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Volker Röben

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Constitutionalism of Inverse Hierarchy: the Case of the European Union

Volker Röben*

* Dr. iur., LLM (College of Europe), LLM (UC Berkeley). Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. Email: vroeben@mpil.de. I thank the participants of a University of Chicago Law School faculty workshop for their suggestions and criticisms on an earlier draft of this paper.

Abstract

On 20 June 2003, the European Convention presented the European Council of Thessaloniki with a Draft Treaty establishing a Constitution for Europe. This paper proposes that this draft treaty reflects the specific, if not traditional, constitutionalism has evolved over the half-century course of European integration, in particular since 1992, when the Treaty on European Union was concluded at Maastricht. In this sense, the Union's constitutionalism is stable even if its positive constitutional manifestations are not. The specific constitutionalism of the EU is a three-level system of government that works through an inverse hierarchy. The constitutional nation State is placed both at the lowest and at the highest level of this system, with the Union/Communities taking the middle level. In the first process, the Union forms a hierarchical centre with the Member States acting at the "lowest level" to the extent the Community enacts policies in areas such as the internal market and the Member States carry them out. But the periphery also inverts this hierarchy with the Member States acting at the "highest level" to the extent that they inspire and determine the action of the centre. At this level of the hierarchy, the Member States act through the heads of States and governments assembled in the European Council, the national constitutional courts and national parliaments in their treaty-making capacity, while at the "lowest" level, they act through their executive organs and their courts. This interaction between centre and periphery is the precondition for the working of the institutions of democracy, the Rule of law, and individual rights within the Union. The article analyses these institutions of constitutionalism as they operate in an inverse hierarchy, taking into account, when appropriate, the Draft Constitutional Treaty.

I. INTRODUCTION

The Draft Treaty establishing a Constitution for Europe presented preliminarily in October 2002[1] and adopted by the plenary of the European Convention on 13 June 2003[2] is the most concrete documentary evidence of the constitutional debate underway in the European Union. While this debate is the first self-conscious attempt to reflect on the nature of the public authority that has been created over fifty years of first the Communities and then the Union, it does not start from scratch. This paper proposes that a specific, if not traditional, constitutionalism has evolved over the course of European integration since 1950, and in particular since 1992, when the Treaty on European Union was concluded at Maastricht. The document that will emerge at the end of the process set in motion at Nice in all probability will reflect this constitutionalism specific to the union of States. In this sense, the Union's constitutionalism is stable even if its positive "constitutional" manifestations are not.

The plan of the paper is as follows: I shall first lay out my understanding of the specific constitutionalism in place in the European Union today, which I term a constitutionalism of inverse hierarchy (II). I shall then analyse three classic institutions of constitutionalism as they operate in this inverse hierarchy, taking into account, when appropriate, the Draft Constitutional Treaty; democracy (III), the Rule of law (IV), and individual rights (V) will be looked at in turn.

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[1] See The European Convention Secretariat, Preliminary Draft of a Constitutional Treaty, 28 October 2002, CONV 369/02 (available at http://european-convention.eu.int/docs/sessplen/00369.en2.pdf). A constitution for the EU was mentioned in writing for the first time in the mandate issued to the constitutional convention by the Laeken Declaration of 2001. See Presidency Conclusions European Council of Laeken, Annex III (p. 19), 14/15 December 2001, SN 300/1/01 REV 1 (available at http://ue.eu.int/Newsroom/related.asp?max=1&bid=76&grp=4061&lang=1).

[2] See The European Convention Secretariat, 18 July 2003, CONV 850/03, Draft treaty establishing a Constitution for Europe (all subsequent citations are to this document). The draft was presented to the European Council of Thessaloniki, June 20, 2003, which decided that „the text of the Draft Constitutional Treaty is a good basis for starting in the Intergovernmental Conference" (para 5). The European Council requested the future Italian Presidency to initiate, at the Council meeting in July, the procedure laid down in Article 48 of the Treaty in order to allow this Conference to be convened in October 2003. The Conference should complete its work and agree the Constitutional Treaty as soon as possible and in time for it to become known to European citizens before the June 2004 elections for the European.

II. THE IDEA OF CONSTITUTIONALISM OF INVERSE HIERARCHY

The constitutionalism of inverse hierarchy of the EU establishes a connectivity between 'State', 'union of States' and 'constitution', and the Draft Constitutional Treaty reflects this: it is a system of government that works through an inverse hierarchy.[3] The constitutional nation State is placed both at the lowest and at the highest level of this hierarchical system, with the Union taking the middle level.

