an important mediating role. Through the JMC(E), the Scottish and Welsh executives have an opportunity to express a view on EU matters and help shape the overall UI< position on EU issues. This Committee now regularly meets before a European Council meeting.[43]

The Supplementary Agreements include bilateral Concordats[44] on Co-ordination of European Policy Issues between the UK Government on the one side and, *inter alia*, the Scottish Ministers and the Welsh Cabinet, on the other.[45] Each EU Concordat[46] covers the provision of information; the formulation of UI< policy; attendance at the Council of the EU and related meetings; the implementation of EU obligations and infraction proceedings.

[41] Cabinet Office, *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee*, CM 4444, HMSO, London (1999); a revised version appeared in CM 5240 (2001). Reference is hereinafter made to the revised Memorandum of Understanding as "2001 MoU."

[42] 2001 MoU, Part I, para. 3; Part II, Section A (Agreement on the Joint Ministerial Committee).

[43] C. Carter, *Making Multi-Level Governance work?*, "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 5, p. 8.

[44] R. Rawlings, *Concordats of the Constitution*, "Law Quarterly Review" 2000, No. 116, p. 257.

[45] *Concordat on Co-ordination of European Policy Issues, Scotland-*. 2001 MoU, Part II, Section B.l; *Concordat on Co-ordination of European Policy Issues, Wales:* 2001 MoU, Part II, Section B.2. A Common Annex to each bilateral EU Concordat for all three peripheral nations is also provided: 2001 MoU, Part II, Section B.4.

[46] These Concordats are not legally binding: 2001 MoU, Part I, para. 2.

From the beginning, each Concordat states that the UK Government[47] - wishes to involve the Scottish Executive [or Welsh Assembly Cabinet] as directly and fully as possible in decision-making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance in Scotland [or Wales]).

These EU Concordats emphasise the necessity for information exchange and consultation between the UK Government and devolved authorities with respect to UK participation in EU decision-making: "In reaching decisions on the composition of the UK team, the lead [UK] Minister will take into account that the devolved administrations should have a role to play in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their devolved responsibilities."[48]

Scottish and Welsh Government members can,[49] where appropriate, participate in Council meetings as part of the UK delegation and even speak in the Council, albeit only on behalf of the United Kingdom as the Member State. Such Scottish and Welsh Government members may only participate in Council meeting by invitation, with the lead UK Government Minister making decisions on attendance on a case-by-case basis. The UK Minister consequently retains overall responsibility for the negotiations and determines the optimum way of securing the pre-agreed and unified "UK line" in EU policy-making. The EU Concordats also underline the need for inter-institutional confidentiality during the formulation of the UK line, referring to a "duty of confidence" and "legal requirements of confidentiality."[50] The Scottish and Welsh executive members are accordingly constrained by the operation of the MoU, the Concordats, the devolved legislation and EC Art. 203 (that impliedly requires adoption by a Member State of a single policy line in the Council) to follow the UK negotiating position without deviation or adverse comment.

(b) Scottish and Welsh parliamentary input

One of the main institutional innovations achieved through devolution was the possibility for parliamentary debate and scrutiny on EU matters to

[47] Scotland EU Concordat: 2001 MoU, Part II, para. Bl.3; Wales EU Concordat: 2001 MoU, Part II, para. B2.3.

[48] 2001 MoU, Part II, para. B4.13.

[49] 2001 MoU, Part II, paras. B4.12-B4.15.

[50] 2001 MoU, Part I, para. 11.

occur at the devolved level.[51] Both the Scottish Parliament[52] and the National Assembly of Wales ("NAW")[53] - particularly through their respective European and External Relations Committees ("EERCs") — have sought to develop a more democratic and legitimately-informed Scottish or Welsh UK-EU policy in those fields of especial importance to the two peripheral nations - e.g. agriculture, fisheries, and economic development.[54]

The EERC of the Scottish Parliament (and to a lesser extent that of the NAW) has developed a vigorous scrutiny and accountability system of the Scottish Government on EU matters as well as influencing Scottish UK-EU decision-making. Through its focus on transparency, the Scottish EERC has opened up parliamentary processes and mainstreamed its scrutiny of Scottish UK-EU affairs across the subject committees of the Scottish Parliament.[55] Increasingly, the subject committees[56] are recognising EU elements in their work and so increase the need for their cooperation with the EERC in fulfilment of its scrutiny role.[57] A similar process is discernible in respect of the Welsh EERC in relation to its more limited scope for scrutiny in the NAW:[58] nevertheless, with the 2006 Government of Wales Act such scrutiny powers and pan-parliamentary committee cooperation is set to intensify.

However, in performing their work, one issue remains central that usually has little impact on the functioning of the executive and administration in EU matters, viz., financial resources. Only with sufficient funding and a concomitant support of necessary legal advisers and other specialists (like economists, and experts in fisheries and agriculture) can any European Affairs parliamentary committee seek to exercise its functions effectively.

[51] 2001 MoU, Part II, paras. B4.31-B4.33. See C. Carter, *Democratic Governance Beyond the Nation State: Third-Level Assemblies and Scrutiny of European Legislation,* "European Public Law" 2000, No. 6, p. 429.

[52] A. Cyngan, *Scotland's Parliament and European affairs: some lessons from Germany*, "European Law Review" 1999, No. 24, p. 483.

[53] H.C. Jones (chair), *The National Assembly for Wales and the European Union*, European Strategy Group, Welsh Office, Cardiff 1998.

[54] C. Carter et al., *Scotland and the European Union*, "Devolution Briefings" 2005, No. 27, March, Economic and Research Council Research Programme on *Devolution and Constitutional Change*, ESRC, Edinburgh 2005, p. 6.

[55] A. McLeod, *The Scottish Parliament and Europe*, "SPICe briefing" 2003, No. 03/44,4 June, Scottish Parliament, Edinburgh 2003, pp. 14-18.

[56] On the operation of these subject committees, see P. Cairney, *The analysis of the Scottish Parliament committee influence: Beyond capacity and structure in comparing West European legislatures*, "European Journal of Political Research" 2006, No. 45, p. 181.

[57] C. Carter et aL, *Scotland and the European Union*, "Devolution Briefings" No. 27, Economic and Research Council Research Programme on Devolution and Constitutional Change, ESRC, Edinburgh 2005, p. 7.

[58] C. Carter, *Making Multi-Level Governance work?*, "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 5, p. 4.

Future prospects

The open-ended nature of devolution, the absence of a final defined end-stop, leaves a broad area within which the devolved authorities in Scotland and Wales will be able to articulate their own policy preferences. One major stimulus in this[59] follows from the implications of EU membership, more particularly the formulation of EU policy and its implementation:[60]

Devolution is also altering the elite political culture on European matters. The discourse on Europe in the UI< is becoming more territorially diverse and has begun to take on more evident sub-national/regional dimensions. As noted earlier, the perceptions of Europe in Wales and Scotland have always been somewhat different from that articulated in London. What devolution has done is to allow the further articulation of these differences and it has provided Scotland and Wales with the resources and opportunities to do this. Decision makers in both these countries are well aware of the strategic potential of devolution enabling them to engage in the UK European Policy process on the one hand as well as lobbying Whitehall and Brussels on the other.

The articulation of these differences, currently championed most particularly by the Scottish devolved authorities, may in due course lead to a re-vision of the understanding of parliamentary sovereignty in a way in which EEC membership and the 1972 European Communities Act led to a previous réévaluation.[61] It has been argued[62] that asymmetrical or dissonant constitutional solutions are inherently unstable and are liable to promote tensions between central government and the devolved authorities.[63] What was not apparently intended was the fédéralisation of the British polity:

> The differential standing of the nations of the union under devolution and the predominance of bilateral relations between the nations and the centre reduces the likelihood that the devolution project will promote fédéralisation in the UK. A fédéralisation of the system would imply the development of formal horizontal channels of communication between the constituent units of the polity in addition to

[55] The Scottish Constitutional Convention had specifically identified European affairs as one major part of the Scottish Parliament's function: Scottish Constitutional Convention, *Scotland's Parliament. Scotland's Right*, SCC, Edinburgh 1995, p. 16.

[60] S. Bulmer, M. Burch, *British Devolution and European Policy-Making: A Step-Change towards Multi-Level Governance?*, "Manchester Papers in Politics: EPRU Series" 2002, No. 2, p. 19.

[61] A.F. Tatham, *The Sovereignty of Parliament after Factortame*, "Europarecht" 1993, No. 188.

[62] C. Tarleton, *Symmetry and asymmetry as elements of federalism: a theoretical speculation*, "Journal of Politics" 1965, No. 27, p. 861.

[63] R. Simeon, *Recent trends in federalism and intergovernmental relations in Canada: lessons for the UK?*, "The Round Table" 2000, No. 354, p. 231, at 237.

> formal vertical linkages. In the UK, central government is not keen to foster links which do not operate through Whitehall. Any direct links and contacts between the devolved authorities remain largely confined to informal, *ad hoc* measures made on the initiative of the devolveds themselves.[64]

But whether or not intended, the potential for fédéralisation remains. The evolution into proportionally-elected representative bodies in Scotland and Wales will allow for continuous popular vindication of the devolution settlement, post the 1998 referenda. They also create an impetus and expectation for further extension of powers thereby expanding the policy universe partially or jointly occupied by the devolved authorities with the central authorities.

British Government's attempts to limit these developments and to control their evolution by providing for *ad hoc* and informal agreements between Whitehall and the devolved authorities and by retaining the ultimate power to legislate in all areas at Westminster may be ultimately doomed to failure, given time. Under the British North America Act 1867[65] and the Commonwealth of Australia Act 1900[66] (each dominion's founding constitutional charter), the Westminster Parliament retained ultimate power to legislate for Canada and Australia respectively. Due to the effluxion of time, such provisions fell into practical disuse although they remained in force and theoretically exercisable. Only in the 1980s did both nations "repatriate" their constitutions and ask the Westminster Parliament to repeal the relevant statutes which it duly did. It is not inconceivable that the relevant devolved legislation may come to be considered as an anachronistic relic of British constitutionalism and eventually lead not just to a creeping fédéralisation of the UK system but rather to its ultimate de-merger.

The transformation of informal administrative structures pre-devolution to increasingly more formal institutional power relations, partially centred on the devolved legislative assemblies post-devolution, has enhanced active participation at the sub-national level in the formation and implementation of EU law and policy. The development of a nation-specific European policy by the devolved authorities marks a step in the direction of assumption of constitutional executive powers in respect of foreign-policy type competences formerly reposing at the national unitary State level alone. Admittedly, the current devolved legislation provides that international and European re-

[64] P. Hogwood, *Devolution in the UK: A Step Towards Fédéralisation ?,* "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 4, p. 8.

[65] British North America Act 1867, c. 3, 30 & 31 Viet.

[66] Commonwealth of Australia Act 1900, c. 2, 63 & 64Vict.

lations are "excepted" from the sphere of business of the devolved authorities at the EU level. Yet, within the powers already conferred, representatives of both the Scottish Parliament and National Assembly for Wales are evolving their own agendas *vis-à-vis* EU matters, whether in inter-institutional cooperation with other national or sub-national legislative assemblies in the UI< or the EU or more importantly their increasingly effective scrutiny over EU policy formation, adoption and implementation. Moreover, the recent 2006 Government of Wales Act has commenced a process of rendering the Welsh devolution settlement more consonant with the Scottish one. The parliamentary dimension is also converging with the Scottish EERC striking out and being emulated by its Welsh counterpart

Through these means, there exists the potential for evolution to constitutional identification of the Scots and Welsh for their own devolved institutions at the ultimate expense of the central UK institutions. This dissonant federalism (or, for some critics, preferably dissonant devolution) of the United Kingdom will be exacerbated over time, the consonant constitutional nationalism of each of the constituent nations of the UI< is proceeding at their own pace, the stronger the identification of the Scots and Welsh occurring at different paces commensurate with the level of devolved powers and, in itself, reflecting the longstanding relations between the peripheral nations and England within the UK. It is therefore strongly arguable[67] that for the devolved authorities, the *ad hoc* and dissonant nature of the devolution settlement may prove itself to be a means to achieving new powers through their active participation in EU policy-making at the national and sub-national levels.

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[67] P. Hogwood, *Devolution in the UK: A Step Towards Fédéralisation?,* "Manchester Papers in Politics: Devolution and European Policy Series" 2003, No. 4, p. 5.

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National Constitutions and the Common Good of the European Union

The first stage of integration, when there was at first one Community, and then three Communities, was characterised by limited areas of cooperation in selected aspects of economic and social policy. Therefore, it generated no need for significant changes in the political systems of the member states and in their constitutions. This kind of need only arose as the process of integration proceeded and various aspects of internal and external policy began to be covered by it, and most importantly, as various forms of administration and various instruments were introduced with the aim of pursuing the goals of integration. These brought changes in the legal orders of the member states. The key stimulant of the changes in the internal legal order of the member states was the degree of integration, and the resulting adoption of legal and organisational solutions conducive to achieving the Communities' goals.

The progress of integration so far is however no predictor for the future of the Communities and the Union. The developments so far suggest in no way that the progress will continue according to one trend which can be defined *a priori.* To the contrary, the experience so far shows that there have been periods of stagnation and prolonged search for consensus as to further progress and means of achieving it. From the very beginning of the integration, there has been the need to reconcile national and community interests. The period of institutional stagnation related to the difficulties in ratifying the Constitutional Treaty (finally overcome during the Lisbon summit in 2007 in the adoption of the Reform Treaty[1]) is a clear symptom of national interests prevailing over community interests.

Such a conclusion can be supported by declarations of representatives of certain member states who questioned the need for further integration, favoured a solution consisting in assigning "privileged partner" status to candidates for integration, and felt the need to define in final terms the outer limits of united Europe. In the area of cooperation within the Union, there is a distinction between generally formulated aims and particular initiatives which can be perceived as unfavourable to specific national interests. Fifty years after Europe began uniting, questions as to its future still abound, due in particular to the extended area of cooperation, increased number of member [1]

[1] Assume here that the Lisbon documents which reform the legal order of the Union are not binding yet and thus cannot serve as a basis for deliberation here.

states and enlarged territory. These are only selected factors which hinder forecast concerning the European Union.

Integration in its present form is not an expression of systematic realisation of any dominant concept, neither the federal one nor the "Europe of homelands". Apart from these two visions, other visions of the future of integration are also possible. Choosing one of them will determine the degree of unification of the member states. Links between the states may remain at the current level, may be tightened or may be loosened. Therefore, if we are to take a position as to whether Poland's constitution is adequate to the challenges of integration, it appears sensible to do so based on the current stage of integration, as defined by the Treaties, jurisprudence of the European Court of Justice, and the provisions of the Constitution of the Republic of Poland related to Poland's membership in the European Union.

Should the Union, with the approval of the member states, transform itself into a federation, it is likely that a constitutional change would not be immediately necessary. Instead, adoption of an act which would have supremacy over national constitutions would be crucial. This act would have to regulate internal and external relations of the newly created institution.[2] One can therefore consider hypothetically both a passive mechanism of acceptance and, under extreme circumstances, dissolution of the European integration project. Neither of these options however is likely to cause changes in national constitutions, including Polish. The futurological method of determining the future of the Union is not reliable, since the existence of the Union depends currently on a large number of member states whose present and future are widely varied, as well as on numerous factors, both internal and external, that are too numerous to render results of such forecasts feasible.

Just like nations organised into states perceive in this shared form of living a benefit expressed in the pursuit of the good of individuals, so do the states accept the process of integration under the condition that it will be beneficial to them and that it will not diminish their sovereignty without their consent. The evaluation of costs and benefits in the area of international cooperation is not quantitative. It depends on the preparedness of nations to cooperation, on the level of social awareness, on shared cultural values and a number of other predictors.

When considering the relationship between the Communities and the Union (perceived as a system shaped by certain legal acts) and member states, whose internal legal order is shaped by their constitutions, one must take

[2] According to B. Banaszak, „in the future a new act might be adopted which would contain a new type of a social agreement, shared by all EU citizens (adopted by the new*pouvoir constituant)''* which would replace national constitutions and have the character of an international agreement. B. Banaszak, *Konstytucja europejska a Konstytucja Rzeczypospolitej Polskiej*, "Gdańskie Studia Prawnicze" 2004, Vol. 12, p. 17.

into account the fact that the founding Treaties and other similar legal acts belong to a different legal order than national constitutions. From a formal point of view, the Treaties and the national constitutions are fully autonomous. The founding Treaties are international agreements and as such are subject to the international law regime, while the constitutions are elements of internal legal orders of the member states. The legal order which constitutes the Communities and the Union is established on the basis of the shared will of the member states, and amended according to this will. The creation and amendment of national constitutions can only be affected by the member states, independently and autonomously.

The Treaties do not stipulate directly that the constitutions of member states must be harmonised with the Treaty regulations. Such a requirement however can be derived both from the well established principle of *pacta sunt servanda* and from the Vienna convention on the law of contracts, which provides that a state which has undertaken international obligations must perform them in good faith and shape its legal order in a manner conducive to the performance of such international agreements. This principle is reflected in the community law in Article 10 of the Treaty Establishing the European Community, which provides that member states should implement any measure, both of general and specific character, in order to fulfil their obligations resulting from the Treaty and from the activities of community institutions. This Treaty provision emphasises that the member states should facilitate the achievement of community goals and also should refrain from undertaking any measure which might hinder the fulfilment of goals resulting from the Treaties.

The experience of the relations between the Union and the member states, as well as the jurisprudence of the European Court of Justice, shows that Article 10 has shaped the model attitude of member states towards shared goals which are the fundament of integration.[3] This attitude is characterised by the mandatory character of actions undertaken by the member states in or-

[3] In a number of cases (including *Flaminio Costa v. Enel, Walt Wilhelm v. Bundeskartellamt),* the Court has ruled on the relationship between community law and laws of the member states. The Court has expressed its opinion as to the enforcement by the states of the principle of effective actions in view to achieve community goals *(effet utile).* The Court stressed that as long as there is no contradiction between the legal system, national authorities are free to choose measures contained in the national law. However, if such measures might hinder the functioning of community law, such decisions would be in breach of Article 10 of the Treaty Establishing the European Community. The Court also ruled that primacy of Community law must be observed, even if this necessitates a departure from constitutional principles. The Court noted that the fundamental condition for the realisation of community goals is enforcement of community law in all member states. This means that national regulations cannot be cited in opposition to community regulations. In the enforcement of community law conflicts between legal systems must be eliminated, and only when this is impossible, the national law must be repealed. Member states are also obliged to refrain from any activities which would hinder the achievement of Treaty goals. See *Prawo Wspólnot Europejskich. Orzecznictwo,* eds. W. Czapliński, R. Ostrihansky, P. Saganek, A. Wyrozumska, Warszawa 2001, pp. 37-51.

der to achieve Treaty goals, as well as the quasi-facultative character of measures undertaken to do so. Such measures must be appropriate and effective in relation to the goals presented in both primary and secondary legislation. It is also not permitted to introduce measures which might hinder or render impossible the achievement of the shared goals.

This problem can be discussed in the perspective of relations between achieving community goals (understood as the common good of the member states) and achieving national goals (understood as the common good of a given member state). The common good of the member states is not a notion introduced into the legal order by the Treaties, nor does it have a legal definition. The common good as a category can be reconstructed not on the basis of the provisions of the Treaties, but on the basis of preambles and declarations outlining the goals of the Communities, the European Union and its member states. Importantly, the European Union understood as the common good cannot be perceived as an institution which is abstract, external and unfriendly towards the states, nations and individuals that constitute it.

The "One Europe" declaration[4] of the Athens summit in 2003 stipulates that the shared goal of the member states is to make Europe a continent of democracy, freedom, peace and progress. The Union is determined to avoid new divisions in Europe and to support stability and development within its new borders and beyond. The shared goals will be achieved through working together. The goal is one Europe. The fifty years of integration demonstrate that integration itself is a common good, one that makes it possible to strive towards the shared values through cooperation of states and nations.

The preamble to the Treaty of Rome (now the Treaty Establishing the European Community) emphasised the desire for economic and social progress in the member states achieved through cooperation.[5] This leads to the observation that the common good is (in the teleological sense) a dynamic category: it evolves as integration proceeds, as the number of goals increases and as the states unite around shared goals. Materially, then, the common good may result from the goals of integration. Since integration requires states to act together, one of the important factors influencing its development is the extent to which the interests of particular countries overlap with the shared interest which constitutes the common good. The greater this extent, the more certainty there is that the common good will be pursued.

[4] Declaration One Europe is one of the documents included in the Act on the conditions of accession of new member states which is an integral part of the Treaty signed in Athens on 16 April 2003 between the fifteen member states and the ten acceding states (Polish version - *Journal of Laws* 90/2004 item 864).

[5] OJ. C 97. 340.173.

The scope of the common good is difficult to define. It may be determined not only by Community goals but also by principles shared by the member states, freedoms and rights of individuals, *acquis communautaire*, the unified institutional system as well as the material wealth of the Union. The common good cannot be perceived as simply the sum of interests of particular states, since this would mean that the common good could only be pursued through the satisfaction of each separate national interest. In fact, the common good is pursued when the totality of interests of the member states is taken into account, and the individual interests are considered in proportion to the goals of integration.

Therefore, the common good in relations between the member states is not a unilateral category, one that generates only duties imposed by certain states or by the EU institutions. The common good is generated on the strength of the will of the member states and of the citizens of the Union, who are able to express their opinions as to the shared goals and the system of integration both directly[6] and through their representatives in the European Parliament.

The fact that the goals and methods of the Union are widely accepted does not however mean that there are no conflicts of interests, either between the majority of member states and other member states or between the individual member states. Such conflicts of interests require an adjustment of the shared goals and their reconciliation with national interests. The duty to take national interest into account in the achievement of the common good does not mean that each and every national interest must be considered. There is a certain limit, which results from the essence of the idea of integration. It is expressed in how the member states accept the common good and reconcile their national interest with it.

Alternative solutions are located beyond this limit. These include either a modification of the goals of integration so as to make them universally acceptable or the decision of certain member states to leave the Union. The concept of a "hard core" consisting in lose cooperation between a small group of states which impose a faster pace of development on the others cannot be perceived as a good model of enforcing the principle of the common good and non-discriminatory progress of integration.

Following the principle of the common good *via negationi* excludes both self-willed actions and self-centred attitudes expressed in a desire only to draw benefits from the integration. To the contrary, its should be manifested in an attitude of responsibility for the achievement of goals which serve

[6] In Poland, on the basis of a Resolution of the Sejm of the Republic of Poland of April 17, 2003 the Accession Treaty was ratified following a popular referendum (M.P. 19/2003 item 291). The referendum took place on June 7-8, 2003. 77,45% of voters were in favour of accession.

not just the national interest but the common good.[7] The member states have a degree of freedom in how they pursue the shared goals. The freedom is limited chiefly through the condition that the measures must be effective in achieving such goals. The provisions of the Treaties do not describe such measures in detail. The above-mentioned Article 10 lists general and specific measures; these terms are very flexible and suggest that both constitutional acts as well as statutes and lower-level acts can be employed.

Based on the provisions of the founding Treaties, it is possible to reconstruct the relation between the legal order of the Communities and the constitutions of the member states, as well as to define the functions of the national constitutions within the area of realisation of community goals and application of community law.

Assuming that Article 6 section 1 of the Treaty on the European Union establishes the principles and values common for the whole integrated legal order (freedom, democracy, respect for human rights and fundamental freedoms, rule of law), one must note that these principles and values, while constituting a Treaty norm, at the same time stem from the constitutional tradition of the member states (of which the same Article makes mention in section 2). The content of the provision, interpreted *in toto*, gives rise to a principle of mutual influence of the Community system and constitutional systems of the member states. The community system derives the values on which the Union's existence is based from the democratic system of the members states and make them its own. They become binding on the member states at the moment of accession. Considerable infringement of the above-mentioned principles and values may result, on the basis of Article 7 of the Treaty on the European Union, in suspension of certain rights of a member state. Article 49 of the same Treaty stipulates that only a state which respects the principles and values of Article 6 may apply for accession. The requirement that the member states must respect the principles and values within their legal order does not *eo ipso* mean that they must be proclaimed in a prescribed way in their constitutions. One should assume therefore that the member states are obliged to respect these principles and values, but that they are free to choose in which form these principles will be incorporated into their legal systems.

In terms of goals and legal bases of the integration process, constitutional systems of the member states are autonomous in relation to the community legal order. Therefore, primary legislation of the Union in no way interferes with the institutions of the member states; the states are free to ensure by any me-

[7] See also W.J. Wołpiuk, *Dobro wspólne a interes publiczny*, "Zeszyty Naukowe Wyższej Szkoły Informatyki, Zarządzania i Administracji w Warszawie" 2006, No. 1 (4), pp. 15-16.

ans they choose that their constitutions comply with community law. This is reinforced by the fact that the national constitutions, as elements of national identities, are protected by Article 6 section 3 of the Treaty on the European Union. The Treaty's provision that "the Union respects the national identity of the member states" may be understood both as an obligation of the Union not to interfere with the constitutions (which reflect the national identity and determine the functions of the state) and as an obligation to respect the diversity of the states (i.e. each state's right to shape its laws as it wishes).

The founding Treaties make references to national constitutions in three types of cases. Firstly, when the subject matter of the regulation is the manner in which the community regulations can be amended which must be ratified by the member states;[8] secondly, when the Treaty provisions relate to the manner in which community institutions make laws or decisions that the member states must accept,[9] and thirdly, when regulating the manner in which agreements or conventions can be made which need acceptance and ratification of the member states.[10] However, no Treaty provision requires that member states introduce an *a priori* specified amendment into their constitutions. The general Treaty instruction according to which the states should introduce appropriate changes to their legal orders so as to harmonise them with EU law uses the wording "in accordance with their respective constitutional requirements". This may be understood twofold. Firstly, as manifestation of respect towards the constitutional order of the member states and

[8] For instance, Article 48 of the Treaty on the European Union stipulates that the amendments to the founding Treaties come into force once they have been ratified by all member states in accordance with procedures provided for in their constitutions.

[9] Article 22 of the Treaty on the European Union contains the principle according to which the Council (unanimously, following a motion by the Commission and having consulted the Parliament) may pass legislation in order to supplement the laws pertaining to EU citizenship which the member states are recommended to adopt in accordance with procedures provided for in their constitutions. A similar procedure for adopting legislation and decisions of the EU is provided for in Article 17 section 1 of the Treaty on the European Union, Article 42 of the Treaty on the European Union, Article 190 section 4 of the Treaty Establishing the European Community, and Articles 229a and 269 of the Treaty Establishing the European Community.

[10] Each of the founding Treaties, according to its final provisions, is subject to ratification in each member state according to procedures provided for in that member state's constitution (Article 52 section 1 of the Treaty on the European Union, Article 313 of the Treaty Establishing the European Community, Article 224 of the Euratom Treaty). Article 49 of the Treaty on the European Union regulates contracts between member states and candidate states. Each such agreement must be ratified by all contracting parties, according to the procedures provided for in their constitutions. As far as the matters of the 3rd pillar are concerned, Article 34 section 2 point d of the Treaty on the European Union provides the option of drafting a convention which will be recommended to all member states, again according to the procedures provided for in their constitutions. States are free as far as agreements are concerned whose aim is to further the policies and cooperation within the EU. As far as agreement are concerned which are related to the 2nd and 3rd pillar, Article 24 section 5 of the Treaty on the European Union stipulates that such an agreement is not binding on the member state whose representative claimed that it must fulfil the requirements of the procedures provided for in its own constitution.

the fact that the Union refrains from interfering with these orders (according to the principle with autonomy of national legal orders), thus allowing the member states the freedom of choice of measures implementing the changes. Secondly, as acknowledgment of the need for changes to be introduced into national legal orders in an appropriate manner (following the principle of constitutional legalism and proper procedures) and using appropriate instruments, i.e. constitutional regulations.

Moreover, amendments to Treaties are not always effective in the legal orders of member states. This is the case if the subject matter of the amendment is related purely to the European level of integration, where no aspect of the national constitutional order is affected.[11] Thus, one may conclude that the Treaty provisions point only to a very general need to use constitutional measures in order to regulate the relationship between the community legal order and the national legal order, and the said provisions only refer to cases where the member state must express its acceptance of community legislation.

Since the Treaty regulations include no mandatory mechanisms for the inclusion of community provisions into the constitutions of the member states, one may consider whether there are models stemming from European constitutional practice which could be considered a standard in the area of harmonisation of national constitutions with community requirements and in the area of ensuring their effectiveness in the internal legal order of the member states.

This is a complex problem, because the character of community law is complex. Some of its norms are subject to the regulations of international public law, while others - generated by community institutions - come into force either upon the completion of appropriate procedures, or by becoming an element of internal legal orders. The member states therefore must open their legal systems both to the universal norms of international law (e.g. due to their membership in the United Nations) and to regional law (e.g. due to their membership in the Council of Europe and the jurisdiction of the European Court of Human Rights), and on top of that must regulate the relation-

[11] A good example is the declaration concerning Article 191 of the Treaty Establishing the European Community which is apart of the Treaty of Nice. Since the Treaty of Nice amended Article 191, giving the Council a new competence (according to the procedure of Article 251) to decide on the status of political parties at the European level, and in particular on the manner of their financing, it was deemed necessary to give this Article 191 an interpretation in the form of a separate declaration. The declaration stipulates that party financing at the European level using funds of the European Communities cannot be used, directly or indirectly, to finance parties at national level. Therefore - as the declaration stipulates - the provisions of Article 191 do not create a transfer of competencies to the European Community with regard to parties at national level, and have no bearing on the application of appropriate provisions of national constitutions.

ship between their internal legal order and primary and secondary community law.[12]

For many years in European constitutionalism the dominant tendency required that the relationship between national law and international law be determined normatively. Openness towards international norms was interpreted as openness also towards community norms, without paying respect to its dual character. It was believed that if the founding Treaties are assigned an appropriate position in the political system of the member state, this *eo ipso* will solve the problem of effectiveness of community law in the given legal order. The situation changed in some states under the influence of cases of collisions between norms of national constitutions and norms of the community law, connected with the progress of the integration project reflected in the community legislation.[13] Some states, for instance Germany and France, decided that this type of constitutional formula (where the constitution stipulates primacy of international law or international agreements and adoption of international law as a part of the internal legal order) is insufficient

[12] E. Łętowska calls the legal system of a state which consists of elements of its own legislation and legislation generated by external decision-makers a multicentric system. See E. Łętowska, *Między Scyllą i Charybdą. Sędzia polski między Strasburgiem i Luksemburgiem*, "Europejski Przegląd Sądowy" 2005, No. 1, pp. 3-4,9. Multicentric law is characterised by heterogeneity and the fact that it is generated by subjects who are not directly subordinate to the state. This kind of law is in force in the state which has agreed for this multicentric system to operate on its territory. One must remember that, firstly, there are shared interests and goals which are being pursued by means of such an arrangement, and secondly, that *mutatis mutandis* the states are not without impact on the law generated by the external centres (community institutions). In this sense this law cannot be perceived as imposed from outside; on the contrary, it serves the purpose of pursuing shared goals. See also A. Wyrozumska, *Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa*, [i n] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, ed. K. Wojtowicz, Warszawa 2006, pp. 31-108.

[13] W. Czapliński notes correctly that for a long time courts of the member states did not treat the community legal system as a system separate from international law; on the contrary, they were willing to claim that this order was subject to the same regulations as the norms of international law introduced into the national order. According to Czapliński, conflicts between national constitutional laws and community laws only occurred with regard to constitutional laws regarding fundamental rights. In those cases, both the European Court of Justice and the courts of the member states avoided stating that such conflict actually occurred. As far as it was possible, an interpretation technique was applied which required that community laws were interpreted in a manner friendly towards the constitutions of the member states, while constitutions were interpreted in a manner friendly to community laws. W. Czapliński, *Członkostwo w Unii Europejskiej a suwerenność państwowa*, in: *Konstytucja dla rozszerzającej się Europy*, ed. E. Popławska, Warszawa 2000, pp. 129,130-131. The Treaty on European Union was a milestone, because the constitutional courts of Germany and France became involved in the decision as to the degree to which EU laws were compliant with national laws. (More on this: B. Pawlowski, *Konstytucyjne aspekty integracji Rzeczypospolitej Polskiej z Unią Europejską*, "Przegląd Sejmowy" 2003, No. 5, pp. 78-83). The rulings of the French and German constitutional courts, stating that the national constitutions of the respective countries were not compliant with proposed EU laws, was the chief reason why the two constitutional acts were amended. On the jurisprudence of the Federal Constitutional Court see R. Arnold, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej*, "Studia Europejskie" 1999, No. 1, pp. 95-106.

due to the progress of European integration.[14] Consequently, these countries changed their constitutions so as to regulate clearly their participation in the European Communities.[15]

Two issues must be raised in connection with the examples of Germany and France. First, the inspiration for the changes which resulted in harmonisation of the national legal order with the community legal order came from within; it was the internal need of the states rather than external influence (such as for example Treaty provisions or a ruling of the European Court of Justice). The amendments had the positive legal consequence of placing in the constitutions legal bases for application of community laws, and also of allowing the states to confirm the position of their constitutions as autonomous from community laws and as the highest laws of the state (with which any norms applied in the territory must be in compliance). Secondly, in amending their constitutions, each of the states individually chose the form and scope of the amendment, thus combining the traditions typical to the given country with progressive, pro-integration regulations.

The examples cited above do not give sufficient ground for claiming that constitutionalism of the member states demonstrates a clear tendency towards regulating the relationship between national law and community law in a manner which might be considered to constitute a standard.[16] The man-

[14] The German constitution includes, in its Article 25, the principle that common principles of international law constitute a part of the federal law and have supremacy over statutes and are a source of rights and duties of citizens of the Federation. Article 55 of the French constitution stipulates that treaties or agreements, once duly ratified, at the moment when they come into force have supremacy over statutes, under the condition that the remaining parties to this treaty or agreement have applied the same principle in their legal system.

[15] To the German constitution, Article 23 (European Union) has been added, which outlines the basis for the membership of the Federal Republic of Germany in the European Union. To the French constitution, Chapter XV (On the European Communities and the European Union) has been added, in which the four new Articles 88-1, 88-2, 88-3 and 88-4 outline the basis for the membership of France in the integration process, in particular the manner of participation in the economic and monetary union, implementation of the Schengen *acquis*, execution of electoral rights by EU citizens resident in France and manner in which the parliament may express its opinion on community laws implemented as statutes. The French constitution of 1958, even though it was adopted after the ratification of the founding Treaties, until 1992 included no regulations related to France's membership in the integrating organism. See K. Kubuj, *Miejsce prawa wspólnotowego w wewnętrznym porządku prawnym Francji*, "Studia Prawnicze" 2001, No 3-4, p. 185.

[16] In literature on constitutional law one may find claims that national constitutional laws are being Europeanised, which is manifested in the search for and conformity with a shared system of European standards as well as a shared European constitutional culture. See H. Suchocka, *Jaka konstytucja dla rozszerzającej się Europy?*, [in:] *Konstytucja dla rozszerzającej się...*, as cited, p. 32. It would be irrational to question this tendency, considering that there is a trend to introduce into constitutions principles demonstrating the adherence to democratic values, such as for example the rule of law, freedoms and human rights. Germany raised this issue of inadequate regulations in this area (in comparison to regulations in German law), which resulted in the Amsterdam Treaty containing a list of fundamental rights. However, it would be difficult to agree that Article 6 section 1 of the Treaty on the European Union (freedom, democracy, respect for human rights and fundamental freedoms, rule of law) or the entire Article 6 is a catalogue of necessary

ner in which this relationship is regulated certainly deserves separate analysis.[17] However, just looking at the most superficial aspects, we find that the constitutions of the member states include a variety of regulations in terms of the subject mater of the regulations, manner of regulations, degree of detail of regulations and wording of regulations. Some of the constitutions are characteristic in that they regulate the matters related to the European Communities an the European Union in a manner clearly separated from the universal order of international law; other constitutions contain no clear norms with regard to the integration.

The fact that some constitutions contain only implicit norms relating to community law is no ground for conclusions that this kind of regulations has a lesser value than the regulations which refer clearly to community law. Constitutions of the "oldest" member states (Belgium, the Netherlands, Luxembourg, Italy) have weakly developed regulations relating to integration. In Italy, in contrast to France and Germany, until now no amendments have been introduced due to the membership in the European Union.[18] From among the states which joined the Union in 1994, only Austria (renowned for its pro-legalist traditions) has amended its constitution by introducing to it a new sub-chapter entitled "European Union."[19] Interesting pro-integration

standards which are repeated in national constitutions. One must note that various constitutions contain the principles which might be considered European standards in a variety of manners and scopes of regulation. Moreover, the notion of a standard may be applied not only to general principles but also to principles which regulate the functioning of a state as a member of the integrated organism.

[17] See more in M. Kruk, *Konstytucja narodowa a prawo europejskie: czy Konstytucja Rzeczypospolitej Polskiej wymaga zmiany?,* [in:] *Konstytucja dla rozszerzającej si*ęas cited, pp. 178-180; B. Pawłowski, *Konstytucyjne aspekty integracji...,* as cited, pp. 76-84; E. Kamińska, *Konstytucyjno-prawne aspekty integracji europejskiej. Wpływ prawa wspólnotowego na porządki konstytucyjne wybranych państw członkowskich Unii na przykładzie Niemiec, Francji i Wielkiej Brytanii oraz jego implikacje dla Polski,* "Radca Prawny" 2003, No. 4, pp. 116-122; R.M. Małajny, *Constitutio suprema lex? (Unia Europejska a ustawy zasadnicze państw członkowskich),* [in:] *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego,* ed. I. Bogucka, Z. Tobor, Kraków 2003, pp. 206-212; M. Muszyński, *Podobieństwa i różnice. Normy integracyjne w konstytucjach państw członkowskich Unii Europejskiej,* "Rzeczpospolita" 2002, 7 May.

[18] K. Działocha calls the amendment of Article 117 of the Italian constitution "cosmetic" because other than introducing the name of a new form of cooperation, it introduced no substantive changes. See K. Działocha, *Podstawy prounijnej wykładni Konstytucji RP*, "Państwo i Prawo" 2004, No. 11, p. 33. According to Z. Witkowski, all important consequences of legal and pragmatic character stemming for the Italian membership in the Union are regulated by dynamic interpretation of the constitution. *Konstytucja Włoch,* translation and introduction Z. Witkowski, Warszawa 2004, p. 46. According to Annibale Marini, president of the constitutional court of Italy, community law has primacy over national law. However, in case of conflicts, the primacy goes to fundamental human rights and the Italian constitution. The constitution was never amended due to such a conflict. See: *Pół wieku w obronie praw człowieka,* "Rzeczpospolita" 2006,1 April.

[19] Subchapter B in Part 1 of the Federal Constitution of the Republic of Austria entitled "General provisions. The European Union" contains six articles (23a, 23b, 23c, 23d, 23e and 23f). The provisions relate to: elections to the European Parliament (23a), problems under Austrian law due to the holding by certain categories of persons a seat in the European Parliament (23b), manner of appointment by the federal government of officers of Union and Community institutions and bodies, (23c), manner of informing the federal countries

changes were made in 2003 in the constitution of Romania, despite the fact that the country was not at the time a member of the European Union. The amendments related to matters of joining the Union, of the relationship between the national legal order and community laws, and of selected aspects of performing the state's duties resulting from its membership in the European Union.[20] The constitution of Romania also regulates the relationship between national law and international law, and these regulations apply to community Treaties as well.[21] The makers of the Romanian constitution drew from the experience of other countries in introducing to their constitution provisions relating to active and passive electoral rights of EU citizen in local elections in Romania, active and passive electoral rights of Romanian citizens in the elections to the European Parliament, and norms preventing collision between constitutional regulations and the regulations of primary and secondary community law.[22]

On the basis of these examples it seems legitimate to claim that certain "newer" member states, as well as some states of candidate status, are more concerned with adjusting their constitutional norms to the situation of functioning within the integrated structures. This however cannot be generali-

of legal initiatives in the Union as well as the consultation procedure in this respect, and measures available to the federal countries in order to implement EU laws (23d), procedures of informing the federal legislative bodies on legal initiatives of the Union and consultation procedures related thereto (23e), performance by Austria of its obligations in the area of common foreign policy and security policy as well as judicial and police cooperation in criminal matters (23f). Articles 23e and 23f also pertain to the distribution of powers in the area of performing the tasks connected with the realisation of Treaty goals and Union law.

[20] The amendment did not change the norm of Article 1 section 1 which describes Romania as a national state, sovereign and independent, homogenous and indivisible. A new Title VI "Euro-Atlantic Integration" was added, in which one of the two provisions, Article 148 (Integration with the European Union) regulates the manner in which Romania may accede to agreements "founding the European Union, in order to transfer certain competencies to community institutions, as well as in order to perform together with other member states the competencies regulated by such agreements" Section 2 of Article 148 contains the principle of primacy of Treaty regulations and community law of mandatory character "over provisions of national law which are contradictory to them". Section 4 of Article 148 stipulates that "the Parliament, the President of Romania, the government and the judiciary ensure the performance of obligations stemming from the agreement to join.. Section 5 or Article 148 provides that the government must present to both chambers of the Parliament draft "acts of mandatory character, before they are presented for acceptance to the institutions of the European Union" See J. Falski, *"Euroatlantyckie" zmiany w Konstytucji Rumunii,* "Zeszyty Naukowe Wyższej Szkoły Informatyki, Zarządzania i Administracji w Warszawie" 2006, No. 1, pp. 123-124.

[21] In Article 11 of the Romanian constitution Section 3 was added which stipulates that, in case an agreement to which Romania wishes to become a party contains provisions which are in contradiction to the Constitution, this agreement may only be ratified upon prior change of the Constitution. Article 147 Section 3 provides that and agreement or international treaty which is deemed contrary to the Constitution cannot be ratified. *Ibidem,* p. 125.

[22] The amendments to the Romanian constitution include also provision such as Article 137 Section 2, which makes it possible to replace the national currency with the currency of the European Union, and Article 19 (Extradition and relegation) which makes it possible for Romanian citizens to be extradited. *Ibidem,* pp. 125-126.

sed, particularly in a manner which would suggest that a certain type of constitutional regulation has the characteristics of a standard. This is because even though "old" member states who have made no constitutional changes, there are nevertheless exceptions to this rule. On the other hand, the degree of openness to the integration varies very much among the "newer" states. It appears that the particular states have selected their own methods of adjusting their constitutional orders to the needs of membership in the Union, and therefore their constitutions have preserved their specific national character. Regardless of the degree of adjustment of the national constitutions to the relationship between the state and the community structures, the constitutions remain the key instruments regulating internal legal orders.

Constitutions are legal acts which top the hierarchy of legal acts in a system, and whose norms may be used as models in legislative, executive and judiciary proceedings. No constitution contains a regulation which would explicitly give primacy to community law.[23] In some cases (for example in France) there is the requirement of a prior constitutional amendment in order to ensure compliance of community laws with the constitution and in order to prevent conflicts between constitutional and community regulations. It must be therefore stressed that at the present stage of European integration, constitutions of the member states have preserved their character of acts which are adopted and amended following special procedures, which have the highest position in the national legal systems, and which regulate national maters and, as far as it is necessary, also matters resulting from the achievement of goals of international and intergovernmental cooperation.

Considering the above, it seems useful to discuss the notion of "adjusting the constitution" to the requirements resulting from European integration. It tends to be a synonym for amending the constitution.[24] It must be noted that

[23] S. Biernat, W. Czapliński and K. Działocha correctly point out that the principle of primacy of community law is not the principle of supremacy of this law over national laws, and in particular over the constitution. Its essence is the primacy of application of the community law within the national legal order. See S. Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie - kilka refleksji*, "Państwo i Prawo" 2004, No. 11, pp. 20-21; W. Czapliński, *Pierwszeństwo to nie nadrzędność*, "Rzeczpospolita" 2004, September 6; K. Działocha, *Podstawyprounijnej wykładni...*, as cited, p. 31. However, according to B. Banaszak, "only the Irish constitution gives community law supremacy" B. Banaszak, *Konstytucja europejska...*, as cited, p. 9. According to M. Muszyński, the Irish constitution also no more than suggests primacy of community law. The Irish constitution also provides that it must be amended if its regulations are contrary to community regulations. However, it includes no explicit mention giving community law supremacy. See M. Muszyński, *Podobieństwa i różnice...*, as cited.

[24] See P. Winczorek, *Kilka uwag w kwestii dostosowania Konstytucji Rzeczypospolitej Polskiej do wymogów prawa europejskiego*, [in:] *Konstytucja dla rozszerzającej się...*, as cited, pp. 187-188; S. Biernat, *Czy konieczne są zmiany w Konstytucji przed przystąpieniem Polski do Unii Europejskiej*, [in:] *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, ed. J. Barcz, Warszawa 2002, p. 42; *Pytania o konstytucję. Opinia zbiorowa*, "Studia Prawnicze" 2003, No. 3, p. 13; M. Kruk, *Konstytucja narodowa a prawo...*, as cited, p. 175; B. Banaszak, *Konstytucja europejska...*, as cited, p. 12; K. Wójto-

some countries have not deemed it necessary to amend their constitution, or have done so to a minimal extent, while other countries have implemented deep changes. However, in their decisions, all countries have based their decision on their own evaluation of needs, resulting from their political systems, traditions and legal cultures, as well as from the fact that community laws, although directed at achieving cooperation, will *nolens volens* also be applied in the national legal orders. "Adjusting the constitution" seems to be rather inadequate a notion, considering both the rank of the constitution in a legal order and the aims of this "adjustment" All changes in the constitutions flow from the free will of the state. In some countries the procedure of amending a constitution is very complex, in some cases requires permission from a sovereign, often also necessitates an appropriate "political moment" for it to be viable. Such an "adjustment of constitution" should not be perceived as just a legislative change, similar to an amendment to any other statute. Nor should it be considered in the perspective of primacy or supremacy of community law, which generates certain models, where the constitution is perceived as an act of national law which is expected to be adjusted to these models. The community legal system (with its complex and heterogeneous character) is separate from the national legal systems and from the constitution both in terms of purposes and in terms of legal force.