1. The centre

In the first process, the Union *and* the Member States (that is, the States acting at the "lowest" level) form a hierarchical centre, to the extent the Community enacts policies in areas such as the internal market and the Member States carry them out. At this "lowest" level, Member States act through their national executive organs and their courts.

2. The periphery

In the second process, the Member States acting at the "highest" level autonomously inspire and determine the actions of this centre. Thus the periphery inverts the centre's hierarchy. At the "highest" level of the hierarchy the Member States act through the heads of States and governments assembled in the European Council, the national constitutional courts and national parliaments in their treaty-making capacity.

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[3] Others have applied hierarchical analysis (but not inversely hierarchical). See Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper 10/00, http://www.jeanmonnetprogram.org/papers/00/001001-01.html#P8_131: "In Europe, that presupposition does not exist. Simply put, Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where their federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power." For such analysis in a public international law context see, e.g., Martti Koskiennemi, *Hierarchy in International Law: A Sketch*, 8 EUR J INT'L L 566 (1997).

3. The interaction between centre and periphery as the precondition for the working of the institutions of democracy, individual rights, Rule of law and federalism in the Union

There are thus two separate yet parallel constitutional processes operating. It is the specific interaction between centre and periphery in both processes that meets the demands of the institutions of a liberal democracy with respect to the concepts of democracy, the Rule of law, human rights and federalism. This interaction of centre and periphery transcends the constitutional nation State. The specific constitutionalism of the European Union is thus distinct from the relation between the federal and infra-federal level of government in a federal nation State. It is not process federalism since it is not limited to ensuring adequate peripheral representation in the centre's organs, nor is it about carving out domains of power or immunity for the infra-federal level of government.[4] Rather the process at the centre depends on its being complemented by the process at the periphery. Within this process, the relative weight of influence between the more supranational and the more intergovernmental organs may change. But the inverse hierarchy as such will not be fundamentally changed by the constitutional treaty as currently discussed. This constitutionalism of inverse hierarchy is the autonomous constitutionalism *of* the European Union.

III. DEMOCRACY IN THE UNION

The central idea of democracy is to make exclusive power tolerable through inclusion of those subject to it, thus legitimizing the power. In the case of a union of states not only individuals are subjected but also nation States. For inclusion to take place, collectively binding decisions must be attributable and ultimately be accounted for in sufficiently transparent ways. Separating legislative, executive and adjudicative powers and allocating them to specific organs secures attributability and accountability. The legislative power needs to be vested in a directly elected body. This is balanced with the political initiative and overall leadership of a monolithically structured head office of the

executive.[5] Modern mass democracies depend on political parties both for the meaningful carrying out of elections and for the transmission of public opinion between elections. The structure of inverse hierarchy set forth above affects the operation of democracy in ways unique to the Union.

A) THE CENTRE

The capacity of first the European Communities and then the Union for collectively binding decision-making has grown continuously with European integration. Each of the organs is thought to represent a certain constituency in the centre's decision-making process: the European Commission the common interest, the Council the Member States, and the European Parliament the peoples of Europe. The Commission's right to initiate legislation, which will then be passed on by the Council of Ministers and Parliament acting under the cooperation or the co-decision procedure,[6] corresponds to a fairly strict hierarchy vis-à-vis Member State parliaments. The Union may task Member State parliaments with implementing Union directives, art. 249(2) EC, and they remain independently accountable only if and insofar as the directive leaves them room for discretionary decision-making.[7] The legislative decision-making process of the Union has been marked by two tendencies: enhanced efficiency and parliamentarization. Ever since the Single European Act replaced unanimity with qualified majority voting on internal market legislation, efficiency of decision-making has increased critically in the

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[4] See Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP CT REV 1, 3 (distinguishing process, power and immunity federalisms).

[5] In parliamentary democracies all other office must be derived form that original expression of the popular will. This translates into parliament electing the head of government and retaining the power of a vote of no-confidence. Presidential democracies, of course, provide for a separate chain of legitimacy for the executive branch.

[6] See art. 250 EC. The monopoly of the Commission on submitting proposals for legislation has been attenuated in the context of the recent expansion of Community competences, see art. 67(1) EC.

[7] A sharp light is cast on the centre's hierarchy if one recalls the U.S. Supreme Court's federalism jurisprudence with respect to the Federal Government 'commandeering' the States, see, e.g., New York v. United States, 505 U.S. 144 (1992), Printz v. United States, 521 U.S. 898 (1997). According to this jurisprudence "no matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. …it may not conscript State governments as its agents.", 505 U.S. at 178. Only a statute that "regulate[s] State activities", rather than "seek[ing] to control or influence the manner in which States regulate private parties" will pass the muster of the Tenth Amendment, see Reno v. Condon, 528 U.S. 141, 148 (2000). But this is precisely the EU's preferred mode of legislation.

Council of Ministers.[8] Regarding the centre's competence to install a common market without internal frontiers, art. 95 EC empowers the Community to harmonize existing national rules if necessary for the establishment of the internal market. The introduction of art. 95 EC (then: art. 100a EEC) in 1986 into the treaty by the Single European Act, replacing unanimity by majority voting in the Council of Ministers, overcame the protracted hold out problems in this core area of Community competence. The broad interpretation of art. 95 EC by the Court of Justice has left the discretion of the political organs largely unfettered. It is only recently that the Court of Justice has taken a more restrictive approach. The Court of Justice sets out two categories that will trigger the power under art. 95 EC: the removal of barriers to market entry of goods or persons and addressing substantially distorted competitive conditions in one or several Member States.[9] The expansion of this decision-making mode to more and more substantive areas of Community competence is complemented by the move towards according the Parliament a genuine legislative veto, which is the effect of the co-decision procedure provided for in art. 251 EC. This expansion comes mainly at the expense of the co-operation procedure between the Council of Ministers and Parliament as provided for in art. 252 EC, which leaves the last word to the Council. Parliamentarization has also been on the ascendancy since the introduction of qualified majority voting just mentioned.[10] Primarily as a result of the amendments brought about by the Amsterdam Treaty, the Parliament's power exercised under co-decision now roughly parallels the legislative

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[8] The concept of enhanced cooperation makes the decision-making process even more efficient. It allows Member States to go ahead with a planned measure absent unanimity or in the presence of a blocking minority in the Council of Ministers.

[9] See ECJ, Case C-84/94, Judgment of 12 January 1996, United Kingdom v. Council, [1996] ECR I-4705. In the case of the Directive 43/98 on the advertisement of tobacco, the Court of Justice struck the directive down because the provisions banning the advertisement in newspapers did not satisfy either requirements and thus did not serve the functioning of the internal market. See Case C-376/98, Judgment of 5 October 2000, Germany v. Council and Parliament, [2000] ECR I-2921. But see Case 491/01, Judgment of 10 December 2002, ex parte British American Tobacco (Investments) Ltd (n.y.r.), where the Court acknowledges that art. 95 EC is the basis for the prohibition of certain forms of presentation of tobacco products ("light"). Not explicitly stated yet clearly inherent in the Court's new reading of art. 95 EC is that it applies only to the regulation of economic activities. This jurisprudence of the ECJ corresponds to the categories of federal commerce clause power concerning persons and goods in inter-State commerce and intra-State activities that substantially affect inter-State commerce as articulated by the U.S. Supreme Court in its recent line of cases on the Commerce Clause power. *Cf. Lopez* (529 U.S. 598).

[10] See Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2456-65 (1990).

powers of the Council in those cases where the Council can decide by majority vote.[11] Appointment power of the Commission is vested with the Council of Ministers but Parliament's approval is needed as well, art. 214 EC.[12] Parliament also was given the power to censure the Commission based on its "activities", art. 201 EC. This arguably goes beyond the power to remove the Commission for cause and approaches the power of a vote of no-confidence. If Member States will indeed have to rotate seats on a smaller Commission as foreseen by the Treaty of Nice and also by the Draft Constitutional Treaty, this will reduce the strong element of Member State representation built into the Commission. Even more important is the considerable accretion of power and status in the Commission's president, who now is well on his way to a premiership within the Commission.[13]

Even so, efficiency outweighs parliamentarization in that the Council of Ministers has the first vote on any piece of legislation proposed by the Commission. Blockage of legislation in the Council will deprive the Parliament of the chance to pass on legislation that it may like. In effect, the Council of Ministers and thus the Member States' executives set the agenda for the legislature. Furthermore, Parliament's involvement in the exercise of legislative powers delegated to the Commission remains limited to controlling whether the Commission is exceeding the powers delegated to it.[14] The bulk

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[11] The Treaty of Nice has continued to parallel the pushing back of unanimity in the Council with providing Parliament with veto power (art. 251 EC, the so-called co-decision procedure) in three areas: the new power under art. 13(2) rev. EC for the Community to support action taken by the Member States to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; the implementation of art. 18 EC concerning the free movement of Union citizens; and the exercise of the Community competences regarding 'visas, asylum, immigration and other policies related to the free movement of persons'. However, there remain several areas of Community competence where the Parliament has no real say, most notably the common agriculture policy and the budget.