The systems are autonomous, but at the same time the relationship between them should be based on the principle of subsidiarity, which means that the national system should only be changed insofar as it is necessary to pursue the common good. Similarly, requirements towards constitutions should be limited to those that are necessary to pursue the goals of the Union understood as the common good. The minimal requirement on the basis of which the constitutional norms should be shaped is therefore the lack of contradictions between the constitution and the community laws, and the establishment of a mechanism which makes it possible for the state to perform its obligation stemming from community laws.

Considering that differences between the two systems do exist, a simple adjustment of the constitution to community law (consisting in a transfer of community norms into a constitution) is not possible. The postulate of "adjustment" can however be understood as an oversimplification, relating to a legal operation which will make it possible to apply community law within a national legal order in accordance with constitutional norms. It is the member state that decides whether (and if so, how) to conduct such an operation. The necessity to introduce changes is determined by the need to perform ef-

wicz, *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, (in:] *Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny*, ed. K. Działocha, Warszawa 2004, pp. 314 and 319.

fectively the obligations undertaken by the state and aimed at achieving common good. According to S. Biernat, changes to a constitution "should be deemed necessary when there is a discrepancy between constitutional norms and EU legislation."[25] This suggests that a constitution - which by definition is an act which is supposed to be stable and last for generations - should not react spontaneously to innovations in the community legislation which cause no discrepancy between the two systems. Examples of many member states which have preserved their constitutions (relatively) intact demonstrate that these states strive to maintain the character of their constitutions as chief regulatory instruments of domestic legal orders rather than executive acts of community law.

The issue of a constitutional amendment was raised in Poland in the academic (and, to some extent, public) debate during the preparations for accession, before the referendum on accession, before Poland actually joined the European Union, before elections to the European Parliament were held, and finally, during the first stages of the ratification procedure of the Constitution for Europe. Before the accession, the main focus was on examining whether the constitution was ready for accession and for the adoption of *acquis communautaire.* After the accession, the compliance of constitutional regulation with community law is mostly analysed, in connection with the need to amend certain provisions. Also, analyses are carried out as to the compliance of certain provisions with the community legal order *de lege ferenda.*[26] A catalogue of postulated changes has been drafted; depending on the academic orientation of scholars it is being expanded to a moderate or large degree.[27] However, neither before nor after the accession was the constitution significantly amended. Despite this, there have been no difficulties in application of community law, and no collisions between Polish constitutional norms and community law. It was decided that amendments were not necessary, and

[25] S. Biernat, *Czy konieczne są zmiany w Konstytucji...,* as cited, p. 43. According to S. Biernat, discrepancy between norms occurs when two or more norms of the constitution and community law cannot be executed at the same time, and all of the norms in question are applicable. This suggests that no discrepancy between norms generates no need for amendments.

[26] A particularly comprehensive analysis of the legal problem following Poland's accession to the European Union is contained in: *Polska w Unii Europejskiej,* ed. M. Kruk, J. Wawrzyniak, Kraków 2005.

[27] See J. Barcz, *Członkostwo Polski w Unii Europejskiej a Konstytucja z 1997 r.,* [in:] *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski...,* as cited, p. 40 , and references to this text; P. Winczorek, *Konstytucja RP a prawo wspólnotowe,* "Państwo i Prawo" 2004, No. 11, pp. 3-17 and references to this text: S. Biernat: *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie - kilka refleksji...,* as cited, p. 18 and other; K. Działocha, *Podstawy prounijnej wykładni...,* as cited, p. 28; *Pytania o konstytucję...,* as cited, pp. 12-14 and other; J. Jaskiernia, *Członkostwo Polski w Unii Europejskiej a problem nowelizacji Konstytucji RP,* Warszawa 2004, pp. 38-60. Analysis of proposed amendments to the constitution in the perspective of their compliance with community laws may provide another research topic.

the existing "loopholes" in the law could be remedied by means of statutes[28] as well as pro-community jurisdiction of the Constitutional Tribunal.[29] From among the rulings of the Tribunal issued before and after accession, only in once case was the compliance of the constitution with the community law questioned.[30] In a ruling pertaining to the framework decision of the Council of the European Union on the European Arrest Warrant, the Tribunal pointed to the limits of pro-community interpretation of the constitution, explaining that the limit is set at a right of an individual citizen.[31] This was the only case when the constitution was amended; its Article 55 is now worded so that it allows the European Arrest Warrant to operate in Poland.

It is noted in the literature that a pro-community interpretation of national laws and a pro-national laws interpretation of community law is a *sui generis* remedy for doubts and conflicts between the two systems. Therefore, there is no justification for feverish activity and hurried attempts to amend national constitutions.[32] I fully support the view that, where conflicts do occur, a remedy must first of all be sought within the constitutional order. Stability of the constitution is, in my opinion, a very important value in the perspective of the trust in the law, trust of the citizens in state, identity of the state and promoting attitudes of constitutional patriotism. At the same time,

[28] The system of issuing opinions by the Sejm and the Senate with regard to EU laws was established on the basis of one of these laws (see Law of 11 March 2004 on the cooperation between the Council of ministers with the Sejm and the Senate in matters related to Poland's membership in the European Union, Journal of Laws 52/2004, item 515, as amended). The system functions on the basis on specialised committees in the Sejm and in the Senate, and it provides the opportunity for the legislative to present its opinion with regard to draft laws of the European Union. See W.J. Wołpiuk, *Opiniodawcza funkcja parlamentu w zakresie współtworzenia prawa wspólnotowego*, [in:] *Stosowanie Konstytucji RP z 1997 roku - doświadczenia i perspektywy*, ed. Z. Maciąg, Kraków 2006, p. 248. Issuing opinions by these institutions was not provided for in the constitution. The need for it resulted from the need for cooperation between the executives of the member states with their national parliaments. After the above-mentioned law was passed, detailed regulations as to the procedure were included in the Working Regulations of the Sejm and the Senate (MP 12/2004, item 182 and MP 18/2004 item 302). The involvement of national parliaments in the community law-making process is a *sui generis* remedy to the democratic deficit in this process.

[29] The Tribunal has issued rulings which were formulated in accordance with the principle of friendly interpretation towards the integration process. A clear expression of this can be found in the justification to the ruling of 24 October 2000 (K 12/00). Also, in the justification to the ruling of 27 May 2003 (K 11/03) as to the compliance with the constitution of the popular referendum the Tribunal noted that current laws should be interpreted in accordance with the constitutional principle of openness towards the process of European integration and international cooperation, tracing this principle back to the preamble to the constitution and Article 9 of the constitution.

[30] More on this: J. Barcz, *Europejski nakaz aresztowania - konsekwencje braku transpozycji lub wadliwej transpozycji decyzji ramowej w państwie członkowskim UE*, "Europejski Przegląd Sądowy" 2005, No. 1, pp. 11-22; A. Grzelak, *Europejski nakaz aresztowania - orzeczenie Trybunału Konstytucyjnego z punktu widzenia prawa Unii Europejskiej*, "Europejski Przegląd Sądowy" 2005, No. 2, pp. 24-33.

[31] See B. Banaszkiewicz, *Prawo polskie a prawo Unii...*, as cited, p. 54.

[32] See K. Działocha, *Podstawy prounijnej wykładni...*, as cited, p. 33.

one must remember (bearing in mind the *casus* of the European Arrest Warrant) that there are limits to the flexibility of interpretation of constitutional provisions, and that this method may fail, particularly if the constitutional norm is not conducive to interpretation. The attempt to settle cases of collision between the two systems by means of friendly interpretation gives therefore no grounds for excessive optimism: the constitution is not always capable of compliance with community norms, and certain postulates resulting from the progress of the integration project and related to the functioning of the state may not be fulfilled without a constitutional amendment.

The doubts as to the usefulness of the current Polish constitution may be justified: there are postulates in the literature for it to be expanded to include new regulation (some of them - regulations concerning subject matters which so far have not been regulated by it).[33] New ideas are constantly being generated with view to achieving a better regulation of the relationship between Poland and the European Union.[34] Compared to older constitutions, the Polish constitution is in a sense encouraging to such activity, because its provisions are very detailed.[35] It was drafted as a result of a painstaking compromise,[36] and therefore its makers (in the belief that the values they held dear needed to be constitutionalised in order to be protected from abuse) chose to be very specific in the provisions they drew up.[37] Ten years after the constitution has been adopted, it is clear that the level of detail makes application of the constitutional provisions difficult and that the details, instead of eliminating doubts, rather tend to intensify them.[38] It seems justified to claim that the current constitution, both formally and materially, is not conducive to being harmonised with community laws.

Small-scale amendments to the constitution are not likely to eliminate the need for further amendments as the integration process progresses. A debate would seem useful which would result in suggestions of solutions that are not contrary to the constitutional order but that can create long-term mech-

[33] *Ibidem,* p. 30.

[34] *Ibidem,* pp. 30-31.

[35] See M. Kruk, *Konstytucja narodowa a prawo europejskie,..,* as cited, p. 184; M. Kruk, *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a integracja europejska - trzy płaszczyzny rozważań,* [in:] *Prawo, społeczeństwo, jednostka. Księga jubileuszowa dedykowana Leszkowi Kubickiemu,* Warszawa 2003, p. 119.

[36] See J. Jaskiernia, *Konstytucja RP jako efekt kompromisu politycznego,* [in:] *Stosowanie Konstytucji RP z 1997...,* as cited, p. 69.

[37] See. W. J. Wołpiuk, *Zasady tworzenia ustawy zasadniczej - tryb przygotowania i uchwalenia Konstytucji RP z dnia 2 kwietnia 1997 r„* "Studia Prawnicze" 2001, No. 3-4, p. 363.

[38] The opposite opinion is sometimes expressed, to the effect that in a society where not very many shared fundamental values exits, there is a need for detailed constitutional provisions. See for instance A. Strzembosz, speech during a conference *Konstytucja - prawo - sprawiedliwość,* Batory Foundation, 16 May 2006.

anisms of Poland's participation in the integration process and of application of community law in the national legal order.[39] In this context, one must confront the issue that possibly, attempts to introduce such solutions might not be limited to EU-related subject matter. In other words, is there a possibility that the postulate of pro-community changes in the constitution will give rise to postulates of a change of the whole constitution?

Based on the experience of other member states, it seems recommendable to introduce only such changes which are inevitably necessary, and only to the degree which is necessary without disturbing the specific national character of the constitution. The criterion of the common good justifies that Poland's constitution in its current form gives due consideration to the fundamental principles and values of the European Union, and that the provisions of the constitution allow for the application of primary ad secondary community law in the national legal order. It can therefore serve well the common good of the European Union.

[39] The debate is driven both by certain practical solutions, such as *legge La Pergola* in Italy, and by opinions expressed by jurists. For example, M. Kruk insisted that in the constitution a separate chapter should be created which would contain all regulations pertaining to the relationship with the European Union. See M. Kruk: *Konstytucja narodowa a prawo europejskie...*, as cited, pp. 184-185. According to A. Zoll, it would be rational, in order to solve the problem of constitutional amendments, to introduce into the constitution a provision stipulating that a statute should be adopted which would regulate the matters of Poland's relationship with the European Union. See: *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, ed. J. Barcz, Warszawa 2002, p. 133.

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The Interrelationship between European Law and the German Constitution

You all may have heard that during the weekend, the Prime Minister of the Czech Republic announced that there are serious doubts whether the Reform Treaty is compatible with the Czech Constitution, and that therefore it will be brought to the Czech Constitutional Court to check whether it is in line with the Czech national constitution. This shows how important it is to have a close look at the powers of national constitutional courts, in reference to European law. What I want to do is very modest: I simply want to illustrate this problem by taking the German example and the relationship between the Constitutional Court in Germany and the European law, or more precisely, the European Court of Justice. Much of what I say will be very familiar to you, but I have to put it in context in order to make my point.

1. Introduction

European law may mean different things: law in the context of the European Union and law in the context of the European Council. The relationship between the national Constitution and the supranational entity known as the European Union is totally different from the relationship between the national Constitution and the European Council which is not a supranational entity but must to be treated according the rules for international treaties. If international treaties are ratified in Germany they have the status of statutory law, ranking in the hierarchy of legal sources below the Constitution. This also refers to the European Convention on Human Rights. This leads to the effect that judgments of the Federal Constitutional Court in Germany and judgments of the European Court of Human Rights may differ and operate in parallel one next to the other. However, in order to overcome the result that a ratified international treaty is overruled by the German Constitution, the Federal Constitutional Court has developed an approach to interpret the Constitution in the spirit of the international treaty, thereby bringing both sources closer to each other and minimizing the danger of conflicts. However, this very interesting and rather complicated problem of the relationship between the German Constitution and international treaties will be neglected in this paper.

In order to minimize the confusion and not to exceed the available space the paper will focus exclusively on the relationship between European Union

law and the German Constitution or - more precisely - on the relationship between the German Federal Constitutional Court and the European Court of Justice. Due to the supremacy of European Law there is an implied conflict. In analyzing the Federal Constitutional Court's jurisdiction the different approaches to the solution of the implied conflict in the course of the history of the European project will be shown.

2. The international openness of the German Constitution

The Basic Law, passed in 1949 as Constitution for the Western part of Germany and several times amended afterwards, became also the Constitution for the unified Germany in 1990. From the very beginning, eight years before the start of the European Economic Community in 1957, the Constitution had been based on the idea of integration in a broader European context. This is expressed by the text of the preamble which reads: "...Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law." In addition art. 24 par. 1 empowers the Federal republic of Germany to transfer by law "sovereign powers to international organizations". By an amendment of 1992 this power has been extended to the individual States of the Federal Republic, the Laender: "Insofar as the Laender are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to trans-frontier institutions in neighbouring regions" (par. 1 a).

The general entitlement to transfer sovereign powers is specified in art. 23 which has been amended several times, the latest in 1993. The first two sentences of the decisive par. 1 of this article nowadays read as follows: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of fundamental rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Federal Council." (The Federal Council in Germany is the body representing the interests of the Laender whereas the interests of the Federal State are represented by the Federal Parliament.) As will be shown later, this text is based on the jurisdiction of the Federal Constitutional Court which is acting as the guardian of the Constitution.

3. Fundamental Rights as most important pillar of the Constitution

The first and most important chapter of this Constitution contains a catalogue of fundamental rights which is of utmost importance. These funda-

mental rights are probably the strongest pillar on which the Federal Republic of Germany is built. Only if it is explicitly allowed by the specific provision referring to a fundamental right this right may be restricted to a certain extent by legislation. But “in no case may the essence of a fundamental right be affected” (art. 19 par. 2). The Constitution can be amended by a two thirds majority in the legislative bodies. But amendments by which the principles “laid down in articles 1 and 20 shall be inadmissible (art. 79 par. 3). Art. 1 not only guarantees human dignity as a fundamental right (par. 1) but stresses that “the German people ... acknowledge inviolable and inalienable fundamental rights as the basis of every community, of peace and justice in the world” (par. 2) and finally states that “the following fundamental rights shall bind the legislature, the executive, and the judiciary as directly applicable law” (par. 3). According to art. 20 Germany is “a democratic and socially oriented Federal State” (par. 1) in which all state authority is derived from the people (par. 2) and in which “the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice” (par. 3). This safeguard against the abolishment of fundamental rights and other essential pillars of the Constitution is a reaction to the experience made in the Nazi period where it became clear that majority vote does not prevent the perversion of the rule of law. The already mentioned art. 23 in the 3rd sentence of its par. 1 makes sure that the transfer of powers to the European Union (EU) does not undermine this so-called “eternity rule”: “The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs 2 and 3 of art. 79”

As already mentioned, according to art. 1 par. 3 of the Constitution, all the three State powers - the legislature, the executive and the judiciary - shall be bound by the fundamental rights. Art. 1 par. 3, however, does not give a full picture of the scope of application of fundamental rights. It is much too narrow and therefore misleading. It only refers to the vertical application in the relationship between citizens and State. This reflects the traditional understanding of fundamental rights as a defence against State power, thereby guaranteeing the citizens an area of freedom in which the State cannot interfere. In the meantime, this traditional understanding is considered to be the starting point only. Fundamental rights nowadays are considered to be the expression of values on which the legal order as a whole is based. Therefore, they can no longer be ignored in the relationship between private actors. Inequality of power is not only characteristic of the relationship between State and citizens, but is a growing phenomenon also between private actors, as for example employers and employees. This insight has led in Germany to the concept of indirect horizontal application of fundamental rights. This is a soft way of introducing the

fundamental rights into relationships between private actors. The fundamental rights are not applied strictly in the same way as in the relationship between State and citizens but the general clauses of the law governing relationships between private actors are to be interpreted in the light of the values expressed by the fundamental rights. This of course gives the judiciary a broad leeway of interpretation in adapting the fundamental rights to the specific situation.

The Federal Constitutional Court as guardian of the Constitution has great merits in developing and step by step improving the concept of fundamental rights. By way of monitoring the legislative, judicial and executive powers this Court not only has made sure that none of these powers undermine or ignore the fundamental rights but has also specified the vague notions of the text of the Constitution, thereby strengthening the effects of fundamental rights.

4. The Interface between the Federal Constitutional Court and the European Court of Justice

4.1. The two "as long as" judgments

The development of the supremacy of European law over national law, including constitutional law, by the European Court of Justice inevitably led to the question whether national Constitutional Courts still are entitled to examine European secondary law in the light of national Constitutions or whether only European law is decisive, to be exclusively monitored by the European Court of Justice. When the Federal Constitutional Court in 1974 was confronted with this question[1] it stressed that the European Economic Community is obliged "to do everything in searching for rules which are compatible with the constitutional law of the Federal Republic of Germany."[2]

However, it expressed doubts whether the European Economic Community has already developed a generally binding standard of fundamental rights comparable with the one contained in the German Constitution. Even if the jurisdiction of the European Court of Justice was in the spirit of fundamental rights, it considered this not to be sufficient.[3]

Therefore it concluded: "As long as the process of integration is not advanced to an extent that the Community law also contains a catalogue of fundamental rights which is on the same level as the catalogue of fundamental rights in the German Constitution" the Court continues to examine the compatibility with the fundamental rights of the German Constitution, even if the

[1] Federal Constitutional Court, Judgment of 29 May 1974, BVerfGE 37, 271 *etseq.*

[2] *Ibidem,* 279.

[3] *Ibidem,* 280.

European Court of Justice has already decided on the matter.[4] This meant nothing else but an open conflict between the two courts. Twelve years later the German Federal Constitutional Court used the opportunity to revise this position.[5] In the meantime it became evident that the Court's fears expressed in the judgment of 1974 were unjustified. It still stressed that art. 24 entitling the Federal Republic to transfer souvereign powers is not without limits but requires a framework which leaves the identity of the constitutional order untouched.[6] However, the Court recognized that in the meantime the Community had developed a standard of fundamental rights which in its effects may be considered equal to the fundamental rights as contained in the German Constitution. "All main institutions of the Community in the meantime have declared that in executing their powers and in pursuing the Community's goals they are guided in a legally binding way by the respect for fundamental rights as contained in particular in the Constitutions of the Member States and in the European Convention of Human Rights. There are no indications that the achieved standard of fundamental rights in the Community is not sufficiently stable and only of a temporary nature."[7] Therefore, the Court concluded: "As long as the European Communities, in particular the jurisdiction of the European Court of Justice, guarantee an efficient protection of fundamental rights which essentially equalizes the protection by fundamental rights as contained in the German Constitution"[8] the Court will no longer continue to examine the compatibility of European law with German Constitutional Law, thereby leaving the monitoring of European Law and its transposition into national law exclusively to the European Court of Justice. These two judgments became well known in Germany as "as long as I" and "as long as II"

4.2. The Maastricht Judgment

However, only a few years later in 1993 the position developed in "as long as II" has been questioned in the course of the ratification of the Maastricht Treaty. At the outset, the ratification of the Maastricht Treaty never seemed to be a problem in Germany. Hence it was not surprising that the Federal Parliament in the final reading of the Act on Ratification on 2 December 1992 passed almost unanimously (543 votes in favour out of the total of 568). The Federal Council, only two weeks later backed this Act unanimously. Thus after the nec-

[4] *Ibidem*, 285.

[5] Federal Constitutional Court, Judgment of 22 October 1986, BVerfGE 73, 339 *et seq.*

[6] *Ibidem*, 375.

[7] *Ibidem*, 378.

[8] *Ibidem*, 387.

essary procedural steps to be taken this legislative measure finally was enacted on 28 December 1992. Everything seemed routine. The document of ratification merely had to be signed by the President of the Federal Republic to fulfill the last necessary step. When, however, the constitutionality of this Act on Ratification was questioned by involving the Federal Constitutional Court the so far quick and uncomplicated process came to a stop. In due respect to the authority of the Federal Constitutional Court, the President refused to sign the ratification document before the Court delivered its decision. Thus with a delay of more than ten months the signature was put under the document after the Court's (unanimous) decision of 12 October 1993.[9] Thereby Germany was the last of the twelve member States ratifying the treaty of Maastricht.

The interesting aspect of the Court's judgment is not that it considered the Maastricht Treaty to be compatible with the German Constitution, even if this was - quite naturally - the politically decisive result. In the context of this paper, however, it is much more important that the judgment redefined the relationship between the German Constitution and European law. It is not very easy to specify clearly this relationship. This difficulty is due to the fact that the judgment is written in a rather diplomatic and sometimes ambiguous language. At least in parts it reads more like a political essay than like a legal text. By sticking to diplomacy the judgment succeeds in putting forward the European Union on the one side and in giving the opponents the feeling that their concerns were taken very seriously. Due to the ambiguity of the judgment's language it seems to be necessary to reproduce the reasoning of this judgment in more detail.

The focus of the judgment was on the already mentioned art. 79 par. 3 according to which the principles as stated in articles 1 and 20 (for their content see above) cannot be amended, modified or abolished. As already indicated, this so called "guarantee of eternity" in 1949 was embedded into the Constitution as a reaction to the Nazi period. Never again should it be possible to change the essential principles of the Constitution and pervert them as it happened after 1933. And as already indicated above, these principles which neither can be amended, modified or abolished have to be respected in engaging in international Treaties. As also indicated above one of the principles in article 20 is the democratic structure. This principle is specified in article 38 which reads: "The members of the Federal Parliament are elected in a general, direct and free election by equal and secret vote. They are representatives of the people as a whole, not bound by orders or directives, only responsible to their conscience." Then in the second paragraph of the article the right to vote is regulated.

[9]Federal Constitutional Court, Judgment of 12 October 1993, BVerfGE 89,155 *etseq.*

According to the plaintiff's view art. 38 is violated by the Maastricht Treaty since it guarantees each citizen a right to a representation in the Federal Parliament legitimized democratically. The citizen participates in the execution of the powers of the Federal State by way of this Parliament. The violation - according to the plaintiff - consists in the fact that the Maastricht Treaty transfers essential powers of the German Federal Parliament to the organs of the Community. Consequently the members of the Federal Parliament as elected representatives of the German people are no longer able to execute their powers granted by the Constitution. Hence these powers are no longer performed by the German people. In addition the plaintiff was referring to the democratic deficit on Community level. According to the plaintiff's view this deficit is not compensated by an adequate participation of the Parliaments of the Member States in legislating on Community level.[10]

The Court started with the assumption that theoretically art. 38 could be violated if the powers of the German Parliament would have been transferred to a body consisting of the Governments of the member states of the Community to such an extent that the minimum requirements of democratic legitimacy as guaranteed in articles 20 and 79 of the Constitution were no longer existent. However, after careful analysis of the Community structure and of the text of the Maastricht Treaty the Court denied such a violation. In this context it especially stressed the fact that it was the intention of the Constitution from the very beginning to be open for European integration. In drawing the conclusion it stated that by ratifying the Maastricht Treaty Germany is not subjected to an automatism which could no longer be controlled. According to the Federal Constitutional Court the Treaty merely opens the way to further integration of the European Community step by step. Each further step would depend on the agreement of the German Government on which the Federal Parliament would exert its influence. But at the same time the Court insists that at least presently the national Parliaments remain to be the decisive bodies to provide democratic legitimacy.

Therefore, it states that the peoples influence on the representative bodies and their legitimacy has to be secured also in a confederation of States. This mainly means that the German Federal Parliament has to retain powers and tasks of substantial importance. Therefore it is necessary to determine as clearly as possible the transferred rights and the intended program of integration. If it were not clear to what extent the German legislator has agreed to a transfer of powers it would be possible for the Community to take over powers which are not specified. Such a general empowering of the Community

[10]For the plaintiff's view see ibidem, 165 *etseq.*

would be incompatible with art. 38 of the Constitution.[11] In arguing that the Maastricht Treaty remains within these borderlines the Court offers its interpretation of the Treaty which it considers to be binding for Germany and for whoever acts on its behalf. At the same time it insists that future alterations of the Maastricht Treaty would not be covered by the present German Act on Ratification. It draws a clear demarcation line between interpretation of the Treaty and alteration of the Treaty, ending up by the warning that interpretation may not result into alteration of the Treaty. If that would be the case it would not have binding effect in Germany. And most important in reference to the topic discussed here: it is the Federal Constitutional Court's task to examine whether measures taken by Community institutions and organs remain within the power frame as granted by the Treaty. In this context the Court stresses that the generous approach to article 235 of the original EEC Treaty as experienced in the past has to be understood in a more restrictive way in the future. The same — in the Court's perspective — applies to the concept of "implied powers" and to the interpretation method focusing on the "effet utile."[12]

In its effort to keep the Community organs within the borderlines of specified powers granted to them it especially stresses the importance of the principle of subsidiarity as formulated in the Maastricht Treaty. For the Court this principle limits the execution of powers granted by the Treaty. In the Court's view the Community legislator can only act after having carefully checked whether the goals of the specific measure to be taken could not be sufficiently achieved by regulations on the level of the member States. The Court explicitly stresses that the principle of subsidiarity is a legal principle to be monitored by the ECJ. According to the Federal Constitutional Court the German Federal Government has a constitutional obligation to exert its influence in the Council on Community level to assure a strict application of the principle of subsidiarity. As far as the German Federal Parliament according to the Constitution has the power to influence the practice of the Council it is bound by the same constitutional obligation. And it will always be the Federal Constitutional Court's task to examine whether these bodies have properly fulfilled this constitutional obligation.

In the Federal Constitutional Court's perspective also the principle of proportionality as stated in art. 3 b par. 3 of the Treaty plays an important role. It mainly sees its function in preventing an overregulation by Community measures, thereby preserving the identity of the member States and conse-

[11] For this reasoning see ibidem, 182 *et seq.*

[12] For this reasoning see *ibidem,* 188 *et seq.*

quently the powers of the national parliaments.[13] The consequence of all this reasoning is simple: the Federal Constitutional Court retains the possibility to monitor whether too many powers are transferred to the European Union and whether acts of secondary legislation remain within the borderlines of the transferred powers.

The second and in the context of this paper most relevant part of the judgment refers to the control of fundamental constitutional rights as guaranteed by the Constitution. As indicated above, according to the judgment "as long as II" the examination of Community law was left exclusively to the European Court of Justice since European law was considered to contain the same standard of protection by fundamental rights as the German Constitution does. Now in the Maastricht judgment the Federal Constitutional Court at least uses a different language. As far as the power to examine secondary Community law is concerned the Court saw itself in a "relationship of cooperation" with the European Court of Justice. In this relationship it understood its part as limited to a "general guarantee of the unchangeable standard of fundamental rights". This is not exactly an illuminating example of clarity of judicial language. But it suggested that the German Federal Constitutional Court was intending to take again a more active role in monitoring Community acts.

4.3. The impact of the Maastricht Judgment

It was not at all clear whether and in how far the Maastricht judgment meant a new approach compared to the "as long as II" judgment. In particular the meaning of the obscure notion "relationship of cooperation" was rather nebulous and needed clarification. In the meantime the Federal Constitutional Court has helped to clarify the situation.

An important step in this direction is the Federal Constitutional Court's judgment[14] on measures taken by German authorities based on the revised EC-regulation on bananas.[15] It did not accept the claim against these measures. It considered the examination of secondary European law only to be possible if it can be proved "that the present development of the law on protection by fundamental rights, in particular the jurisdiction of the European Court of Justice, does generally not guarantee the inadmissible protection of fundamental rights."[16] This, however, was denied by the Court. It stressed that the development of protection by fundamental rights in European law

[13] For the reasoning on subsidiarity and proportionality see *ibidem*, 210 *et seq.*

[14] Federal Constitutional Court, Judgment of 7 June 2000, BVerfGE 102,147 *et seq.*

[15] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ1993, L 047.

[16] Federal Constitutional Court (FN 14) 161.

has not changed since the "as long as II" judgment. Therefore, in reference to the Maastricht judgment it clarified that the "relationship of cooperation" does not change the perspective of the "as long as II" judgment. "The European Court of Justice is also competent for the protection by fundamental rights in the relationship between citizens of Germany and measures of public authorities based on secondary European law."[17] In short and to make the point: at least in reference to monitoring fundamental rights the fears implied by the Maastricht judgment seem to be unjustified. The perspective developed in 1986 is maintained in spite of the confusing formula "relationship of cooperation".

The question, however, still remains whether this also applies to conflicts in which the EU is accused to have exceeded its powers or whether these powers were not transferred in line with the German Constitution. Here it seems, that the Federal Constitutional Court is determined to execute its monitoring task. This can be deducted from the reasoning in the "Alcan" judgment of the Federal Constitutional Court.[18] In a preliminary ruling the European Court of Justice had confirmed that Community Law requires repealing the unjustified subsidies and that the powers executed by the Community are in line with European Community law. The Court states that there is no indication for "an act exceeding the transferred powers in the sense of the Maastricht judgment". This statement can be read as a confirmation that if there were such an indication the Court would consider itself to be empowered to monitor this question. Thus at least in this respect there is still the possibility of a judicial conflict between the German Federal Constitutional Court and the European Court of Justice. In the Federal Constitutional Court's recent judgment on the constitutionality of the Act on the European Warrant of Arrest[19] the Court examined only whether the German legislator had used the leeway left by the European framework decision - in the area of the European Union's third pillar - in a way which respects the constitutional requirements. The legality of the European framework decision as such was not questioned at all.

5. Conclusion

Supremacy of European law meant a big challenge for the German Federal Constitutional Court. In the beginning it considered this dogma as a danger for the standard of protection by fundamental rights as contained in the German Constitution. Only when it became evident that fundamental rights

[17] *Ibidem,* 163.

[18] Federal Constitutional Court, Judgment of 17 February 2000, NJW 2000, 2015.

[19] Federal Constitutional Court, Judgment of 18 July 2005, NJW 2005, 2289.

are respected in European law the Court changed its attitude. However, in the Maastricht judgment it became evident that there is still a fair share of ambiguity in the Court's approach. Follow up judgments finally did away with this ambiguity at least in reference to fundamental rights. The Court still claims to examine whether and in how far powers can be transferred to the European Union and whether secondary European law remains within the limits of transferred powers.

DISCUSSION

- Professor Ryszard Małajny, PhD - University of Silesia

I can infer from these four lectures, those of professor Carby-Hall, professor Wolpiuk, professor Weiss and that of mine, that there is a slight difference between professor Carby-Hall and the rest of us. Namely I think that you and I are inclined to have the position that in general, European law has supremacy over national constitutional laws - in general, with some small reservations. But as far as the rest of us are concerned, we maintain that these constitutional systems of particular countries on the one hand and that of the European Union are equal or equiponderant, because as I have mentioned in my speech two days ago, the EU is not a federation. If it were, the case would look quite different. For example, Article 6 of the United States constitution says that US constitution and properly ratified treaties and statutes passed by the Congress are the supreme law of the land, and they prevail even if they are contradictory to any state constitution or statute. In no European fundamental acts can you find such a norm. In my opinion it is not only up to the European Court in Luxembourg, which will develop or elaborate the concept of the supremacy, but it is also up to national constitutional tribunals. For example, as I have also mentioned, our specialist in European law makes a difference between supremacy on the one hand and primacy on the other. Well, for me, it is a tautology. Because this difference is very sophisticated, and nuanced. So I am curious about your comments in this matter.

- Ewa Popławska, PhD - Polish Academy of Sciences

I have a question to Professor Tatham. Thank you very much for the interesting information on devolution. You said that the devolution reform concerned Northern Ireland too, but later you gave no details on this matter. Was that because the reform is still quite new, or is it because the Irish representa-

tive body has such small competencies that they do not warrant discussion? This is my first question, and the second question is addressed to both today's British speakers. For some time now, Britain has also been implementing a reform of the judiciary, and as far as I know, this is en element of the Labour manifesto. But in the French literature of the subject I have also encountered the claim that the chief impulse for the implementation of this reform was the McGonnell case in the European Court of Human Rights. I would like to know your opinion on that.

• Professor Kazimierz Dzialocha, PhD - Professor Edward Lipinski
University College of Economics and Administration in Kielce

Have the participants of this conference noticed that among the topics of the speeches and in the debate, the notion of the sovereignty of the nation, sovereignty of the state has disappeared somehow? Only Professor Carby-Hall, spoke of sovereignty in its specific British form, i.e. the sovereignty of the Parliament from which we can trace, following a certain method of interpretation, the sovereignty of the British nation on the basis of the constitution. Yet this issue has generally been absent from our discussion.

We are talking today about the EU, the legal systems of the member states, where the underlying principle, the source of the constitution, which we always take into consideration, is the principle of the supremacy of the nation, especially here in the new or reborn democracies of Central Europe and South-Eastern Europe. Which is not surprising, given that it is a reaction to limited independence, I am not going to say limited sovereignty, because I have reservations to this term. Only yesterday, and quite shyly, with no accentuation, we spoke - and I took a good note of this - about the classic understanding of sovereignty, and post-modern understanding of sovereignty, but that was the end of it.

So therefore I would like to raise this question: how is this sovereignty of the nation related, in the external aspect, with the sovereignty of the state? Does it exist or does it not? You realise that there are many theories in this respect, because the legal doctrine cannot be constructed without taking this into account, so the topic keeps resurfacing. We speak, and the everyday language uses this phrase too, of limited sovereignty. Membership in the EU limits the sovereignty of the member states. But the problem is, the notion of limited sovereignty is contradictory to the essence of this term. If someone is sovereign, if we understand that as having unlimited power, both internally and in terms of external relations, then the notion of limited sovereignty is not acceptable.

There is the concept of divided sovereignty as a relationship, as reflecting the consequences of certain states joining the European Community.

But here too significant reservations must be made. Sovereignty is not a sum of competencies. It is a whole. You cannot arithmetically divide the competencies between EU competences and member state competencies. This approach has met with doubts both in the study of constitutional law and international law.

Finally, there is another concept, one which would require a closer look, the concept of shared exercise of sovereignty: exercise of it by the state, the primary holder of sovereignty, and the EU through its institutions. Here however another obstacle appears: some competencies are exclusive and belong to the Union only. They are therefore not exercised in a shared manner. Should we therefore not say, especially in the light of today's discussion, that the sovereignty of nations and the sovereignty of member states is expressed in what can be called sovereign constitutional power of the member states? I am going to use the term "unlimited" as far as constitution-making and amending a constitution is concerned, even if those amendments are made under the influence of integration processes or at the insistence of the Strasbourg court?

What I mean to say is that it seems to me that this is all that is left to us, one could say that it is a lot, or on the contrary, rather little: sovereignty of a national constitution, taking into account the fact that the state belongs to a certain community. Our conference as well as the news from Lisbon seem to suggest that the name and notion of the European Constitution have been deposed, all that we now have is a Reform Treaty. National constitutional courts, as presented for instance by Professor Weiss on the example of Germany, show resistance against European rulings based on their Constitutions and try to interpret the Treaties - the Maastricht Treaty in the example - on the basis of the principles of the national constitutions. So I would like to ask whether you agree that what we are dealing here with is sovereignty which is expressed though the sovereignty of nations to have their own constitutions, and sovereignty of states to have their own constitutions.

• Professor Carby-Hall, PhD - The University of Hull

I will try to be as brief as I can, because there are some very interesting concepts which the two learned professors have suggested. I shall not answer your questions, for the simple reason that I think you are better qualified than I am. I shall apologise for being here under false pretences: I am not a constitutional lawyer at all. I am a labour lawyer, like my friend Manfred Weiss, and I apologise for him as well for taking the guise of constitutional lawyers. But I think we know enough about constitutional law to be able to answer briefly the questions which you raised.

First of all, when we talk about sovereignty of the states, I agree with you, sovereignty in a particular state in a particular situation, and I agree that all

states, in my humble opinion, are sovereign, each state in the EU is sovereign. There is no doubt at all about it. But I think we should distinguish between sovereignty and supremacy, because I think there are two distinct meanings to this. And that is the very reason why, when I was talking earlier on, I was not talking about sovereignty, I was talking about supremacy. Sovereignty is a totally different concept in my opinion to supremacy. And what I was talking about was the supremacy of European law over national laws. Why do we need that? The reason why we need that is, I agree with you Professor, the EU is not a federation. But we need to have certain rules which are common for every single member state, and the only way we can do this is to give part of our sovereignty to the EU in very limited field, fields to do with EU law: directives, regulations, decision, charters, and all the bazaar. So I see a distinction between sovereignty and supremacy. And what we have seen now when we were talking about the supremacy of European law, we are seeing not a codification, but a consolidation of cases.

Plenty of authors I have read in constitutional law talk about our European law being codified. It is not, in my opinion, and I would be glad to argue this with anybody. It is not a codification, it is not a law that you have in all the EU member states apart from Great Britain, where we have our common law, we do not have a codified law. So, of course, do Malta and Cyprus, because they are ex-colonies. So we have therefore this distinction, and I think this distinction should be made from the very beginning.

Now, the question was asked about the agreement of national laws with EU laws. Yes, of course. When we look at our courts, in the EU, you will find that the courts themselves seem to try to interpret what EU law is, and if not, they ask the European Court of Justice for an opinion. This to me seems a sensible and common-law solution to the problem.

• Associated Professor Allan Tatham - ESSCA, Budapest

I can give you the answers very briefly. To question number one, on Northern Ireland: there was no time, no space, and there are exceptional circumstances on Northern Ireland because the Assembly has only just started working again after the agreement between the Sinn Fein an the Democratic Unionist Party, but I will be happy to talk to you about that later.

As regards the reforms, the judicial authority, yes, it is a case concerning Guernsey, because of the position of the Law Chancellor which as you know under the British Constitution and the Constitutions of Guernsey and Jersey, and I think the Isle of Man as well, had no understanding of what the separation of powers is according to continental theory: the Law Chancellor had executive, judicial and legislative roles. Therefore cutting him out of the system and turning him into the highest judge meant that, if that happened in little

Guernsey for which the UI< is responsible, it was going to happen to Britain, so in fact that is what we have to design - a supreme court which will be based in Middlesex Guild Hall, because if it is based in the Houses of Parliament, then the Scottish courts do not have to recognize its authority, according to the Act of Union of 1707.1 will be happy to talk to you later about any other issues you may want to raise.

- Professor Rolf Grawert, PhD - University of Bochum

Just two sentences. To return very briefly to sovereignty: I think the discussion of sovereignty was implied in what we discussed. If there was no partial transfer of sovereignty, we would not have to discuss what kind of rules we need to make sure that we distribute the sovereignty properly between the two blocks: between the European Union and the member states. So I think, whether we call it limited sovereignty or something else, the real discussion is on how much sovereignty remains in the member states, and of course it is a different situation than before we had the EU. And one more sentence: sometimes it is good not to be only constitution lawyers, but to be a labour lawyers as we are. We should not only talk about formal sovereignty, we should also talk about substantial sovereignty, and if we look to substantial sovereignty, we will find out that it is diminishing day by day not because of the European Union, but because of the multinationals and many other factors, and we take all this together, then we start to worry about what remains as sovereignty in individual states.

- Professor Waldemar Wolpiuk, PhD - Helena Chodkowska
  University College of Management and Law

First of all, I would like to say that I agree with Professor Weiss. The issue of sovereignty is of great importance, but it is the subject matter sufficient for another conference. But precisely the way in which I agree with Professor Weiss is that I think the sovereignty factor was included in the speeches here, for example also in my speech about the common good. I have participated in a large number of conferences where sovereignty was the central matter, and myself I have even written a book on the issue of sovereignty. This is all *in statu nascendi*, just being developed.

If we are to do something together, then of course the problem of sovereignty will be shaped differently. If the cooperation within the EU leads us toward a federal state, then of course the problem of sovereignty will be different than in a traditional state.

But what I was talking about somehow also meets with what Professor Dzialocha said about the constitution being a certain background to sovereignty, in that it is not the role of constitution to closely follow and closely re-

fleet the changes taking place in reality, but that it is in the constitution that the sovereignty of the state is preserved.

The issue of what we need to talk about as far as sovereignty is concerned depends on the will of those states, nations and individuals, who are jointly constructing our future within the EU.

Part 2

ANNA PATEREK, PhD — Andrzej Frycz Modrzewski Krakow University College

Axiology of the Future European Union as Opposed to the German Constitution - Debate in the German Parliament

The main purpose of this paper is to discuss the decisions of the Constitutional Treaty,[1] particularly those which are going to consolidate values of the European Union as an organisation. These values are then compared with the ones expressed in the Basic Law for the Federal Republic of Germany.[2] Analysed are the debates which took place among German political parties represented at Bundestag during XIV and XV terms (1998-2005): SPD, Alliance'90/Green, CDU/CSU, FDP and PDS.

7. *The Charter of Fundamental Rights*

In the Federal Republic of Germany, the political debate about axiology of the European Union was carried out at the time when the Charter of Fundamental Rights of the European Union was being prepared. This act was promoted by many German politicians. They tried to show it as a key part of the future European Constitution and a way of solving future problems which could appear in the European Union particularly as the effects of its extension. Including this document into the Constitutional Treaty was a great opportunity to consolidate the European Union one more time and to give citizens an opportunity to identify with this organisation.

The idea of preparing The Charter of Fundamental Rights appeared in Germany at the time of Intergovernmental Conference 1996/1997. This postulate was formulated by an MP of opposition SPD - Jurgen Meyer. He said

[1] Treaty establishing a Constitution for Europe, "Official Journal of the European Union" 2004, C310, Vol. 47,16 December, http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN.

[2] The Basic Law for the Federal Republic of Germany (Grundgesetz GG), In the version promulgated on 23 May 1949 (first issue of the "Federal Law Gazette" dated 23 May 1949), http://www.iuscomp.org/gla/statutes/GG.

most emphatically that there was a need to carry out an open public discussion on the European Catalogue of Fundamental Rights.[3]

Creating the Charter of Fundamental Rights was very important for every German parliamentary factions. They all said this document would be the main part of the future European Constitution. And what was very important, many politicians hoped it would help to support the process of integrating the European Union's citizens into the organisation, especially facing the increasing deficiency of decisions which were made by the European Union. Many German Members of Parliament were totally committed to their work on the subject of fundamental rights.[4] They agreed about the core and the main message and meaning of this act. They accepted that the document should guarantee protection of fundamental rights in the European Union in a comprehensive and consolidating way. The politicians meant both classical personal, political freedoms and also new rights, namely, social and economic and ones that were the result of scientific and technological development.

Controversies concerned the substance of the Charter: the meaning of social rights, right to ask for asylum, homosexual partnership status and the problem of interference in authority of members the European Union. CDU and CSU wanted to include into the Charter "European human vision, which is based on Christian-western tradition."[5] Christian Democratic Party demanded to write down in this act "the right to protect homeland, protection against re-housing and guarantee for resolutions maintaining ethnic, national and language rights."[6]

The canon of fundamental rights was approved formally by the National Convention on 2nd October 2000. To sum up the work on the Charter parliamentary debate took place on 12th October 2000 and every Bundestag parliamentary faction accepted the text. The preamble of the act reads: "The peoples of Europe (...) are resolved to share a peaceful future based on common

[3] Debatte zur Reform des Vertrages von Maastricht und zur Europapolitik 22. Juni 1995, *Verhandlungen des Deutschen Bundestages*, 'Stenographische Berichte", XIII. Wahlperiode, 44. Sitzung, 22. Juni 1995, p. 3562-3563.

[4] At the time of Convention there were three debates and the subject was the Charter of Fundamental Rights: 8th May, 7th July i 12th October 2000 r., [in:] *Verhandlungen des Deutschen Bundestages*, "Stenographische Berichte" XIV. Wahlperiode, 105. Sitzung, 18. Mai 2000, p. 9839-9860; *Verhandlungen...*, 115. Sitzung, 7. Juli 2000, p. 11022-11050; *Verhandlungen...*, 124. Sitzung, 12. Oktober 2000, p. 11903-11923; and common session Bundestag and Bundesrat European Committee Bundestag: Öffentliche Anhörung zu der Charta der Grundrechte der Europäischen Union. Gemeinsame Sitzung des Auschusses für die Angelegenheiten der Europäischen Union des Deutschen Bundestages mit dem Auschuss für Fragen der Europäischen Union des Bundesrates am 5. April 2000. Texte und Materialen. Berlin, Juni 2000.

[5] BT-Drucksache 14/3368.