[12] See art. 214 EC.

[13] See art. 219(1)/217(1) EC rev.: The Commission President exercises "political guidance". See Strategic Objectives of the Commission 2000-2005 proclaimed by the incoming Commission President Romano Prodi. After Nice, the President also has the power to decide on the portfolio of each Commissioner and to ask for his or her resignation; whether these new legal competences of the Commission President translate into political power depends ultimately on whether he or she can credibly threaten to exercise these powers vis-à-vis Commissioners nominated by a national government. Under the Draft Constitutional Treaty, the President of the European Council shall set the European Council's agenda in collaboration with the President of the Commission.

[14] See Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 OJ L 184/23. Arts. 3 to 6 of this second comitology decision lay down, respectively, four procedures, entitled 'advisory procedure' (art. 3),

of Union legislation now consists of such implementing legislation, adopted in 'regulatory committees', in which the Commission and the Member State executives but not the Parliament are represented.[15] The concern for democracy in European Union decision-making does not arise with regard to parliamentarization but with regard to efficiency. As qualified majority voting becomes the norm, it is increasingly difficult to hold the national representatives in the Council of Ministers – and thus the Council as a whole – accountable. One might assume the Council representative of each Member State to be the loyal agent for that Member State or at least for the government of which he or she is a member. As an autonomous actor, the representative may suffer the occasional defeat at the hand of the qualified majority. In reality, however, a vote is almost never taken. And the assumptions of loyalty and autonomy need to be relaxed because of the dynamics of decision-making in the Council of Ministers, which takes place under the condition of qualified majority voting across large swathes of Community competences; the collegiality and camaraderie between ministers responsible for certain portfolios; and the import of the national administrations, driven by an ethos of expertise, in both the preparation of the decision-making by the ministers and in implementation of those decisions at the national level. The democratic qualms raised by ever more efficient decision-making in the Council are reflected in the introduction of a demographic element into Council decision-making, which has the effect of preventing the Council from taking a specific decision.[16] If the European decision-making process, through the institutions analyzed here, can be found lacking in democratic accountability, it is also because of the absence of European political parties, *i.e.* of institutions that straddle the

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'management procedure' (art. 4), 'regulatory procedure' (art. 5) and 'safeguard procedure' (art. 6). Under art. 2 (b) "measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure". These procedures, however, are not meant to bind the Council, see ECJ; Case C-378/00, Judgement of 21 January 2003 (n.y.r.), paras. 43-48.

[15] See ECJ, Case 25/70, Judgment of 17 December 1970, Koester, [1970] ECR 1161, para. 6 (interpreting art. 202 EC third indent as mandating that all "essential requirements" be included in the delegating act); but see Cass Sunstein, *Nondelegation Canons*, 67 U CHI L REV 315 (2000) (considering a wider range of 'non-delegation canons' in the context of U.S. law).

[16] Both as contained in the Protocol on Enlargement to the Nice treaty and under the form of the so-called double majority of both the votes in the Council of Ministers and the population of the Union provided for in the Draft Constitutional Treaty (art. I-24(1),(2)).

social and political spheres. The loose coalitions formed in the European Parliament do not yet have an effect outside the parliamentary process, they do not yet contribute to forming public opinion. The competence to enact the statute of European political parties provided for in art. 191(2) EC as revised by the Treaty of Nice is clearly designed to remedy this situation and may accelerate developments already under way.[17]

B) THE PERIPHERY

EU constitutionalism has specifically responded to these democratic challenges by empowering the periphery.

1. The autonomy of the periphery

Member State action is required to complement the Union's opening of the common market without internal frontiers. Art. I-13 of the Draft Constitutional Treaty expresses this by providing for shared competence of the Union and the Member States with respect to the internal market. Having come quite close to subjecting the national policies to a uniform reasonableness standard in the 1960s and 1970s under a jurisprudence centred on the effects of a national rule on cross-border trade, the Court reversed itself in the early 1990s and restricted the reach of the economic freedoms as they set limits to Member State action. Moving from *Dassonville*'s broad understanding of the concept of the free movement of goods as the paradigmatic of the treaty's fundamental freedoms,[18] to the limitations of *Cassis de Dijon*[19], to the dramatic change operated by *Keck*,[20] the Court seems content to have found a way to tailor the rule so that it protects access of foreign

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[17] Art. 191(1) EC provides: "Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union." The Declaration on art. 191 EC included in the Final Act of the Intergovernmental Conference at Nice stipulates that "[t]he Conference recalls that the provisions of Article 191 do not imply any transfer of competence to the European Community and do not affect the application of the relevant constitutional rules." The Draft Constitutional Treaty moves the provision on political parties form the context of the institutions to the "principles of representative democracy" (art. I-45) of the new Title VI "The Democratic Life of the Union".

[18] ECJ, Case 8/74, [1974] ECR 837, understood to encompass any national measure having the actual or potential effect of reducing the volume of trade between Member States.

[19] ECJ, Case 120/78, [1979] ECR 649. *Cassis de Dijon* contained an important limitation, when national rules designed to meet an "overriding public policy requirement" – cognition of which resides with the Court of Justice - was found not to fall under the art. 28 EC ban.

[20] ECJ, Cases 267-268/91, [1993] ECR I-6097. *Keck* introduced the distinction between selling and product requirements, with only the latter falling under art. 28 EC.

individuals, goods and companies but does not open to its judicial review all national measures as to their general reasonableness. Under its current formula[21] the rule may be restated as protecting market access and checking national laws and regulations that prevent or hinder such access. The scope for balancing has thus been significantly reduced and that of autonomous decision-making in the Member State has been enlarged.[22] Member States may shield their national policies from the effect of these fundamental freedoms by laying down a Community framework for a certain public interest objective through a harmonization directive according to art. 95 EC. A national implementing measure that stays within the limits of this framework cannot be challenged under any of the fundamental freedoms. Even where the Union enjoys exclusive competence, Member States have reserved areas for their own action, albeit in close intergovernmental cooperation. As a result, the centre's action depends on peripheral action if its policies are to stand a chance of success. This is the case with respect to the Union' single currency and monetary policy. The EC Treaty addresses both social and economic policy areas but does not subject them to the supranational decision-making process.[23] The Union may define a general framework, but it may not legislate. As to economic policy, the European Council shall, acting on the basis of the report from the Council of Ministers, discuss a conclusion as to broad guidelines of the economic policies of the Member States and of the Community. Based on this conclusion it shall, acting by a qualified majority, adopt recommendations setting out these guidelines. In the field of social and employment policy, the treaty envisages

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[21] The ECJ reads the prohibition of Member States measures having an equivalent effect to quantitative restrictions as follows: "Obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labeling, packaging) constitute measures having equivalent effect which are prohibited by Article 28, even if those rules apply without distinction to all products, unless their application can be justified by a public interest objective taking precedence over the free movement of goods". See, e.g, Case 89/97, *Van der Laan* [1999] ECR I-731, para. 19.

[22] The deeper reasons for that substantial shift in the Court's case law remain subject to speculation. The Court may have seen itself as simply unable to handle the myriad of cases that reached it under the *Dassonville/Cassis de Dijon* formula. See René Joliet, *Der freie Warenverkehr: Das Urteil Keck und Mithouard und die Neuorientierung der Rechtsprechung*, GRUR INT 979 (1994). It may also have been responsive to signals coming from the Member States for less influence in national policy making. Most probably, the Court acted on its own constitutional law analysis.

cooperation between Member States and the Community in developing a coordinated strategy for employment, art. 125 EC. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in art. 125 EC in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to art. 99(2) EC (art. 126 EC).[24] The periphery's action dominates in other fields as well for lack of authoritative centre competences. Thus, short of any harmonization, the Union may support Member State action regarding industry, protection and improvement of human health, education, vocational training, youth and sport and culture, each of which area is touched by the Community's Internal Market competences. The Draft Constitutional Treaty leaves this basic model unchanged. It does not rule out to that Union competences will be rounded at the edges. But it expressly provides that the Union will have competences only to coordinate, support, and guide by framework what remains Member State action.[25]

2. The periphery and the Centre's decision making

The trend to qualified majority voting in the Council of Ministers in the centre is counter-balanced by the ever increasing role on the periphery of the European Council of Heads of State or Government and of the Commission president. As will be recalled, the European Council was not part of the original scheme of the treaties of Paris and Rome, which established the Coal and Steel, the Economic and the Atomic Energy Communities. Yet it has become the central player in the decision-making process of the Union. In response to the increased political weight of the European Council, the European decision-making process has become a dynamic circular process. It takes on the form of a four-step approach: a programme of action is developed by the

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[23] Art. 98 EC provides that Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Community, as defined in art. 2 EC, and in the context of the broad guidelines referred to in art. 99(2) EC.