[6] *Ibidem.* „The Charter of Fundamental Rights would be [...] untrustworthy if it wanted to work on every fundamenta right [...] so the problem of rehousing and minority protection remains out of inner concerning." P. Altmaier, [in:] *Verhandlungen...*, 105. Sitzung, 18. Mai 2000, p. 9846.

values."[7] Among these common values, which create philosophy of European Union there are: human dignity, freedom, equality, solidarity, democracy, and the rule of law. The preamble recalls spiritual and moral inheritance of the European Union. What is interesting, in the document dated on 20th September 2000, there was also a mention of religious heritage of the European Union. It caused protests in France, and that is why the expression "religious" was withdrawn. Ingo Friedrich from the CSU, MEP, demanded to include into the preamble sentences concerning Christianity and responsibility before God. These demands were supported by Convent chairman Roman Herzog and states such as Austria and Luxemburg, and of course the Churches.[8] Finally the parties found out the best solution, and settlement was achieved. Only in the German version of the act there was the expression "spiritual-religious"[9] *(geistig-religiös)*, in the other ten languages versions, including English, the wording was "spiritual".

SPD/Alliance'90/Green put particular emphasis on the importance the Charter of Fundamental Rights in creating good relationship between citizens of the European Union and the European organization as the institution. Their politicians emphasized the integrity of human rights, not only civil and liberal but also basic social ones.[10] Human dignity is inviolable and it is written in the first article of the Charter. And according to the Social Democratic Party it is the basis of the whole Charter.[11] What is more, this right is also written in the first article of the Basic Law for the Federal Republic of Germany which reads: "Human dignity shall be inviolable" The second title, "Freedoms" is written in compliance with Bundestag. The article 11-70 ("Freedom of thought, conscience and religion"), 2nd section reads: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right" Quoting this passage, the citizens could refuse the service in the army because freedom of faith, conscience and creed is guaranteed. It is expressed clearly in 4th article section 3 in the Basic Law: "No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law." Also important for German representatives was including into the Charter freedom of arts and scien-

[7] The Charter of Funadamental Rights of the European Union. The Text. Positon of Advisory Committee of the European Union to Fundamental Right..., p. 11.

[8] Kein Bezug auf Gott in EU-Grundrechtecharta, "Süddeutsche Zeitung", 29.09.2000, p. 2; R. Chimelli, *Einigkeit über EU-Grundrechte-Charta*, "Süddeutsche Zeitung", 7.10.2000, p. 9.

[9] It was approved primarily CDU/CSU factions, see: Hintze, Altmaier, EU-Grundrechtecharta ist großer Erfolg für Europa. Pressedienst. CDU/CSU Fraktion im Deutschen Bundestag, 2. Oktober 2000.

[10] BT-Drucksache 14/4269.

[11] BT-Drucksache 14/4584; *J.* Meyer, *Verhandlungen...*, p. 124. Sitzung, 12. Oktober 2000, p. 11904-7.

ces (article 11-70). Discussing this matter they referred to Article 5 section 3 the Basic Law: "Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution." The solution concerning the right to property written in the Charter according to SPD politicians is more progressive than Article 14 of the Basic Law. The law should protect, secure and guarantee "lawfully acquired possessions" and also "intellectual property shall be protected". Article 11-83 stipulates that "equality between women and men must be ensured in all areas" and it was accepted enthusiastically as a modern solution. In addition, the Charter excludes the possibility of extension of competencies and tasks which are included into the European Treaties. Another important achievement in the Charter is assurance of the protection written in national constitutions.

The German SPD/Alliance'90/Green representatives believed that the main advantage of the Charter was its modern and holistic way of showing the matter of fundamental rights. And that is why it was so important for them that the Charter stipulated inviolability of human rights. Also, the Charter specified modern rights such as: protection of personal data, environmental protection, consumer protection. Thirdly, it included new generation rights: bioethics and ban on discrimination. And finally the Charter included the right not to be discriminated against on the basis of gender.[12]

Alliance'90 and Green representatives believed that the Charter of Fundamental Rights was an extraordinary act which would consolidate the European Union. They pointed however to the fact that many German postulates were not realized. The politicians showed many weak points, such as insufficient regulations related to environmental protection, bioethics, right to asylum, minority protection and animal rights. But the faction appreciated some subjects which they called "progressive": ban on discrimination, family and marriage protection, guarantee of equal rights, social and political advancement, women's rights. Talking about the future status of the Charter, the politicians wanted to make this act law as soon as possible. They also appealed to the government to create forceful methods of executing rights by citizens. The representatives agreed the idea of referendum on the Charter was good and useful, but were afraid of reaction the other states. Yet the most important is that the faction also accepted the Charter of Fundamental Rights as "the milestone in process of European integration."[13]

CDU/CSU fraction also considered the Charter as a very important part of the future Constitutional Treaty, as "soul of the European Union". It was said this act should become the foundation of common values and the tool

[12] BT-Drucksache 14/4269.

[13] BT-Drucksache 14/4584.

used in democratic states. It also ought to guarantee legal verification of European institutions and decision they made. One on the faction's requirement was achieved: they managed to persuade the others to include into the Charter the "European vision of human being" founded on Christian and Enlightenment tradition as unequivocal recognition of human dignity and also the subsidiarity rule. What is more the Charter had to - according to German Christian Democratic Party - not only be just a tool of the European identity but it also had to become "an important political sign for states which will be going to become members of the European Union and for organisations protecting human, civic and democratic rights all over the world". The politicians believed that the Charter would become "a godfather" of many future constitutions East European and Third World states. Furthermore the politicians wanted to show they meant the European Union not only as a free market space but first of all as a community of common values founded on democratic ideas. The politicians emphasized that the Charter guaranteed legal protection of rights within the European Union.

But there was another problem to solve. The rules which were going to be written in the Charter were incoherent. That is why the way of acquiring the prerogatives by the Union should be defined very strictly. The ratification process was the time of dividing tasks and competences among the Union and its members. The faction was in favour of making the Charter binding. They persuaded the others it would be a very useful tool for the European citizens to control Union institutions (especially the right to complaint). Therefore it had to be vouched that only these rights could be the subjects of complaint which were given to European authority by its members. CDU/CSU faction discussed this matter because they were certain that it had not been expressed clearly and precisely, especially in terms of division of competences between the Union and its members.

In their opinion the Charter should be just a starting point to further debate about the division of competences in the European Union. They claimed it could become another great step towards making the Union more democratic. The Christian faction demanded the national government to take steps forward and to include the Charter into the European treaties. CDU/CSU also pointed the advantages of the Charter: unequivocal recognition of human dignity, taking into consideration new tendencies in medicine and biology, freedom of conducting business, right to asylum, protection in the event of removal, (collective) expulsion.

According to CDU/CSU the main disadvantages was lack of the right to homeland, and groups and minorities rights which were mentioned by Christian parties. In spite of these deficiencies the Charter was thought to be an accelerator of the future European integration process. This act allo-

wed the European Constitution to be discussed.[14] FDP representatives also perceived the Charter as a cornerstone in creating the European Constitution. It could be said it was the first step towards creating the Federation of the European Union. But the politicians emphasized the need to decide about division of competences and stronger democratic authorization of the decision processes. They agreed that both constitution and the Charter should be accepted by European societies. To this aim, the politicians stressed that European citizens ought to have an opportunity to create the catalogue of fundamental rights (they should have an influence on corrections and ratification process ending with referenda). The faction required the government to start actions aimed at incorporation of the Charter into the European Treaties and engage the societies in debates on the Charter and its final adoption. In additions, it was important to point to the incoherence in jurisdiction of Court of Justice of the European Communities and European Court of Human Rights.[15] FDP representatives believed that Convent would lose its battle about not giving the European Union new prerogatives which were not mentioned by the European members in the international treaties. It was important for them because many subjects such as environmental protection, consumer protection and health policy had already been included into the Charter. What is more, the faction were against using the phrase "rule of the law" ("Achtung von Rechten"). They wanted to change it into "protection/guarantee" ("Gewährleistung"), believing that the former one gives less protection to some rights.[16] There was debate on the Article 11-71 section 2: „The freedom and pluralism of the media shall be respected" while Article 5 section 1 of the Basic Law reads: "Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed".

According to PDS representatives, the Charter was a foundation of the European Union. They said that its main advantages was the holistic attitude to protection of human rights, including personal rights and freedoms and also political, social end economic ones.[17] Thinking about the Charter of Fundamental Rights as "the *sine qua non* of the future European constitution", PDS disagreed with the other politicians who wanted to see the Charter document as "the way to the essential extension of prerogatives of the European Union" or the beginning of "European superpower". This rule was written very clearly in Article II-11 section 2 in the Charter: "This Charter does not

[14] BT-Drucksache 14/4246.

[15] BT-Drucksache 14/4253; You can read more in: E Jasiński, *The Charter of Fundamental Rights of the European Union*, Warsaw 2003, p. 223-239.

[16] BT-Drucksache 14/4253.

[17] BT-Drucksache 14/4654.

extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."[18]

In addition PDS demanded to define in the Charter the notions of "person" and "everyone."[19] The question was about Article 11-62 and 11-63 which is talking about "everyone" (German translation "jede Person"). PDS representatives said that it should not be worded in this way, because protection of "everyone" is "controversial and unacceptable". According to PDS the right to "be a person" is not inherent, the consequence is that this right can be acquired and also there is a possibility to lose it. It means that newborn and the old who are not "conscious of their history, in some circumstances become no-everyone and that is why they have no right to protection". This interpretation brought about the "danger of excluding the disabled and mentally handicapped from under basic rights (...)". PDS representatives called for federal government to support an amendment, changing "everyone" into "person". Fortunately these apprehensions were not necessary, because the Basic Law in its Article 2 section 2 provides for the right to life and physical integrity and this act describes "every person". But in the Article 1 it uses the word "human", so the conclusion is that the state of consciousness has no reason. Expression "jede Person" is used in German translation of the Charter because it must be shown that one of the advantages of the Charter is the belief it expresses that any discrimination based on gender is not acceptable. In the opinion of PDS faction, the Charter was a necessary "answer" to economic and monetary consolidation. And it was also an "invitation" for the Union members. The catalogue was going to counterbalance too strong a belief in the free market.[20] In addition, the politicians wanted to write down into the Charter absolute prohibition of cloning, not only "the prohibition of the reproductive cloning of human beings" (Article II-63d). There were also claims that freedom and pluralism of media and right to education had not been guaranteed in an appropriate way.

German parties (SPD/ Alliance'90/Green, CDU/CSU, FDP and PDS) believed that incorporation of the Charter into the Constitutional Treaty is the condition *sine qua non* of consolidation of the civil society on the way to European unity. They were sure that European identity is important in building "a community of values" among the Union citizens. It was said that constitution should be adopted in European referenda. Christian Sterling on behalf of Alliance'90/Green emphasized there is a certain need for writing this right

[18] *Ibidem.*

[19] BT-Drucksache 14/4720.

[20] *Ibidem.*

(to referenda) in the Constitutional Treaty. In his opinion "referenda (...) are necessary both for European democracy and European identity."[21] According to the finance minister Hans Eichel, debates about the meaning of European values would continue until "people identify themselves with their own history."[22] The Prime Minister of Bavaria, Edmund Stoiber (CSU) was also supportive of referenda on European Constitution. For him this matter was very important, and he expressed it during his speech at the Humboldt University. He said that this act was so significant that therefore it should not be decided without participation of European citizens. The matter of referenda caused lively public discussion. What is interesting, these actions strengthened the need for referenda.[23]

Despite differences of opinions, Christian Democratic parties wanted to represent similar attitudes to constitutional referenda. CSU was in favour of federal referenda but CDU was against this idea[24]. FDP representatives also emphasized the relationship between building the European society and the European public opinion. That is why they suggested that it would be better to organise European referenda on Constitutional Treaty and its future modifications.[25] The Liberals applied to Bundestag for an amendment to Article 23 the Basic Law on the opportunity of running referenda on the European Constitution among German citizens.[26] But this project was not supported by any of parties in the Bundestag.[27]

The requirement for including the Charter into the Constitutional Treaty has also been expressed in SPD's manifesto from November 2001. Taking into consideration different constitutional traditions and meaning of fundamental rights of the Union member states, it has to be said that creating the Charter of Fundamental Rights was a very important contribution towards establishing an identity among citizens of the European Union. The Charter

[21] *Verhandlungen...*, 236. Sitzung, 16. Mai 2002, p. 23579.

[22] *Ibidem*, p. 23582.

[23] See: N. Fried, *Stoiberfiir Referendum zur EU-Reform,* "Siiddeutsche Zeitung" 9.11.2001, p. 6.

[24] S. Holl, *Union will Referendum Uber EU-Verfassung,* "Siiddeutsche Zeitung", 27.11.2001, p. 7.

[25] BT-Drucksache 14/9044.

[26] BT-Drucksache 15/2998.

[27] *Verhandlungen...,* XV. Wahlperiode, 112. Sitzung 28. Mai 2004, s. 10211; The German Basic Law says that handing over authority of Federal Government to Union Institutions needs a bill approved by 2/3 majority of Bundestag deputies. (Art. 23, p. 1, "The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79" and art. 79, p. 2, "Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat"). It involves the condition to accept by Bundestag and Bundesrat ratification act for every treaty signed by German government, especially a treaty which considers changes in treaties about the fundamental rules connected to European Committees and the European Union.

defined values held and expressed by members of the European Union. Preparing this act was a great opportunity to start another debate on European Constitution. Social Democratic parties stressed that the Charter was one of important conditions which had to be made in the name of European consolidation of the European civil society. It was achieved not only by including the catalogue of fundamental rights into the Constitutional Treaty, but also by giving a chance to European citizens to participate and have benefits (the right to complain to Court of Justice of the European Communities).[28]

Moreover, according to PDS "constitutions will be strong only if citizens have a chance to vote for them (...), and then Europe will find its place in citizens' hearts" (Uwe Hiksch, PDS).[29] In addition PDS demanded to guarantee citizens more rights to participate in making decisions and creating Union policy, *inter alia* creating referenda.[30] Referenda on the European Constitution would be a chance to "integrate the European project with real human expectations concerning European policy" (Uwe Hiksch, PDS).[31]

2. Preamble and the title of the First Chapter Creating the Constitution for Europe

Besides resolutions included in the Charter of Fundamental Rights, which are the important part of Constitutional Treaty (Article 1-9, section 1), and the part of Chapter II (Articles 11-61 to 11-114), great value in providing axiology of European Union must be given to the preamble and resolutions written in the Title (Definition and Objectives of the Union). The values specified in the preamble of the Constitution are much broader than the ones in the preamble of the Charter. Because the first one speaks of the cultural, religious and spiritual heritage of Europe, from which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed. The "religious heritage" is a result of compromise reached between these representatives who did not want to mention it at all, and the others who desired to show the Christian influence on European history and write it into the Constitutional Treaty.

In Germany, a need to have an invocation to God written into the Constitution was emphasized by Christian parties. *Invocatio Dei* is also mentioned in the German Basic Law: "conscious of their responsibility before God and man". And that is why CSU quoted the Basic Law and demanded to write the same rule (invocation of God and Christian heritage) in the Constitutio-

[28] *Verantwortungfilr Europa...*, p. 8-10.

[29] *Verhandlungen...*, XIV. Wahlperiode, 207. Sitzung, 12. Dezember 2001, p. 20452-20453.

[30] BT-Drucksache 14/9046.

[31] *Verhandlungen...*, 236. Sitzung, 16. Mai 2002, p. 23581-23582.

nal Treaty. If it were not included, they would not support the ratification of the act.[32] According to Angela Merkel (CDU/CSU) including Judaic and Christian roots of Europe and unequivocal invocation to God would make a chance to define the indefinite European identity in a very clear way.[33] All the same, Edmind Stroiber (CSU) gave emphasis to the fact that including the Charter in the Constitutional Treaty obliged the European Union to respect "values which stem from the Christian-Western culture."[34]

Christian Parties at Bundestag pursued the same postulates.[35] CDU/CSU representatives in petition on 14 October 2003 claimed that invocation to God in the Constitutional Treaty was suggested in the preamble text: "Being aware of responsibility before God, man and spiritual-religious inheritance of Europe, the European Union has developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and solidarity". Christian Democratic parties demanded also (the same attitude they represented during debate on the Chapter of the Fundamental Rights) invocation to Christian-Western tradition.[36] The representatives of the other factions emphasized that favouritism in the preamble towards one particular religion was against secular constitutional rules some European states (France, Belgium), and it could discredit equality, one of the most important European values. That is why it could be said that reaching a compromise between different constitutional traditions member of the European Union was a great achievement.[37]

The European Union respects various legal systems of its members, and the law defines the relationship between state and the churches. Article 1-52 says: "1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2.

[32] EU-Verfassungsvertrag nachbessern, Beschluss des 68. Parteitages am 18.-19.07.2003, *Die EU-Reformkonvent - Analyse und Dokumentation*, ed. C. Giering, CD-ROM, Gütersloh-München 2003.

[33] See. Angelas Merkel speech during the parliamentary debate 12 May 2005, [in:] *Verhandlungen...*, XV. Wahlperiode, 175. Sitzung, 12. Mai 2005, p. 16352.

[34] See. Edmund's Stoiber speech at the parliamentary debate 12 May 2005, [in:] *Verhandlungen...* XV. Wahlperiode, 175. Sitzung, 12. Mai 2005, p. 16363.

[35] BT-Drucksache 15/1694,15/1695; 15/4206; see Peter's Hintze (CDU/CSU) Statement at the parliamentary debate on 11 December 2003, [in:] *Verhandlungen...*, XV. Wahlperiode, 82. Sitzung, 11. Dezember 2003, p. 7146.

[36] BT-Drucksache 15/1695.

[37] See. Anna Lührmann statement (Alliance'90/Green) at the parlimantary debate 11 December 2003 r. [in:] *Verhandlungen...*, XV. Wahlperiode, 82. Sitzung, 11. Dezember 2003, s. 7144; also the Statement of the minister for Europe Hans Martin Bury [in:] *Verhandlungen...*, XV. Wahlperiode, 82. Sitzung, 11. Dezember 2003, s. 7158; also Anlagen zum Stenografischen Bericht, [in:] *Verhandlungen...*, XV. Wahlperiode, 82. Sitzung, 11. Dezember 2003, p. 7265-7267.

The Union equally respects the status under national law of philosophical and non-confessional organisations. 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations". Therefore the Constitutional Treaty obliges the European Communities to maintain an open, transparent and regular dialogue with these churches. This settlement was taken by CDU as an unquestionable achievement and novelty in regulations between the Union and Church.[38]

Article 140 of the German Basic Law (previously Article 137 of the Weimar Constitution section 1-7)[39] stipulates that the state is secular and respects the independence and autonomy and guarantees freedom of faith, conscience, creed and worship. Both state and churches are open to cooperation. The Constitutional Treaty (article 11-70) confirmed these rights which are also written in the Basic Law. Article 4: "(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed." It is said very clearly that the Constitutional Treaty does not restrict the meaning of freedoms which are guaranteed by the Basic Law. What is stressed, the European Union does not interfere with how the national law defines the relationship between the state and church. The Constitutional Treaty just legitimizes all these freedoms.

Article 1-2 defines the foundation of the common values which are held by the European Communities: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between

[38] See: Peter's Almeier (CDU/CSU) statement at the parliamentary debate 26 June 2003, [in:] *Verhandlungen...* XV. Wahlperiode, 53. Sitzung, 26. Juni 2003, s. 4334; Angela's Merkel statement at the parliamentary debate 12 May 2005, [in:] *Verhandlungen...* XV. Wahlperiode, 175. Sitzung, 12. Mai 2005, p. 16352.

[39] Basic Law for the Federal Republic of Germany (Grundgesetz GG), Appendix to the Basic Law. Extracts from the German Constitution of 11 August 1919 (Weimar Constitution), p. 63-64, "(1) There shall be no state church. (2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the Reich shall be subject to no restrictions. (3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community. (4) Religious societies shall acquire legal capacity according to the general provisions of civil law. (5) Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organization, it too shall be a corporation under public law. (6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law. (7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies."

women and men prevail". The Constitutional Treaty confirmed that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competencies as defined in the Constitution" It was also the postulate of all factions which were represented at Bundestag during terms XIV and XV. Peter Hintze (CDU/CSU) at one of the debates quoted the first federal president, Teodor Heuss, who said that Europe derives from three sources: Acropolis in Athens, Capitol in Rome and Golgotha in Jerusalem. The spiritual foundation of Europe is defined by Greek philosophy, Roman law and Judaic and Christian inheritance. And these roots were also in the minds of the people who were working on the text of the Constitutional Treaty for Europe.[40]

[40] *Verhandlungen...*, XV. Wahlperiode, 175. Sitzung, 12. Mai 2005, p. 16379.

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Poland's Position Towards the Reform Treaty

The position of Poland in the debate concerning the reform of European institutions has evolved considerably in recent years. Poland has abandoned the idea of "Nice or death" and other demands, such as: the objection to limiting the number of commissioners in the European Commission, the idea of group presidency in the Council of the EU, the guarantee to all members of the European Union to participate in making decisions in the issue of determining mechanics of cooperation within the framework of the European Security and Defence Policy (ESDP), and finally the introduction of reference to Christian tradition to the preamble of the Treaty establishing a Constitution for Europe. However, the issue of maintaining the system of reaching decisions as close as possible to the one provided by the Treaty of Nice has remained the unshakable priority.

Polish demands towards the Reform Treaty

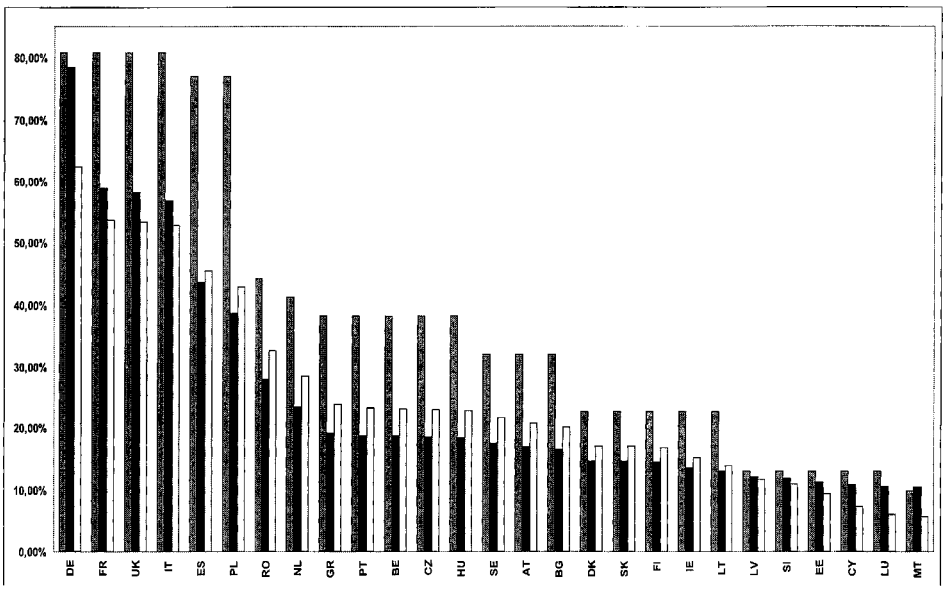
Compromise reached at the session of the European Council (21-22 June 2007) and based on arrangements included in the Reform Treaty created solid grounds for continuation of activities undertaken at the Intergovernmental Conference (IGC) in 2007. Agreed institutional changes are not revolutionary in comparison with the Treaty establishing the Constitution for Europe, and to a high extent concern names only (the so-called "deconstitutionalization"). Poland clearly presented its priorities while negotiating the final version of the new Reform Treaty within the framework of the IGC 2007. These are:

- Entering into the Treaty, rather than into a separate declaration, the clause which will make it possible to postpone disadvantageous decisions in the Council of the EU (the Ioannina mechanism);
- Increasing the number of advocates general in the Court of Justice of the European Communities from 8 to 9;
- Excluding Poland from being subject to the Charter of Fundamental Rights;
- Requirement of unanimity in some votings in the European Central Bank.