[24] As to social policy, the European Council shall each year consider the employment situation in the Community and adopt conclusions thereon, art. 128(1) EC. The Council of Ministers will then draw up annual guidelines for Member State policies, art. 128(2) EC. Given the structural similarities between the economic and the social policy areas, it is not surprising that the European Council meeting in Lisbon in 2000 merged consideration of the two.

[25] See arts. I-11, I-14 on the coordination of economic and employment and arts. I-11, I-16 on areas of supporting, coordinating or complementary policy. Art. I-17(3) gives a flanking guarantee by stipulating

Commission, submitted for approval to the European Council[26], and implemented through manageable pieces of legislation, usually a framework directive to be adopted by the Council of Ministers and the European Parliament and implementing legislation to be taken by the Commission according to arts. 202 and 211 EC pursuant to the regulatory committee procedure. The regulatory committee procedure allows for input by Member States' administrations, through which the national political systems feed their preferences.[27] In the fourth step, the European Council controls steps two and three, in that it may take up any controversies arising during the implementation phase.[28] It is, then, not surprising that the Nice amendments of the provisions on "enhanced cooperation" accord the European Council a central position.[29] Art. 40a(2) EU rev. provides that a member of the Council of Ministers may request that a matter envisioned for enhanced operation be referred to the European Council. The Council of Ministers will then proceed accordingly. The European Council physically embodies the crucial advantages of highly visible policy-making. Most western democracies vest this specific function of overall (comprehensive) political leadership in a monolithic, ideally one-person, office, be it a prime minister or a president.[30] The importance of the European Council is thus closely linked to another dominant structural change in the working of all of the European democracies that follow the Westminster model, *i.e.* the presidentialization of parliamentary democracy. The European Council draws on the constitutional process in the Member States by involving the individuals identified by the broadest national constituencies as embodying the national leadership, thus legitimizing both the European polity and re-legitimizing the national polities. Public opinion is

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that provisions adopted on the basis of the flexibility clause of art. I-17 may not entail harmonization of Member States' laws or regulations in cases where the Constitution excludes such harmonization.

[26] Which will endorse it or institute its own committee of independent experts, such as the *Lamfalussy* Committee of Wise Men on the Internal Financial Market.

[27] See NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY 138-165 (1982) (on mutual dependency of the political system and its administration).

[28] This European Council oversight bears resemblance to the presidential oversight of modern U.S. administrative law, see Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

[29] On enhanced cooperation see GRAINNE DE BURCA & JOANNE SCOTT, EDS., CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY (2000).

[30] See Stefan Oeter, *Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union*, 55 ZAÖRV 659 (1995) (suggesting that the Union's executive be modeled on the Swiss Federal Council which is composed of counselors of equal status chosen in such a way that the German, French and Italian parts of the nation are equally represented).

focused on these meetings of the Heads of State and Governments, which enjoy extensive media coverage. There is a requirement of unanimity and decisions are made by those members of the national governments who are directly accountable either to the people or to the national parliaments. The participants detail their objectives to their parliaments prior to a Council meeting and report back after its conclusion, in addition to the Presidency reporting to the European Parliament pursuant to art. 4(3) EU. And it is not out of the question that a highly visible, sustained failure of a prime minister or president at this genuinely political level will ultimately be sanctioned by the (national) electorate. As the European Council has gained in stature, its revolving presidency has taken to setting out a political agenda to be accomplished during its six month tenure, which reflects the distinct priorities of the Member State holding the Presidency. The re-organization of the European Council at Seville in Summer 2002 further strengthens its role in defining the general political guidelines of the Union by introducing a three year strategic program, to be based on a joint proposal drawn up by the Presidencies concerned.[31] The European Council has also undertaken steps to strengthen its efficiency: meetings are to be prepared by the „General Affairs and Foreign Relations" configuration of the Council of Ministers, which shall coordinate all the preparatory work and draw up the agenda.[32] The Draft Constitutional Treaty provides for a separate Presidency of the European Council.[33] Such a presidency would further strengthen the periphery over the centre. The individual would be elected for a term of office of two and a half years, renewable once by the European Council. But the President would not have a power base of its own but would have to rely on the European Council and thus the Member States. His or her inclination would be towards representing the interests of the big Member States that dominate the Council of Ministers.[34] The Presidency would further strengthen the effectiveness of the proceedings of both Council by providing it

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[31] In consultation with the Commission and acting on a recommendation by the General Affairs and External Relations Council. See Presidency Conclusions, European Council of Seville, at p. 23, Point C.4, Doc. SN 200/1/02 REV 1

[32] See *ibid.*, at Point D.