The inclusion of the Ioannina compromise in the Treaty which Poland demands will result in the requirement of unanimity on any amendments, rather than approval by the majority of EU member states. Additional mechanism that allows delaying a vote has been agreed (on the grounds of the so-called "Ioannina compromise" of 1994). In this way, a certain "safety brake" was won. It will make it possible, in case of particularly difficult and contro-

versial issues, to postpone a decision and take it within a "reasonable time."[1] In fact, this is an instrument not included in the Treaty which constitutes a tool for "forcing" the member states to reach compromise.[2]

The power to prevent action in TN, TI< and Polish proposal



Source: UKIE.

It will come into force in 2014. However, compared to the 2004 formula, decreasing - from 1st of April 2017 (when "double majority" will be fully introduced) - the threshold of blocking minority votes needed for using this instrument was a novelty. The threshold was lowered from 75% to 55% of states or votes, indispensable for forming the so-called blocking minority (Art. 1-25, item 2). In 2014-2017, in the transition period, this formula would work as defined in the Declaration No. 5, attached to the Constitutional Treaty.[3]

[1] Pursuant to the Council regulations, voting is organized upon a motion of the Chairperson of the Council, who holds the voting upon demand of the ordinary majority of the Council Members.

[2] Compare: *Traktat reformujący UE. "Mapa drogowa", forma traktatu, propozycje zasadniczych zmian instytucjonalnych*, [in:] *Traktat reformujący Unię Europejską. Mandat Konferencji Międzyrządowej. Analiza prawno-polityczna. Wnioski dla Polski*, ed. J. Barcz, [2007], p. 23.

[3] At the Intergovernmental Conference IGC 2003/2004, in the Declaration No. 5, attached to the Constitutional Treaty, Ioannina formula mechanism was modified by introducing the following condition: if the Council members, that constitute at least 1' of the Union population or at least I of the member states, required to form a blocking minority, object against adopting a given legal act by the Council then the Co-

Polish Minister of Foreign Affairs, Ms Fotyga, suggested the possibility of using the Ioannina mechanism in the same matter again, which would automatically prolong the negotiations for another few months.

Within the framework of the Intergovernmental Conference IGC 2007 Poland is expecting to increase the number of advocates general in the Court of Justice of the European Communities from 8 to 9. Poland argues that according to the unwritten decision of the Council of the EU, Germany, France, the UK, Italy and Spain each have one permanent spokesperson. Other states, Poland included, fill three positions left based on the principle of rotation. According to the Polish government this is a chance for Poland to increase its influence on the Council's decisions.

Poland also requests exclusion from being subject to the Charter of Fundamental Rights of the EU. Poland (like Ireland) intends to follow the example of Great Britain (opt-out concerning social rights), and reserve the right to obtain the exclusion from coming under the Charter of Fundamental Rights of the European Union. By the end of the IGC Poland will have decided whether to ask for it as well.

Moreover, Poland insists that investments in non-Community countries, financed by the European Investment Bank, should be approved unanimously and not with the majority of the votes. In this manner, blocking the funding of the Baltic Sea gas pipeline which does not go through the territory of Poland would be possible, should the investors ask the Bank for preferential loans.

The Polish government has considered the addition of the so-called solidarity clause in the field of energy to the contents of the Treaty a success. What is significant, the clause was proposed by Poland in Article III-256 of the EU Constitution and Article 100 of the Treaty establishing the European Community (the means of economic assistance will be used according to the decision of the Council of the EU, which will function in the spirit of solidarity among the EU member states).

Voting system as determinant of place and position of a state in the European Union

Most of controversies in Poland have been caused by the issue of changing the mechanics of making decisions in the Council of the EU. Polish proposal,

until shall be obliged to discuss this issue and make all endeavors ("within reasonable time limit") to reach a "satisfying solution" of the problems, raised by the Council members that object against adopting a given legal act. Therefore, up to the 31st of March 2017, the mechanism shall be applied if the Council members, representing at least 75% of the Union population or at least 75% of the member states, needed to form a blocking minority, stipulated by the Art. 1-25, item 2, announce their objection against adopting, by qualified majority, a given legal act.

presented at the European Union summit on the 21st and 22nd June 2007 in Brussels, was based mainly on the concept of replacing "double majority" voting system, provided for in the Euroconstitution, with counting votes according to the square root of each nation's population. Introducing such a system would allow for strengthening small and medium-sized states and decreasing the unjustified advantage of the biggest countries in Europe.

The percentage of population member states towards the percentage of votes in Treaty of Nice: EU power configuration

Country	**Population**	**Population** *(%)*	**Votes**	**Votes**	**Population / weight votes**
Germany	82.038	17.05	29	8.40	0.493
France	59.247	12.31	29	8.40	0.682
Italy	58.966	12.25	29	8.40	0.685
U.K.	57.612	11.97	29	8.40	0.702
Spain	39.394	8.18	27	7.82	0.956
Poland	38.667	8.03	*T1*	7.82	0.973

Source: R. Trzaskowski, *Dlaczego bronimy Nicei?,* "Międzynarodowy Przegląd Polityczny" 2004, No. 4, p. 29.

Desire for a voting system that would be favourable for Poland is a desire to belong to the group of the most significant European countries. In fact, it is a struggle for future position of Poland in the EU. In the long run, it will be favourable for Poland to join the group of the largest states, whose votes are significant in the process of working out compromise solutions. At the same time, Poland tries to speak out for equality within the European Union which consists of *T1* countries and for strengthening positions of small and medium-sized countries, whose opinion should be considered as important as the opinion of larger states.

In the opinion of Polish negotiators introduction of the double majority system is not favourable for Poland from purely mathematical point of view. Double majority principle (member-states and population) will result in changes in individual countries' strength of votes in the decision-making system in the EU. Compared with Nice arrangements, the initial proposal of the Convent resulted in a decrease of Polish strength of vote in the Council of Ministers from 8.13% (acc. to Banzhaf index) to 6.72% with decrease of possibility of blocking for Poland (acc. to Coleman index[4]) at the same time. It resulted in pushing Poland out of a group of the largest states and decreasing its ac-

[4]K. Smyk, Zasady *podejmowania decyzji a pozycja Polski w Radzie Unii Europejskiej*, "Analysis Bulletin of the Office of the Committee for European Integration" [2003], No. 11, p. 171.

tuai impact on decision making process in the Council of the EU. Therefore, modifying or simplifying a complex Nice system, but keeping, however, parity of votes unchanged, was in the interest of Poland. Poland presented two versions of voting formula change (to so-called "square root" formula): in the first version, number of votes (weight) would be counted according to the square root of each nation's population and decisions would be taken with qualified majority of votes at the level of 61.6% of the total number of votes. In the second, slightly modified version, votes counting and decision threshold would be the same, however, majority coalition will have to consist of at least 50% of member states.[5]

The percentage of population member states towards the percentage in a draft of the Treaty establishing a Constitution for Europe: EU power configuration:

Country	Population	Population 1%)	Votes	Votes (%)	Population / weight votes
Germany	82.038	17.05	170	17	0.997
France	59.247	12.31	123	12.3	0.998
Italy	58.966	12.25	122	12.2	0.999
U.K.	57.612	11.97	120	12	1.002
Spain	39.394	8.18	82	8.19	1.001
Poland	38.667	8.03	80	8	0.995

Source: R. Trzaskowski, *Dlaczego bronimy Nicei?...,* p. 30.

Distribution of votes within the "square root" system significantly eliminated differences between population potential of member states and was conducive for keeping balance of interests in European institutions. Yet, Convent's arrangements and "double majority" system, corrected afterwards, resulted in strengthening the votes of the four largest European states.

Double majority voting system in the Council of the EU in the present government's opinion will be less favourable for Poland, and Poland's impact on decision making process will be much weaker. Not only does the fact that (compared with the Nice system) the strength of French or German votes grew significantly seems worrying, but so does the decrease of importance of Poland, a desirable partner in the process of building coalition in decision-making process. Abandoning Nice arrangements and presenting "square root" system, by Poland expressed willingness to compromise.

[5] J. Kranz, *Traktat reformujący UE - podejmowanie decyzji w Radzie większością kwalifikowaną,* [in:] *Traktat reformujący Unię Europejską. Mandat Konferencji Międzyrządowej...,* p. 42.

On the other hand, the double majority system has plenty of advantages. First of all, it is simple, clear, understandable and it renders the making decision process more flexible. Secondly, it makes further enlargement of the European Union possible (which is, by the way, supported by Poland). A new country will be able to access the EU without necessity of negotiating distribution of votes, since its voting strength will be directly conditioned upon its population.

Finally, the double majority system is democratic, since a vote of each citizen of the EU is equally significant regardless of which country they come from. Therefore, double majority takes into account the fact that the European Union is the union of sovereign countries and majority of citizens. For the supporters of limiting the democratic deficit it is an argument which makes the EU more democratic.

However, this thesis seems incorrect in the specific context of international relations. It is just not true that allocating number of votes in proportion to population to each member State will result in elimination of the deficit. In international organizations such cases have not been noted. Democracy in international relations is not identical to democracy in a state. What would be the position of India or China in international organizations if number (strength) of votes was proportional to population?

Furthermore, criteria for weighting votes were established as the result of political compromise, although previous vote weighting formulas in the Council of Ministers based on informal principle of balance between groups of large-, medium- and small-sized countries (initially, in the European Economic Community, Germany, France and Italy had four votes each, Belgium and the Netherlands had two votes each and Luxemburg had one vote).[6] Demographic index (population majority) appeared only at the Nice Treaty. However, it does not mean that the previous system was less fair.

It is also enormously important that Poland has never questioned the principle of double majority and the demographic criterion in particular. To the contrary, it has always acted to obtain a different vote distribution based on the population criterion. While assessing the strength of votes, compared to the Constitutional Treaty, "square root" formula weakened position of Germany (and three other large countries), although this position was strengthened in comparison with the formula presented in the Nice Treaty.

However, within "square root" system, the position of Poland was weaker, compared to the Nice Treaty and stronger in comparison with the Constitutional Treaty. Given the above, "square root" formula has been quite rational. Still, the question arises whether it was pursued in a rational and realistic man-

[6] *Ibidem*, p. 44.

ner. It cannot, however, be denied that the "square root" system was a compromise solution between Nice concept and double majority system.

Making decisions by qualified majority in the Council of the EU in the Reform Treaty

Difficult negotiations at the European Council meeting which took place on 21st and 22nd June 2007 resulted in the qualified majority formula for the decision making process in the Council of the EU. According to this compromise solution, decisions will be made with the use of the double majority principle, considered as the qualified majority (Constitutional Treaty, Art. I-25), which is defined by the threshold referring to the number of states (55%) and the threshold relating to the number of votes (65%), resulting from population criterion provided for in the Constitutional Treaty.[7] Transition periods when the Nice system will be in force, up to 1st November 2014 and from 1st November 2014 to 31st March 2017, have been agreed. Then, each member state will have a right to demand the application of the Nice formula in case of a given decision made in accordance with the qualified majority principle. For Poland, such a compromise is both rational and acceptable. Furthermore, it will make the decision-making mechanism more flexible and ensure evolutionary transition to the new double majority system. The Reform Treaty provides also for minimum number of four states that will create the so-called "blocking minority". In this way, the possibility of forming the blocking minority by three largest states is excluded.[8] However, the problem still remains as to the issue of Ioannina compromise.

Degressive proportionality in the European Parliament

For blocking a decision, it will be much more efficient to focus on degressive proportionality principle than on Ioannina formula. Pursuant to Presidency conclusions from European Council meeting (21st-23rd June 2007), the European Parliament is supposed to submit up a draft of a document that would define a composition of the European Parliament in the future and specify the upper limit of the number of its members (not more than 750), its minimum number (6 members) and the maximum number (96 persons) of members by whom, respectively, the smallest and the biggest state would be represented by October 2006. It is not understandable that the issue of new distribution of seats in the European Parliament, while discussing deci-

[7] If the Council does not form it, upon a motion of the Commission or a Minister for Foreign Affairs, then at least 72% of the Council members, who represent the member states (20 out of 27) that comprise at least 65% of the Union population, constitute a required qualified majority.

[8] Compare: J. J. Węc, *Spór o kształt instytucjonalny Wspólnot Europejskich i Unii Europejskiej. 1950-2005,* Kraków 2006, pp. 401-402.

sion-making strength of a member state, totally slipped the attention of Polish negotiators, who did not take this opportunity to strengthen the Polish presence in the European Parliament[9] on the grounds of compromise and approval of the so-called double majority. It would have effectively build up the position of Poland in the decision making process in the EU and it would have been much more significant than the so-called Ioannina formula.

The attitude of Poland towards Common Foreign and Security Policy/Common European Security and Defence Policy (CESDP)

Poland remains sceptical on the issue of strengthening cooperation in matters related to defence. In Warsaw, the aspect of a military wing of the European Union stirs a lot of controversies. Although Poland supported the decisions involving Common Foreign and Security Policy of the EU together with its military background in the form of CESDP, if is sceptical about the idea of structural cooperation.[10] Many experts reckon that accepting the mechanics of the structural cooperation in the Reform Treaty is disadvantageous in the light of Polish interests since the execution of this policy means division in the EU according to the diversity of the degree of integration. In addition, the attitude to NATO and the USA should be taken into account. From the perspective of Polish interests, rendering security policy of the EU too common as well as building the European security beyond NATO is a very risky undertaking which could lead to challenging the coherence and structure of the North Atlantic Treaty Organisation. Poland is afraid of building a union within the Union by some states, particularly France and Germany. Despite the fact that in the New National Security Strategy of the Republic of Poland (2007), Poland officially supports further development of ESDP, taking into account geopolitical and geostrategic interests of Poland, it would be definitely better to improve the European security system within the framework of NATO.

Conclusions

1. Strong-arm policy towards European Union institutional reforms in the Treaty establishing the Constitution for Europe and the Reform Treaty which is promoted by the present government should be treated as a tactical activity aiming at maximising the political profits in the country rather than as a long-term strategy for shaping mutual relations. However, this policy will soon end and will be replaced by the policy of compromise if the present government becomes stronger. Poland will thus be interested in improving re-

[9] *Ibidem*, p. 31.

[10] In April, the European Union allocated €50 billion to foreign policy, that is 29% more than in 2000-2006.

lations with Brussels on the one hand, and in emphasising its national interests and internal policy goals on the other. Sooner or later rational premises will take the lead as positive relations with European Union emerge from the Polish *raison d'État.* Poland cares deeply about financial support from the EU funds and this is a strong argument of Brussels in shaping mutual relations.

2. Poland has remained distanced from the new Reform Treaty, in which it was the label rather than the essence that was changed in comparison with the Treaty Establishing the Constitution for Europe. For a long time Warsaw aimed at starting the project of drawing up the Constitutional Treaty anew and thus to try to "smuggle" favourable mechanisms of the Nice Treaty, especially the mechanism of weighting of votes. A compromise was reached in the matter of extending the time of using the Nice system of voting and the delaying brake after 2017. Poland demands specifying the Ioannina mechanism before the end of IGC 2007.

3. Reforming the European Union is not only about shaping its future institutions, but most of all it is a "game" in which a role and significance of a given state in Europe is at stake. One can say that, in a way, a struggle for reforms is a struggle for a status of a given country in the EU. The Treaty of Nice strengthened the position of Poland in the EU. Poland obtained not less than 27 votes while the largest states of the EU, namely, France, Germany, Great Britain and Italy acquired 29 votes each. Abandoning the Nice Treaty arrangements increases the impact of France and Germany, which would still hold a "control packet" and weakens the status of Poland (and Spain).

4. Furthermore, implementation of the double majority system that promotes the strongest states of the EU will result in deterioration of political position of Poland in the European institutions. Significance of this issue grows as the strength of vote and impact on decision taken by the EU become more and more important - most of decisions, including distribution of financial means for agriculture (Common Agricultural Policy) or structural funds, will be taken by qualified majority. Therefore, possibility of having impact on areas of actual advantages seems most important, since it determines the position of Poland in the EU in the future.

5. It should not be surprising that Poland defended the Nice system, which was more favourable for us. However, not wanting to follow the formula "square root or death" on its own, Poland abandoned the concept. It seemed to be a good decision, since further works over reforming the EU could be stopped otherwise. However, a very inflexible position, and in a result, the entire negotiation strategy, was a mistake. This way, a previously agreed solution was chosen, since picking out one of the problems would automatically dismantle the entire institutional packet.

6. It is true that none of these systems ensures hegemony of a few states. However, the situation directly influences building decision coalitions. In the double majority system, importance of Poland as a partner decreases significantly, while building decision coalitions by the largest states - Great Britain, Germany and France - is facilitated.

7. For Poland, prolongation of the so-called "Nice voting system" is the most significant result of the conference that closes the presidency of Germany. Delay mechanism remained in force, but thresholds of its implementation are to be lowered after 2017. However, it was a mistake of Polish negotiators to focus on the voting issue only, and forget about that fact that decision making process in the EU is not limited to governmental factor (the Council of the EU), but it also includes the Commission and the European Parliament.

8. Poland has remained balanced in the question of building both the Atlantic and the European strategy. In the foreseeable future, Poland is going to continue this strategy; to execute the plan of bringing the US closer together and to promote the concept of moderate development of security and defence of the EU in terms of transatlantic cooperation.

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ANNA SURÓWKA, PhD - Andrzej Frycz Modrzewski Krakow University College

Harmonisation of Polish Law with EU Law

1. Introduction

Based on the Accession Treaty of Poland to the European Union[1] of 16 April 2003, the Republic of Poland assumed the obligation to observe the Treaties which form the basis of the European Union. According to Article 2 of the Treaty Establishing the European Union,[2] the aim of the European Union is to support harmonious, sustainable and steady development of economic activity, high level of employment and social protection, equality of men and women, steady and non-inflationary growth, high competitiveness and convergence of economic achievements, high level of environmental protection as well as high quality of the environment, increasing the level and quality of life, economic and social cohesion, as well as solidarity between member states through the establishment of a common market, an economic and monetary union, and implementing common policies in this area.

The development of the Community's (now European Union's) legislation, as well as the need to implement the European directives into the legal orders of the member states, is conducive to establishing a certain common standard of development. The obligation to harmonise national laws with EU law applies mostly to those acts of community legislation which are not implemented directly and therefore need implementation into the national orders in order to be effective.

EU law can be divided into primary and secondary, supplemented by the jurisprudence of the European Court of Justice. Primary law is constituted by the Treaties establishing the Union, as well as general principles of EU law. Secondary legislation includes regulations, directives, decisions, recommendations and opinions. Regulations are binding fully and directly on the member states, and have supremacy over national law. Directives are addressed

[1] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed in Athens on 16 April 2003, "Journal of Laws" 2004, No. 90, item 864.

[2] Consolidated version of the Treaty on the European Union and the Treaty Establishing the European Community, "Official Journal" 2006, C 321 E/01.

to member states and only outline the goals which must be achieved by the member states within a specified timeframe; the states may choose the best means of achieving such goals. Thus in the case of directives the problem appears of harmonising national legislation with EU recommendations. It is important also because in certain cases the Court deems directives to be directly effective: even if the member state failed to implement a directive, an individual is able to base his or her claims on it. Decisions again are binding, while recommendations and opinions are not. The problem of harmonisation concerns therefore mostly directives. It is a rather serious problem, since according to Article 49 of the Treaty Establishing the European Community, the directives serve the purpose of approximating legislative, executive and administrative provisions of the member states which have direct influence on the functioning of the common market, i.e. the realisation of one of the fundamental tasks of the EU.

This paper aims to present the institutions which are in charge of ensuring full harmonisation of Polish law with EU law. In Poland, it is the duty of the Council of Ministers and other bodies functioning within its framework, such as the European Committee of the Council of Ministers and the Committee of European Integration. Other institutions involved include Sejm's and Senate's European Union Affairs Committees, as well as experts of the Office of Sejm. It is the duty of these bodies to ensure proper implementation of EU law into the Polish legal order.

2. Role of the Council of Ministers in the process of harmonisation of Polish law with EU law

In Poland the duty to ensure the harmonisation of Polish law with EU law is placed chiefly with the Council of Ministers. According to Article 3 of the law on the cooperation between the Council of Ministers and the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union,[3] the Council of Ministers is obliged to present to the Sejm and the Senate information on the participation of the Republic of Poland in the efforts of the European Union. Presenting the information consists in handing over to the Sejm and the Senate: draft legal acts of the European Union, draft international agreements to which the Union or its member states are to be a party, draft decisions of representatives of governments of member states gathered in the Council of the European Union, draft acts of the European Union which are not to be binding, as well as legal acts which are significant in

[3] Law of 11 March 2004 on the cooperation between the Council of Ministers, the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union, "Journal of Laws" 2004, No. 52, item 515, as amended.

terms of interpretation or application of EU law (Articles 6 and 7). The Council of Ministers is also obliged to request the opinion of the appropriate bodies in the Sejm and the Senate with respect to legal acts which the Council of the European Union is working on (Article 9). On the basis of Article 11 of the abovementioned law, the Council of Ministers is obliged to present to the Sejm bills implementing EU law. The timeframe for the submission of such bills depends on the timeframe provided for the implementation of the EU law at issue. Although the law obliges the Council of Ministers to present such bills, it does not exclude other subjects and bodies from presenting competing bills of their own. Such subjects and bodies include for example the MPs and the Senate. However, due to the fact that the Council of Ministers is the organ whose primary responsibility is the presentation of such bills, special institutions have been created within the Council to watch over the harmonisation process. At the stage of drafting the bill implementing EU law, two bodies are responsible for this process: the European Integration Committee and the European Committee of the Council of Ministers.

The European Integration Committee is the chief body of the governmental administration in charge of planning and coordinating policy in matters related to the integration of Poland with the European Union, as well as matters related to planning and coordinating actions aimed at adapting Poland to European standards. It has been called into being on the basis of the law on the European Integration Committee.[4] The Committee carries out its tasks by means of: initiating and coordinating efforts to approximate Polish legal institutions to EU law, issuing opinions on bills in terms of their compliance with EU requirements, providing appropriate information, concepts and personnel for the integration processes, coordinating adaptive and integrative processes, as well as initiating actions to shape these processes. The Committee is also obliged to present to the Council of Ministers the premises of approximation programmes, opinions as to draft legal acts in terms of their compliance with EU requirements, and draft legal acts aimed at harmonising Polish law with EU law.