[33] See art. I-21 of the Draft Constitutional Treaty. The first version of the Draft Treaty provided for chairs of both the European Council (art. 15, art. 15bis) and the Council of Ministers (art. 17, art. 17b).

[34] See Memorandum of the Benelux: A balanced institutional framework for an enlarged, more effective and more transparent Union, 4 December 2002 (available at http://www.diplobel.fgov.be/Press/Home/homedetails.asp?ID=400).

with a longer-term perspective than the current six month rotating presidency. The power of the European Council to set the long-term planning of Union action creates a fundamental tension vis-à-vis attempts by the Commission to set the overall agenda for the European Union. This indicates one of the constitutional fault lines of the inverse hierarchy of EU constitutionalism. The Commission's December 2002 paper sees this clearly: it moves to extend the exclusive power of the Commission to initiate Union action by submitting a formal proposal for the overall strategic programming of Union action.

As a matter of autonomous evolution of national constitutional law, Member State parliaments may parallel the decision-making process in the Council of Ministers. Thus, for example, under revised art. 23(3) of the *Grundgesetz* or Basic Law, the German Government now has to consult the German Parliament before taking a position on a proposal submitted by the Commission to the Council of Ministers. The Federal Government has to act faithfully on Parliament's opinion during the different phases of decision-making in the EU Council of Ministers. And, Parliament can enforce the discharge of this obligation in the Federal Constitutional Court.[35] Art. 2 EU and art. 5 EC[36] stipulate that the European Union and the European Community exercise their competences according to the principles of subsidiarity and proportionality, except when acting pursuant to an exclusive competence. A Protocol on Subsidiarity to the treaty on European Union sets out the substantive and procedural requirements to implement the principle.[37] And the Draft Constitutional Treaty further emphasizes the periphery by giving the Member States' parliaments a role in the effective monitoring of the subsidiarity principle.[38]

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[35] See 92 BVERFGE 203 (on the parallel provisions of art. 23(4),(5) Basic Law concerning the rights of the *Länder*).

[36] Art. 5 (ex art. 3b) EC.

[37] The Draft Constitutional Treaty continues this approach of setting forth the details of the application of the principles of subsidiarity and proportionality in a separate protocol (Annex II). For the current practice of the Commission see Answer given by Mr. Prodi on behalf of the Commission to Written Question E-2830/99 to the Commission, 22 February 2000, 2000 OJ C 280E/142.

[38] Paras. 5, 6, and 7 of the Subsidiarity Protocol.

3. The periphery's control over the bases of Union competence

Member States retain control of the treaties and thus of the highest authority in the Union legal order. Unanimity rules, in that any amendment requires the constitutionally valid consent of each Member State to enter into force.[39] Amending the treaties is a well-established way to either expand or to limit the competences of the centre. The fact that since 1992 (Treaty of Maastricht) there have been full-blown amendments in 1997 (Treaty of Amsterdam) and 2000 (Treaty of Nice) suggests that engaging in an Intergovernmental Conference with the aim of treaty revision is not prohibitively costly for Member States. Such changes require ratification according to the respective procedures of the Member States but not by the European Parliament. Amendment thus involves a range of actors different from the repeat players in the committees and conference rooms of Brussels. All Member States vest the ratification power in their national Parliaments; the federal or decentralized Member States also involve the intra-federal level.[40] Member States have also made use of their treaty amendment power to send more general signals about their view of the proper balance between centre and the periphery. On more specific points, Member States establish their views as a matter of treaty law by means of the protocols and declarations that are a regular feature of the final acts concluding the Intergovernmental Conferences.[41] Such instruments stipulate the agreed understanding of a certain provision of treaty law. In at least one instance, a declaration was used to limit the effects of a judgment of the Court of Justice.[42] The

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[39] This unanimity has in the past been achieved by permitting closer cooperation of certain Member States (Schengen, the common currency), on the one hand, and numerous exceptions for individual Member States which had often to be negotiated in order to allow a Member State to ratify an amendment, on the other. The Penelope paper, *supra* note 24, had proposed that inability to ratify an amendment should entail an obligation of that Member State to leave the Union altogether.

[40] Thus, according to art. 23(1) 2nd sentence of the German Basic Law, ratification of treaties amending the European treaties requires assent of both Chambers of Parliament (*Bundestag* and *Bundesrat*). This procedure is specific to the ratification of EU treaties as ratification of all other treaties requires assent only of the *Bundestag*.

[41] A protocol attached to the EC Treaty has treaty status, art. 311 EC.