The Committee is expected to participate in the harmonisation process at two stages: at the stage of initiation of harmonising measures (where it presents to the Council of Ministers draft legal acts harmonising the legal systems) and at the stage of preparation of bills presented by the Council of Ministers (where it issues opinions as to their compliance with EU requirements). Thus, the Committee is the body which on the one hand is supposed to initiate measures aimed at harmonisation, and on the other, watches over

[4] Law of 8 August 1996 on the European Integration Committee, "Journal of Laws" 1996, No. 106, item 494, as amended.

the implementation of EU directives and over the observance of EU requirements in other legal acts.

The second body which is active within the Council of Ministers in the area of harmonisation is the European Committee of the Council of Ministers (ECCM), established on the basis of ordinance of the Prime Minister of 23 March 2004.[5] ECCM is a permanent committee of the Council of Ministers. It is an advisory body to the Council of Ministers and to the Prime Minister in areas connected with Poland's membership in the European Union. Its tasks include: drafting decisions and positions, and issuing opinions as to draft decisions and positions of the Council of Ministers or the Prime Minister in matters related to Poland's membership in the European Union, as well as issuing opinions and recommendations with respect to draft documents which the government is to present to the Council of Ministers or the Prime Minister. ECCM examines draft documents in which the Council of Ministers presents information on Poland's participation in EU efforts, schedules of legislative work connected with implementation of EU laws in Poland, information on the progress of implementation of such schedules, bills implementing EU laws into the Polish legal system, and positions with regard to draft EU laws. Thus the ECCM participates in the process of harmonisation mostly at the stage of drafting the acts which will approximate Polish laws to EU laws.

As for the procedure of drafting bills approximating the Polish law to the EU law by the Council of Ministers, it is regulated by the Working Regulations of the Council of Ministers.[6] Drafts of normative acts presented by the Council of Ministers should comply with the principles of legislating technique and with the Working Regulations of the Sejm. Each bill must be accompanied by a justification which includes the aim and need of the provisions, indication of differences between current legal situation and the stipulations of the bill, and an evaluation of the consequences of the implementation of the bill. The bill must also be accompanied by a table presenting EU regulations that the bill implements, as well as an explanatory note concerning the date of entry into force of the bill or its selected provisions, with information whether this date is in line with the accession strategy and the requirements of the approximation process (§ 10 of the Working Regulations). Moreover, the bill must be accompanied by a preliminary opinion on its compliance with EU requirements, prepared by the presenting body. This body must also consult the governmental bill with the members of the Council of Ministers and the Head

[5] "Polish Monitor" 2004, No. 14, item 223, as amended.

[6] Resolution No. 49 of the Council of Ministers of 19 March 2002 Working Regulations of the Council of Ministers, "Polish Monitor" 2002, No. 13, item 221, as amended.

of the Office of the Prime Minister, and in terms of legal and formal requirements - with the Governmental Legislative Centre. Bills of particular social, economic or legal importance are also sent to the Legislative Council associated with the Prime Minister so that it could issue its opinion (§ 12 of the Working Regulations). It is mandatory that all drafts of normative acts and other legal acts which are presented by the Council of Ministers are examined for compliance with EU laws during consultation proceedings. The presenting body which submits the draft law for consultation must first send it to the European Integration Committee which issues its opinion. The opinion is attached to the draft which is then subject of deliberations in the Council of Ministers (§ 16 of the Working Regulations). According to the regulations, draft legal acts on which the Committee has not yet issued an opinion should not be included on the agenda of the Council of Ministers.

Even though the European Integration Committee issues opinions on governmental drafts of legal acts assessing their observance of EU regulations, such drafts (and in particular, drafts of acts connected with Poland's membership in the EU, including draft approximation acts) are additionally sent to the ECCM, which issues its opinion too (§ 19 of the Working Regulations). Theoretically it is therefore possible that at this stage of proceedings, two contradictory opinions might be presented, one issued by the European Integration Committee and the other by the ECCM. Under such circumstances, the procedure of clarification and approximation of positions described in Chapter 3 of the Working Regulations can be employed. According to this procedure, inter-ministerial conferences are held in order to find common positions. Representatives of the body which prepared the draft as well as of the bodies which have issued opinions are present at the conferences. Participation is mandatory if a large number of substantive comments have been made. Based on the outcome of the conference, the body which prepared the draft is obliged to amend or re-draft the proposed legal act. If this procedure fails to produce satisfactory results, the draft document with a protocol of differences is sent to the permanent committee of the Council of Ministers.

The committee is not bound by the outcome of the above-mentioned procedure, and it may accept the issue for investigation. If the committee fails to find satisfactory solutions, the chair of the committee may submit a motion to have the draft legal act submitted for the consideration of the Council of Ministers. Drafting the document together in a session of the Council of Ministers is the final opportunity to prepare a draft legal act under such circumstances, which is justifiable, given that it is going to be presented as a governmental draft, i.e. one for which the government takes responsibility.

3. Mechanisms ensuring compliance of Polish law with EU law during the legislative procedure in the Parliament

Procedures aimed at ensuring effective harmonisation of Polish law with EU law are also operational at the stage of the legislative procedure which takes place in the Parliament. The legislative procedure commences in the Sejm. According to the Working Regulations of the Sejm,[7] the Speaker of the Sejm is in charge of initiating procedures connected with draft documents presented in connection with Poland's membership in the EU. The bodies responsible for harmonisation of Polish law with EU law are mostly two committees: the Legislative Committee and the European Union Affairs Committee (EUAC).

The Legislative Committee is in charge of issuing legislation and ensuring its coherence. In execution of its tasks, the Committee participates in issuing opinions on draft documents sent to it in terms of their compliance with laws, including EU laws. The EUAC is the most specialised committee among those investigating matters relating to Poland's membership in the EU. In execution of its tasks, EUAC issues opinions and takes positions with reference to draft EU acts, notes issued by the Council of Ministers with regard to the Council's positions, and draff Polish laws in terms of their compliance with EU laws. Moreover, EUAC issues recommendations to the Council of Ministers as to the positions which the Council of Ministers intends to take while considering draft EU acts in the Council of the European Union.

Verification of a bill or another draft law begins as soon as it is presented. Each draft law must be accompanied by a justification which includes first an explanation of the aim of the law and the need for its introduction, and second a declaration that the draft law is in compliance with EU laws or alternatively, that it regards an area to which EU regulations do not apply (Article 34 section 2 point 7 of the Working Regulations of the Sejm). If the draft law is presented by the Council of Ministers, and if its purpose is to enforce EU law, the draft must additionally be accompanied by draft executive acts which the draft law deems necessary (Article 34 section 4a of the Working Regulations of the Sejm). If the drafts presented to the Speaker of the Sejm raises doubts as to their compliance with law, including EU law, the Speaker of the Sejm, having requested the opinion of the Presidium, i.e. the governing body of the Sejm, may send the draft to the Legislative Committee, requesting its opinion. The Committee conducts a preliminary examination of the bill and, in case it finds faults with it, may (with a 3/5 majority of votes) deem it unacceptable (Article 3 section 8 of the Working Regulations of the Sejm). If no examination of the bill by the Committee took place, the Committee may nonetheless select from

[7] Resolution of the Sejm of the Republic of Poland of 30 July 1992 Working Regulations of the Sejm of the Republic of Poland, "Polish Monitor" 2002, No. 23, item 398, as amended.

among its members representatives who take part in the meetings of committees which are to work on the bill. Such representatives may present motions and suggest amendments, but have no vote in the committees (Article 81 of the Working Regulations of the Sejm).

The next stage is mandatory: the bill must obtain the opinion on its compliance with EU law from the experts from the Office of the Sejm. The Speaker of the Sejm requests such an opinion after receiving the bill but before sending it for the first reading (Article 34 section 9 of the Working Regulations of the Sejm). Bills presented by the Council of Ministers and by the President of Poland are not subject to this procedure. EUAC is another body that is entitled to issue its opinion on compliance of bills or draft resolutions of the Sejm with EU laws. Its opinions are delivered to the MPs together with the bills at issue.

The next stage where the compliance of draft legal acts with EU law is examined in the committee after the first reading of a bill. The committee which is working on the bill is obliged to request the opinion of the European Integration Committee as to the compliance of the provisions at issue with EU law. The committee itself decides on the timeframe for this procedure (Article 42 section 4 of the Working Regulations of the Sejm). If during work in the committee amendments were suggested, these amendments too must receive the Committee's opinion.

The committees which worked on a bill produce a report on their efforts. Attached to the report is the opinion on the bill issued by the European Integration Committee. The report is sent in for the second reading which is held in the Sejm. If amendments or motions are presented, the bill is returned to the committees which had worked on it previously (Article 47 section 1 of the Working Regulations of the Sejm). If the committees are unsure as to the compliance of the amendments and motions with EU law, they are obliged to request the opinion of the European Integration Committee. The amended report produced by the committees, together with the Committee's opinions, is then sent for the third reading (Article 47 section 2 of the Working Regulations of the Sejm).

Once the bill is passed, it is forwarded to the Senate. It should be noted that the entire passage of the bill is watched over by a representative of the legislative service of the Office of the Sejm, who participates in the proceedings and has the rights to present motions and comments with regard to legislative and legal aspects, also with respect to the compliance of the bill with EU law (Article 70 of the Working Regulations of the Sejm). If these motions and comments are not taken into account, and if they pertain to significant legislative faults of the bill, including compliance with EU law, the Speaker of the Sejm may address the committee, asking it to take a position with respect to such motions and comments. Moreover, representatives of the European In-

tegration Committee participate in the meetings of committees if the work conducted there is related to issuing opinions on compliance of bills with EU law (Article 153 of the Working Regulations of the Sejm).

The situation in the Sejm is different in case of draft legal acts whose direct aim is the implementation of EU regulations. The Council of Ministers is obliged to present bills implementing EU laws. In case of bills presented by other bodies, such as the Senate or the President, the Speaker of the Sejm, before sending them for the first reading, must decide whether the bill is aimed at implementing EU law (Article 95a section 3 of the Working Regulations of the Sejm). Modifications of legislative procedure with regard to bills implementing EU laws is related to the necessity of staying within the timeframe scheduled for such projects, and they consist mainly in the scheduling of deadlines for the subsequent stages of the legislative procedure (scheduling of the procedure by the Speaker of the Sejm, scheduling by the committee of its own work, date of the second reading, analysis of amendments sent in by the Senate), as well as specific regulations concerning the possibility of suggesting amendments (by a group of at least three MPs, in writing).

4. Mechanisms ensuring compliance of Polish law with EU law in the legislative procedure in the Senate

The next stage in the legislative procedure takes place in the Senate. The Working Regulations of the Senate[8] stipulate that the Marshal of the Senate is in charge of initiating the procedure with regard to documents forwarded from the Sejm, documents expressing the Senate's own statutory initiative, as well as documents presented to the Senate with regard to Poland's membership in the European Union. The body in the Senate which is responsible for issues related to Poland's membership in the EU is the Senate's European Union Affair Committee. It can submit motions to include on the Senate's agenda notes from the Council of Ministers informing the Senate of matters related to Poland's membership in the EU. The Senate's European Union Affair Committee has the right (Article 67b of the Working Regulations of the Senate) to pass resolutions expressing opinions on draft acts of EU law, on the position of the Council of Ministers taken during the work on such acts, and the position to be taken during such work in the future.

The Marshal of the Senate sends Sejm's resolutions to relevant committees on the basis of their subject maters. The committees prepare reports on the outcomes of their work, in which they can recommend to the Senate that it should adopt the bill as is, reject the bill as is, or amend the bill. The reports

[8]Resolution of the Senate of the Republic of Poland of 23 November 1990 Working Regultions of the Senate, "Polish Monitor" 2002, No. 54, item 741, as amended.

are send in for the second reading in the Senate. The Senate votes first on the motion to reject the bill, second on the motion to accept the bill, and third on the motion to amend it as suggested by the committee. A resolution expressing the position of the Senate is then sent to the Speaker of th Sejm.

In the Senate as well the situation is different in case of draft legal acts whose direct aim is the implementation of EU regulations. The Marshal of the Senate sends the bill to the relevant committee. The committees which are examining such a bill may approach the Senate's European Union Affair Committee with requests for opinions as to the bill or its part (Article 68 section la of the Working Regulations of the Senate). This opinion is taken into account during work on the bill. The relevant committees prepare reports on the outcomes of their work, in which they can recommend to the Senate that it should adopt the bill as is, reject the bill as is, or amend the bill. If amendments are suggested, the Marshal of the Senate, before submitting them for voting during the second reading - should be there be doubts as to the scope of the amendment, may request an opinion from Senate's European Union Affair Committee (Article 54 section 4a of the Working Regulations of the Senate). This opinion, together with the report of the relevant committees, is sent for the second reading in the Senate, where the Senate's position is decided. The position is then forwarded to the Speaker of the Sejm.

When exercising its right of statutory initiative, the Senate also needs verification of its bill in terms of its compliance with EU law. When presenting a bill, the person or body presenting it must attach a declaration on its compliance with EU law or a declaration that EU laws do not apply to the subject matter of the law (Article 77 section 2 of the Working Regulations of the Senate). After the bill is presented, the Marshal of the Senate directs the bill to a relevant committee, as well as the Legislative Committee.

In this case the task for the Legislative Committee is to coordinate the legislative work in the Senate as well as to examine the bill in terms of its compliance with existing binding laws. The committees which examined the bill produce a report, which should include information on the compliance of the bill with EU law or on its subject matter being beyond the application of EU laws (Article 80 section 3 of the Working Regulations of the Senate). Once the procedure is completed, the Marshal of the Senate forwards to the Sejm the resolution on the commencement of the Senate's statutory initiative. A declaration on the proposed bill being in compliance with EU law or on its subject matter being beyond the application of EU laws must accompany the resolution (Article 83 of the Working Regulations of the Senate).

5. Sejm procedure related to a resolution of the Senate including amendments to a bill

In case the Sejm receives from the Senate a resolution including amendments to a bill previously passed by the Sejm, the Speaker of the Sejm sends it to the committees which had previously worked on the bill. If there are doubts as to the compliance of the suggested amendments with EU law, the committees must approach the European Integration Committee with a request for opinion (Article 54 of the Working Regulations of the Sejm). The committees then produce a report for the Sejm in which they move to have all or some of the amendments accepted or rejected. The report is discussed in the Sejm which may - by an absolute majority of votes, with at least half of statutory membership present - reject the suggested amendments. On completion of the procedure, the Speaker of the Sejm forwards the bill to the President for his signature.

6. Conclusions

A number of mechanisms were established to ensure the compliance of newly established Polish law with EU laws and to ensure proper harmonisation of the two legal systems. The mechanisms however are not faultless.

First of all, the relation between the European Integration Committee and the ECCM seems problematic. Even though the regulation on the ECCM stipulates explicitly that it is competent in matters related to European integration not assigned to other bodies, the areas of activity of these two institutions seem to overlap. This tendency is most clearly visible in reference to drafting government positions or issuing opinions on such positions in matters related to the EU.

The European Integration Committee has certain a similar competence, consisting in the right to present drafts of legal acts in the area of approximation and integration. The strong connection between the European Integration Committee and the ECCM is also expressed through a personal union: ECCM by definition is headed by the Head of the European Integration Committee. This overlap may result in the responsibility for the harmonisation process becoming blurred. Therefore, the head of the two bodies must carefully coordinate the functioning of the two institutions.

Moreover, doubts arise as to the appropriate course of action if, when working on a bill, the government fails to take into account the opinions of the European Integration Committee and the ECCM. The problem is significant, since it is imaginable that the Council of Ministers, despite negative opinions, will present a bill which does not comply with EU laws.

Problems may also arise in the course of the legislative procedure in the parliament. The Working Regulations of the Sejm include a number of provisions which oblige relevant bodies to obtain opinions from the European Integration Committee, as well as provisions which allow representatives of the legal service of the Office of the Sejm to issue comments on compliance of regulations with EU law. However, the Regulations include no provisions which determine whether the relevant committees are obliged to take such opinions into account.

DISCUSSION

- Diane Ryland - University of Lincoln

I have a question for Dr Młynarski. It is to do with the negotiating positions that Poland put forward after (to my knowledge) the German presidency conclusions of June this year for the draft reform treaty. It is not in connection with the voting mechanism in the Council, but this is in connection with the issue of the number and weighting of the advocates general in the European Court of Justice. And it interests me that this issue appears to be raised in between June and October, and I have not heard of any outcome. It was an issue I had an interest in when the Treaty of Nice was finalised, the fact that the number of the advocates general did not increase from 8, but apart from that we still have 5 advocates general who come from the large member states, with 3 rotating advocates general from the rest of the member states. This was dear to Poland's heart and I wondered whether any progress has been made.

- Professor Rolf Grawert, PhD - University of Bochum

I was very impressed by the panel we had today. I am convinced that the process of European unification not only depends on old men like me, but also young participants, who will come when I am no longer alive. I will ask my questions to all of you.

First of all, to Dr Paterek. I will make a remark as a question. You discussed the relationship between the Charter and the Convention. I think the problem is a problem of sovereignty of the Union, if I may say so, or supremacy, because if the Union accedes to the Convention, the Court in Luxembourg will dominate the Court in Strasbourg. Another remark. In Germany we have a special problem with the very old right of freedom of religion - in Germany, there is a theory that all the freedoms derive from the freedom of religion, and you spoke of this invocation of God, etc. Nowadays we have the problem with the Christian history and a little bit of the rest of the Christian culture. We have secular freedom of religion, and we have Islamic groups who take this religion to a very far extreme. So we discuss: is it not necessary to con-

centrate on God and the Christian culture, and so on? Maybe on one sort of God, but which sort of God? What do we mean by this? To be open in a sort of globalisation, that would be another solution.

To Dr Młynarski, do you think that in the European Parliament the MEPs vote in a national sense, as representatives of their state, or have they voted and will they vote in accordance with common sense, with prejudices they have from the background?

And to Dr Surówka, do you think, and I would take it as my thesis, but I will form it as a question, do you think that the process of harmonisation you described very well, and I respect it very much - I was very impressed by this - but do you think that the processes of harmonisation does not change the national constitutions, not only the national constitutions, but the functions of the constitutions? Does it not change who has something to say in Poland? The parliament, any group in the parliament, the administration, or the courts? And I think all these functions, which form the whole of sovereignty nowadays, are their own sources of harmonisation and relationship to the Union, and therefore the national state will not remain an entity, will become a combination of functions which all have something to do with Europe, and not only with the nation state on its own.

- Alexandra Hennessy - University of Rochester

I have a question to Dr Młynarski. I think your argument is very provocative but also very insightful, and the implication of your argument seems to be that after the double majority principle will come into effect in 2017, or before that, the formal voting rules will become actually less important than the informal deliberations prior to formal decision-making. It seems that for the less populous countries like Poland it will be more important to build coalitions with other states, and thereby gang up on the big countries. And I am wondering whether this is in fact an implication of your argument and if you have any ideas how this will affect the democratic deficit, so is there an inherent trade-off between getting things done, efficiency, and democratic transparency?

- Professor Jo Carby-Hall, PhD - The University of Hull

I have got a short question for Dr Surówka. You gave us a very clear presentation of the safeguards and the procedures in the Sejm and the Senate about the interpretation of European law in connection with Polish laws. Now we have a similar system in Great Britain, not identical, but similar, but we have had problems, and this is basically what I am trying to ask you, with the interpretation of a European law in a national law which has been misinterpreted at court level. I will give you a practical example. For 12 years we

have been following a law which has never been the intention of the European laws. It happened also in Germany, Professor Weiss is not here, in a labour law case in connection with the transfer of undertakings. That is when one company takes over from another company. And because we had, and the Germans had, this sub-contracting of labour from one employer to another, we have been following like the Germans the wrong law until there was a pronouncement from the ECJ to say that our laws were not in accordance with EU laws. Have you got any comment on this? Has it happened n Poland? And if it has, I would be interested to hear your views.

- Professor Rolf Grawert, PhD - University of Bochum

This conference has been very interesting for me, although as I go away I am very unsure of what we should think about the state and the Union. We lose the distinctness of all our terms. We do not know what sovereignty means, all these terms derive from the 16th and 17th century, we do not know exactly what a constitution is nowadays, we do not know what the parliament is, and so on. We all had an impression about it. Maybe we were never sure. It cost us 300 years to know this. Nowadays when I leave here I am very unsure, I do not know what to say - the constitution is this or that. I only learned that everything is a process. And I do not know the aim and the powers and the end of this process. I do not know exactly what this Europe we are going into is. Does it reach to Vladivostok, as de Gaulle said, does it reach to Morocco and Tunisia, according to Sarkozy? Does it sit on religion, as the Turkish try to make in their state, and we are fearing that they will come here with fundamentalist Islam? I think we are in a very interesting time because we see how all things are changing. And therefore I think, it is my hope, we must have a mentality to bring all these things to a better future. We do not know the forms of this future, but we must try and try again, and therefore I am very glad at last to be unsure and to be hopeful for the future.

- Anna Paterek, PhD - Andrzej Frycz Modrzewski Krakow University College

I shall begin then. As for the first question about the relationship between the Charter of Fundamental Rights and the Convention. This is slightly beyond my competence, as I mentioned earlier I am not a lawyer. But what I can say is that the Convention includes all the underlying principle of the Charter, the Convention is the basic instrument of protection in Europe. The inconsistency of jurisdiction may be a problem, indeed, because of inconsistent rulings of the two Courts. I apologise, but this is beyond my knowledge to elaborate on that. But of course we will all have the opportunity to observe the shaping of the mutual relations between these two instruments.

As for the second question on the religious heritage of Europe and its place in either the Charter itself, in the preamble to the Charter, or in the Treaty, of course there have been justifiable controversies: what should we do about Turkey, for example, if we include the Christian heritage? However, it must be noticed that such a provision itself would not make it impossible for Turkey to join. On the other hand, any definition which includes religion is potentially controversial, and we must remember to include secular, neutral countries such as France or Belgium. At the same time, this preamble to the Treaty refers to the spiritual and religious heritage, and the word "religious" is supposed to express the variety and differentiation too. And there is also one more article, a novelty of sorts, which was introduced after negotiations between the EU and the churches, and it is Article 1.52 of the Treaty, which stipulates that the EU does not interfere with relations between the state and the churches, and at the same time the Treaty of course confirms the freedom of confession and somehow provides for the undertaking by the EU of open dialogue with churches or other confessional organisations, which was also perceived as an achievement in term so the relations between the EU and religious organisations. I hope that this answers your question.

• Tomasz Młynarski, PhD - jagiellonian University

As for the first question regarding advocates general, as far as I know Poland has obtained a guarantee of permanent position for one attorney general. This of course depends on the independent decision, independent will, of the Court to actually want to have a greater number of advocates general, but it is a question of politics too. A very interesting question.

As far as the question about the European Parliament is concerned, of course the MEPs vote in accordance with what is best for Europe. This is the basic principle. One may of course pose the question whether the interest of Europe is perceived by everyone in the same way. It appears that it might be understood differently by different people. My point however was different. I was talking about Article 215, which focuses on the role, the codecision procedure in the legislative process, and here until the end of the summit it remained unclear whether the possibility to renegotiate the number of MEPs existed, and of course the impact that countries have varies with the number of MEPs coming from that country. Poland negotiated a compromise as to the voting system, but our negotiators somewhat overlooked this matter, where possibly negotiation might have been undertaken.

And the third question, the double majority principle and the democratic deficit. The double majority principle directly increases democracy in Europe. It is a simple principle: each vote, or the vote of each citizen, is equal. Moreover, the principle of a qualified majority vote now applies to a greater

number of areas, meaning that progress is being made. Adding more and more areas to the majority voting system is also an expression of a certain will to include the parliament more and more in the decision-making processes, alleviating the democratic deficit. And here I believe that coalition-building has always existed and will always exist and is a natural process and an expression of a subtle skill to cooperate on the European platform, and I find this to be perfectly natural.

- Anna Surówka, PhD - Andrzej Frycz Modrzewski Krakow University College

As to the first question, whether the harmonisation of the Polish and EU law does not change the constitution and the authority of official bodies. In the Polish doctrine, there are two kinds of opinions as to whether Poland has transferred a part of its sovereignty to an international organisation, or whether it is simply exercising certain rights connected with its sovereignty. Attention is often drawn to Article 90 of the Polish constitution, which fully regulates the arrangement regarding the transfer of competencies to an international organisation or body. Article 90 says explicitly that the Republic of Poland may, by means of an agreement, transfer a part of its authority to an international organisation or body. A part, not the entire authority.

The second issue which needs to be considered here is that the same constitution in Article 8 point 1 provides that the Constitution of Poland is the highest legislative act in the territory of Poland. So here we should classify the Accession Treaty and EU law just under the Constitution. This law has priority over national law, but it does rank below the Constitution. An argument that supports this point of view is the ruling of the Polish Constitutional Tribunal of 11 May 2005, which concerned the Accession Treaty and which pointed out that, in case the Tribunal believed that the Treaty was indeed above the Constitution, that it was of extraordinary importance, that it was somehow of greater force than the Constitution (and one might think so, given that its ratification procedure is stricter than the procedure of a potential constitutional amendment), then the Tribunal would have to refuse to investigate the matter. However, the Tribunal rules that the Treaty was in fact an international agreement regarding the transfer of competencies, but we were bound by the highest source of law which in Poland is the Constitution. So this is the interpretation we need to apply.

Moreover, it is a widespread belief in the doctrine that Poland may not transfer the entire range of competencies of an organ, because the Constitution stipulates that this transfer must be partial. If we opened up, so to say, to too large an extent, and in the process of integration we were considering a transfer of all competencies of a given body, then this might infringe the constitution.

This is somewhat related to the other question that was asked, relating to interpretative difficulties, and what happens if Polish courts misinterpret the law and consequently infringe EU law. And here again the Constitutional Tribunal comes to the rescue, and its ruling regarding the European Arrest Warrant. This is a ruling of *T1* April 2005. Fundamentally, the Tribunal was investigating the provisions of the Polish act on criminal procedure, so an act of national law. However, the Tribunal noted that we must pay attention to the Article 9 of our Constitution, which provides that Poland must observe international laws that bind it. This is an instruction for the legislature as well as the executive and the judiciary that of all the potential interpretations of legal provisions they should chose these that most fully enforce EU law. Thus the Court took the position that national laws should be interpreted in such a way as to attempt to ensure its coherence with EU law, to act as much as possible in enforcement of EU regulations. So at this stage we may say that an attempt took place to find a solution to a conflict of the sort that you mentioned. And naturally if Polish courts continuously infringed citizens' rights by interpreting laws contrary to EU treaties, then of course the Treaties themselves provide mechanisms for opening procedures which are aimed at restoring and enforcing the rights granted by EU law.

APPENDIX

CONFERMENT
OF THE HONORARY PROFESSORSHIP
OF ANDRZEJ FRYCZ MODRZEWSKI
KRAKOW UNIVERSITY COLLEGE

Professor)o Carby-Hall, PhD
Professor Rolf Grawert, PhD
Professor Harald Kundoch, PhD

QUOD FELIX FAUSTUM FORTUNATUMQUE SIT
SUMMIS AUSPICIIS
SERENISSIMAE REI PUBLICAE POLONORUM
NOS SENATUS SCHOLAE MAIORIS CRACOVIENSIS
NOMINE ANDREAE FRICIIMODREVII
APPELLATAE EX DECRETO DIE SEPTIMA DECIMA
MENSIS OCTOBRIS ANNO BIS
MILLESIMO SEPTIMO FACTO
VIRUM DOCTISSIMUM ATQUE ILLUSTRISSIMUM

JOSEPH CARBY-HALL

QUI TOTA EUROPA NOTISSLMUS ET PLURIMI AESTIMATUS ERUDITISSIMUS SCIENTIA
EXIMIA SUMMAE IURIS BRITANNICI,
QUAE AD HOMINES LABORANTES ET INVICEM AD EOS, QUI HOMINES
OCCUPANT, PERTINET,
NOTIONE CERTA LEGUM VARIARUM CIVITATUM COMPARANDARUM
INCLARUIT ATQUE
LEGUM IN EUROPA OBLIGANTIUM IURISQUE GENTIUM
USU OPTIMO EXCELLUIT
QUI CUM IN PLURIMIS INVESTIGATIONIBUS VERSATUR TUM MULTIS
CUM UNIVERSITATIBUS STUDIORUM,
QUAE IN EUROPA EXSTANT, STUDIA COMMUNICANS
AUDITIONES ELOQUI SOLET

QUI IN PATRIA SUAIUVENES, QUI E REPUBLICA NOSTRA
EVECTI LABORANT AUT STUDIIS INCUMBUNT,
FOVERE ATQUE IN NEGOTIIS SUSCIPIENDIS ADIUVARE DIGNATUS EST

QUI AUCTOR SAPIENS ID STUDET, UT MULTIVIRI DOCTI ET ALUMNI
POLONI ET BRITANNICI UNA SOCIA NAVENT STUDIA,
ET EORUM LABOREM CONSTITUERE ATQUE RECTE TEMPERARE SCIT

QUI ACADEMIIS POLONIS MAGNI MOMENTI OPEM,
QUAE VIRIS DOCTIS ET STUDENTIBUS MAXIMO USUI EST, DONO DEDIT
QUI PLURIMUM AD CONCORDIAM
INTER NATIONES CONCILIANDAM VALUIT

PROFESSORIS HONORARII

TITULO ORNAVIMUS ATQUE IN EIUS REI FIDEM HASCE LITTERAS,
SCHOLAE NOSTRAE SIGILLO MAIORE MUNITAS, SANCIENDAS CURAVIMUS.
DABAMUS CRACOVIAE, DIE ALTERA ET VICESIMA MENSIS OCTOBRIS
ANNO BIS MILLESIMO SEPTIMO
GEORGIUS MALEC
SCHOLAE MAIORIS CRACOVIENSIS
H. T. RECTOR MAGNIFICUS

Laudatio

to

Professor Doctor of Law and Letters, Jo Carby-Hall

The University of Hull, United Kingdom

Professor Jo Carby-Hall is a renowned and acknowledged authority in the fields of British, European, international and comparative labour law and social law. He is the author and co-author of many books and monographs, entries in encyclopaedias, and articles. Edited and published numerous books and research journals. The high quality and significance of his works are evidenced in the fact that they have been translated into seven languages and published in several countries.

Born in Palestine, Jo Carby-Hall, was educated at a French Jesuit College and King's School Sherborne, in England, and then studied Italian, French, and Law at the University of Aberdeen and the University of Hull. He was awarded a PhD at the elitist Pembroke College of the University of Cambridge for a thesis entitled The Juridical Nature of the Collective Agreement. For his numerous scholarly publications he was honoured with the degree of a Doctor of Letters.

Professor Carby-Hall has connected his academic career with legal practice. Professionally qualified as a lawyer, he practiced for six years as legal adviser to David Brown Industries in Huddersfield, a world-known manufacturer of engineering products.

Since 1970, he has served the University of Hull, where he started his educational career as a lecturer, was quickly promoted to a senior lecturer and subsequently to professorship and given a chair. He is currently Director of International Legal Research in the Centre for Legislative Studies at the University of Hull.

Professor Carby-Hall's interest in Poland can be seen in his intensive cooperation in the educational, didactical and organisational areas while collaborating with the Universities in Toruń and Łódź. High quality of his contribution was acknowledged by the Polish authorities, which became the basis for appointing him the Honorary Consul of the Republic of Poland in the United Kingdom. He now runs a busy Consulate of the Republic of Poland in Beverley as well as its branch in the University of Hull. This function, especially in the recent years, is connected with the responsibility of taking care over the increasing number of Polish citizens who are studying and working in the United Kingdom.

In connection to this, Jo Carby-Hall has prepared for the Polish authorities a comprehensive research on the situation of economic immigrants from Poland and new member states in other member states. In his report, he has made recommendations suggesting the need to undertake appropriate actions in Poland as well as in the EU.

Long-lasting and extraordinarily fruitful activities carried out for the welfare of Poland and Polish citizens staying in England were ample reasons for awarding him by the President of the Republic of Poland, first, with the title of Knight of the Cross of the Order of Merit of the Republic of Poland and, then, with the title of Officer of the Cross of the Order of Merit of the Republic of Poland.

It is worth mentioning that Professor Jo Carby-Hall has frequently been honoured with medals by the British authorities. As a mark of recognition for his services to legal education Her Royal Highness Queen Elizabeth II has invested him with the title of Officer of the Most Excellent Order of the British Empire.

Looking for new creative areas of activities for the Polish cause, Jo Carby-Hall has developed multilateral contacts with Andrzej Frycz Modrzewski Krakow University College. As a result of the actions that he undertook, an agreement on cooperation with the University of Hull has been signed. It serves the purpose of establishing student and teacher exchanges, conducting joint research programmes, the results and summaries of which are presented at international conferences organised together by the two institutions. It is well worth mentioning at this point that the International Academic Conference on "Poland in the European Union: Social Dimension" organised in 2005 as well as the current conference on "European Constitution and National Constitutions" served such a purpose.

It was thanks to Professor Carby-Hall's actions that the Library of Andrzej Frycz Modrzewski Krakow University College received over 10,000 volumes of academic publications in English, moreover, the organisation of the conference on "European Constitution and National Constitutions" has been financially supported by the Consulate of the Republic of Poland in Beverley.

Professor Jo Carby-Hall is an excellent teacher. His lectures have invariably been popular in many universities around the world. As a visiting professor he has taught at the universities in Geneva, Paris, Nantes, Thrace.

He was granted the title of an Honorary Professor of the University of Bordeaux, and in the Universities in Toruń and Łódź he conducted lectures within the framework of Jean Monnet Programme.

The multifaceted activities undertaken by Professor Carby-Hall implement the idea of creating understanding between nations, European integration, strengthening and fostering cooperation with academic societies in different countries, which is extremely important for Poland where society

based on knowledge is being developed. Professor Jo Carby-Hall has fully deserved to be awarded the title of Honorary Professor of Andrzej Frycz Modrzewski Krakow University College.

Professor Michal Seweryński

Krakow, 22nd October 2007

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MENSIS OCTOBRIS ANNO BIS
MILLESIMO SEPTIMO FACTO
VIRUM DOCTISSIMUM ATQUE ILLUSTRISSIMUM

ROLF GRAWERT

QUI CUM IDEAS, QUAE REI PUBLICAE FORMANDAE ET LEGIBUS CREANDIS
SERVIRENT, COGNOVISSET, SCIENTIA EGREGIA LEGUM, QUAE AD REM
PUBLICAM CONSTITUENDAM PERTINERENT, POTITUS ESSET,
ET IURIS PUBLICI PERITISSIMUM SE PRAEBUISSET,
CACUMEN IURISPRUDENTIAE ADEPTUS EST

QUI SPECTABAT, UT CUM IUVENES POLONI STUDIORUM COLENDORUM,
TUM VIRI DOCTIINVESTIGATIONUM PROMOVENDARUM IN
UNIVERSITATIBUS STUDIORUM GERMANIS OCCASIONEM HABERENT

QUI SOLLERS ID AGEBAT, UT VIRI DOCTI ET ALUMNI POLONI ET GERMANI
DOCTRINAE PERSCRUTANDAE ET OPINIONIBUS UNA DISSERENDIS
FELICITER STUDERENT
QUI SCHOLAE MAIORI NOSTRAE MAGNAM OPEM, QUAE VIRIS DOCTIS
ET STUDENTIBUS OPTIMO USUI EST, DONO DARE VOLUIT

QUI MAXIMAM OPERAM CONCORDIAE ET UNANIMITATI POLONARUM
ET GERMANARUM NATIONUM RECONCILIANDIS CONFIRMANDISQUE
DEDIT

PROFESSORIS HONORARII

TITULO ORNAVIMUS ATQUE IN EIUS REI FIDEM HASCE LITTE RAS,
SCHOLAE NOSTRAE SIGILLO MAIORE MUNITAS, SANCIENDAS CURAVIMUS.
DABAMUS CRACOVIAE, DIE ALTERA ET VICESIMA MENSIS OCTOBRIS
ANNO BIS MILLESIMO SEPTIMO
GEORGIUS MALEC
SCHOLAE MAIORIS CRACOVIENSIS
H. T. RECTOR MAGNIFICUS

Laudatio

to

Professor, Doctor of Both Laws,

Honorary Doctor, Rolf Grawert

Ruhr University Bochum - Federal Republic of Germany

Professor Rolf Grawert, as an eminent representative of state law and valued constitutionalist, ranks among the outstanding authorities of great renown both in Germany and abroad. He owes this recognition not only to the significant academic achievements and university functions which he had held but also to the abundant international contacts, including his long-term cooperation with the Jagiellonian University as well as the Andrzej Frycz Modrzewski Krakow University since its inception.

Professor Rolf Grawert began his scholarly career by graduating from legal studies in Heidelberg and Münich in 1960, and being granted a doctorate of both laws in 1966 at the University of Heidelberg following a doctoral thesis entitled *Administrative Agreements between the Federation and the States (Bundesländer).* On those grounds, he was granted employment as an assistant at the universities in Heidelberg and Bielefeld. Worthy of praise is his extensive academic activity, manifested even as an assistant, which resulted in six praiseworthy academic works on different subjects published in various magazines. We should also mention that the scope of subjects that the future professor found interesting included the cases of conflicts between the binding federal law and constitutions of the states as well as historical trends in the development of modern legislation. He obtained the habilitation in 1972 on the basis of his likewise original dissertation entitled *State and State Citizenship. Constitutional and Historical Research in the Development of State Citizenship.* As a result, he was entrusted with the post of assistant professor. Two years later (1974) he became professor and was appointed the Head of the independent Chair of Public Law and History of Constitution at the Faculty of Law of the Ruhr University Bochum.

Worth mentioning, among the university functions that prove the fact that university authorities noticed and appreciated Professor Grawert's special propensity, are the functions of Dean of the Faculty of Law of the Ruhr University Bochum (1979-1980) and Deputy Rector of the Ruhr University Bochum (1990-1994). After the system transformation in Germany - he became the founder and Dean of the Faculty of Law at the University of Potsdam as well as Deputy Rector of this university (1991-1994). Most notable

is an array of other functions held by the Professor, including that of Judge at the Higher Administrative Court in Münster for North Rhine-Westphalia (1974-1983) and Director of the Musical Centre of the Ruhr University Bochum (1984-1990).

Professor Grawert's exceedingly intensive academic activity commands attention, the more so as it has enjoyed general recognition. It has brought about five vast monographic works and a body of scholarly papers and reviews numbering 230 altogether. The extremely broad scope of the subjects of the Professor's academic interest is surprising, as may be his frequently critical opinion on the legal regulations applied and the actions undertaken by organs of the federation, while the high level of his published scholarly works has found expression in countless extremely positive reviews. Beyond doubt, an expression of special recognition for the scholarly work of Professor Rolf Grawert was the honorary doctorate awarded by the Faculty of Law of Potsdam University in 1994.

It is to be emphasised that the Professor's retirement in 2002 has in no way curtailed his scholarly activity; on the contrary, he turned to new, current subjects, as can be seen in the titles of his publications, including *How Should Europe be Organised?, The Constitutional Future of Europe According to the Nice Treaty, Human Rights vs the States' Raison d'etre, The Democratic Society of the EU, On the Responsibility of Members of the Government* and *The German-Polish Dialogue.*

Among the Professor's earliest academic output, noteworthy are two remarkable works published in the Polish language. These are *Z problematyki zgodności orzecznictwa sądowego z Konstytucją (Selected Problems of Constitutionality of Court Decisions* published in *Przegląd Zachodni* 1987), and *Prawne i etyczne granice eksperymentów biologicznych (Legal and Ethical Limits of Biological Experiments* published in *Księga pamiątkowa Profesora Witolda Zakrzewskiego,* Krakow 1989). These works are all the more worth quoting as in a sense they initiated the long-term cooperation of Professor Grawert with Krakow universities, which continues to this day. This cooperation found expression in his two, highly fruitful visits to Krakow as a visiting professor in 1991 and 1998. They were both prepared with the utmost care, and with the Polish academic staff and their students in mind.

Let testimony to the great significance attached by Professor Rolf Grawert to this cooperation - with time, assuming the form of friendship - be his participation in conferences and the interesting lectures he delivered. Further proof that the Professor approached his contacts with Krakow with great heart is his extremely fascinating work, written with Krakow academics in mind, namely *Konstytucje Rzeczypospolitej Polskiej w świetle niemieckiej literatury (Constitutions of the Republic of Poland in the Light of German Literature).* This publication, which incidentally contains a number of personal

themes, is accompanied by a valuable bibliography of works on Polish constitutional law in German and covering the span of six decades, prepared especially for the authors representing the younger generation. Its drafting certainly required a major effort as it comprises 450 items, including works by Polish authors from Andrzej Frycz Modrzewski Krakow University, notably professors Stanislaw Grodziski and Zbigniew Maciąg.

After this brief presentation of the achievements and merits of Professor Rolf Grawert, on behalf of all of us, I would like to express my heartfelt conviction that words of exceptional gratitude and recognition are due to Professor Grawert for what he has done with so much devotion for Polish legal studies and for all of us.

Professor Apoloniusz Kostecki

Krakow, 22nd October 2007

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MENSIS OCTOBRIS ANNO BIS
MILLESIMO SEPTIMO FACTO
VIRUM DOCTISSIMUM ATQUE ILLUSTRISSIMUM

HARALD KUNDOCH

QUI AUTOR SAPIENS ID AGEBAT, UT MULTI VIRI DOCTI ET ALUMNI POLONI
ET GERMANI UNA SOCIA STUDIA NAVARENT, ET LABOREM EORUM
FELICITER CONSTITUERE ATQUE RECTE TEMPERARE SCIEBAT

QUI AD NOTITIAM LEGUM AD RES OECONOMICAS ADMINISTRANDAS
AC DISPENSANDAS IN EUROPA ATTINENTIUM
CAUSAS AGENDI FACULTATEM SIMULQUE RERUM OECONOMICARUM
PERITIAM SUMMO INGENIO ADIUNGERE SCIVIT

QUI SCHOLAE MAIORI NOSTRAE MAGNI MOMENTI OPEM,
QUAE VIRIS DOCTIS ET STUDENTIBUS MAXIMO USUI EST,
DONO DARE VOLUIT

QUI CUM PEREGRINACIONES MULTAS, UT ALUMNOS POLONOS,
GERMANOS ET BATAVOS INSTITUERET, SUSCEPISSET,
AUDITIONES UTILES ELOCUTUS ESSET ATQUE DISCIPULOS
ET SECTATORES FOVISSET,
OPTIME DE OMNIUM, QUI IN EUROPA SCIENTIAE AUGENDAE STUDENT,
COMMUNITATE FIRMANDA MERITUS EST

PROFESSORIS HONORARII

TITULO ORNAVIMUS ATQUE IN EIUS REI FIDEM HASCE LITTERAS,
SCHOLAE NOSTRAE SIGILLO MAIORE MUNITAS, SANCIENDAS CURAVIMUS.

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GEORGIUS MALEC
SCHOLAE MAIORIS CRACOVIENSIS
H. T. RECTOR MAGNIFICUS

Laudatio

to

Professor Harald Kundoch, LLD

Gelsenkirchen University of Applied Sciences

- Federal Republic of Germany

Professor Harald Kundoch is a recognised and valued specialist in economic and European law. He combines scholarly and academic activity with broad practical experience, having held a number of responsible posts in the structures of the state administrative apparatus, business authorities and in legal counselling.

Born in northern Germany, he completed secondary school in Cologne, and studied law in Freiburg im Breisgau, Bonn, Cologne and Kiel. Furthering the cause of German-French reconciliation, he managed a programme for cooperation between the youth of the two states. At the same time, he honed his knowledge of French and English, studying in those countries as a holder of a DAAD scholarship.

Having passed the first degree examination in law at the Higher State Court of Schleswig-Holstein, he held his court internship at the regional and state court in Cologne, and later completed a course in international law at the Academy of International Law in the Hague. At the same time, he became an assistant at the Institute of International Law in Kiel. His interest in international and European law led to the doctoral dissertation entitled The Establishment of European Parliament: the Question of Reforming the Process of Deputy Nomination, which was defended in 1972 at the University of Cologne.

Following the completion of his internship, the future Professor passed the second-degree examination in law, which opened to him a career in high posts in the Ministry of the Interior of Schleswig-Holstein in Kiel, the Federal Ministry of Economy in Bonn, the Municipal Association of the Ruhr Area and the General Coal Mining Union in Essen. He later worked at the Treuhand Agency in Erfurt, the global professional services firm KPMG, and also as a barrister and tax adviser in Düsseldorf, Dresden, Erfurt, Leipzig and Magdeburg. This long-term legal practice as well as intensive scientific involvement provided the grounds for his nomination as professor at Gelsenkirchen University of Applied Sciences.

Almost from the earliest days of Andrzej Frycz Modrzewski Krakow University, the Professor maintained regular contacts, delivering special lectures in English, holding seminars and also lecturing. Both lectures and meetings

concerned mostly the questions of European economic law against the background of legal practices and rulings of the European Court of Justice. It must be added that they enjoyed great interest among the students.

Professor Kundoch strongly contributed to the expansion of the international contacts of the AFMKU. He organises study visits for Polish, German, and Dutch students to numerous European institutions within the framework of the Jean-Monnet Europa-Zertifikat programme. Thanks to his initiative, a very fruitful cooperation between Andrzej Frycz Modrzewski Krakow University and the University of Applied Sciences in Ludwigshafen am Rhein began.

Always brimming with initiatives and ideas for international cooperation, Professor Kundoch has personally helped to broaden Andrzej Frycz Modrzewski Krakow University's resources with valuable academic literature in English, German and French. This is a reason why we are glad to express our gratitude, at the same time being convinced that the Professor will not let his past activity die down, but continue working towards European integration based on education and academic learning.

Professor Erhard Cziomer

Krakow, 22nd October 2007