[42] The Protocol No. 2 on art. 119 EC to the Maastricht treaty limited the temporal effects of the decision of the Court in Case 262/88, Barber v. Guardian Royal Exchange [1990] ECR I-1989. In *Barber*, the Court of Justice interpreted the treaty provision guaranteeing equal pay to men and women (art. 119 EEC, art. 141 EC) as extending to occupational pension schemes, which had large implications for the national systems. See Deirdre Curtin, *Scalping the Community legislator: Occupational Pensions and "Barber"*, 27 COMMON MARKET L REV 475 (1990). In contrast, the protocol purports to limit the retroactive effect of the ruling. The protocol stipulates that, with the exception of those who had already instituted a claim, only pay attributable to periods of service completed after 17 May 1990 – the date of the

Member States have taken corrective action to the relative lack of central fundamental rights authority. The competence provided for in art. 13 EC, to combat discrimination based on sexual orientation, can be seen as a response to the well-known *Grant* case of the European Court of Justice. Member States' parliaments maintain a tight control over the treaties even in the newly devised, abbreviated procedure used to bring about a limited, specific change in the treaties. Such change also requires consent of the national Parliaments.[43] In such cases, the European Council decides to amend and then recommends the amendment for adoption by the Member States in accordance with their respective constitutional procedures.[44] Member States Parliaments are well equipped to discharge the important function that accrues to them here. The assumptions underlying much of public choice theory about parliamentary decision-making in this respect have to be adapted in the face of the institutional design of parliamentary democracies. The longer terms of office (between 4 and 5 years for parliamentarians), proportional representation and the rare occurrence of non-party backed challenges of an incumbent tend to insulate the individual parliamentarian from certain short-term re-election considerations. The search for power, at which any rational parliamentarian would be oriented, may direct him or her to take a longterm view of the relevant causation codes (and thus to exercise power effectively).

The adoption of the 'Charter of Fundamental Rights of the European Union' features an innovation in the process of amending the treaties. The European Councils of Cologne and Tampere in 1999 decided to draw up a Charter of fundamental rights, and laid down the composition and working methods of the body responsible for drafting the Charter, which later on took the name of "Convention".[45] The Convention was comprised

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Barber judgment – would constitute pay within the meaning of art. 141 EC (ex art. 119). In much of the subsequent litigation, the ECJ managed, without necessarily mentioning the protocol, to correspond with its terms. See Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 19 COMMON MARKET L REV 17 (1992); Thomas Hervey, *Legal Issues concerning the Barber Protocol*, in DAVID O'KEEFE & PETER TWOMEY, EDS., LEGAL ISSUES OF THE MAASTRICHT TREATY 329 (1994).

[43] See, e.g., art. 190(4) EC; art. 229a rev. EC; art. 17(1) subpara. 2 EU.

[44] See, e.g., art. 17(1) rev. EU, which provides that a common defense policy for the Union presupposes such a treaty amendment.

[45] See Presidency Conclusions, European Council of Cologne, 3/4 June 1999, Annex IV (available at http://europa.eu.int/council/off/conclu/june99/june99_en.pdf).

representatives of the Member States governments, the European Parliament, the Commission, and the national parliaments. And the drafting of a Constitutional Trearty was again to a similarly composed deliberative body outside of the diplomatic machinery of the Member States (the European Convention). The involvement of Community institutions in this act of constitutional law-making is indeed a remarkable development that some think may indicate a emergence of a separate constituent power of the Union, independent of the Member States. Upon closer examination, however, things are smaller than they appear at first sight. In fact, the Member States have retained the keys for the Charter to become part of the Union's constitutionalism, as they have done regarding the Draft Constitutional Treaty elaborated and adopted by the European Convention.

IV. THE RULE OF LAW IN THE UNION

Law's function is collectively binding decision-making. In a constitutional system, legal and political decision-making are structurally joined so that legal decisions are secondary to the primary political decisions. Law rationalizes the exercise of public authority providing it with secondary legitimacy that complements the primary legitimacy derived from elections.[46] The Rule of law is that bundle of principles that seeks to maintain the specific rationality of the law. Most important is the principle that rules be binding; jurisdictional and procedural rules control whether aspirational law (*Sollen*) in fact translates into reality (*Sein*), and how reality is then fed back into the "ought-to". By ensuring that the legal system operates according to the binary code of legal/illegal,[47] the Rule of law works "the re-entry of the form into the form". Internal consistency of the law is thus both the result and the object of the institution of the Rule of law.

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[46] The choices on judicial and other procedures then reflect the values and self-perception of a polity. See Duncan Kennedy*, Form and Substance in Private Law Adjudication*, 89 HARV L REV 1685 (1976).

[47] See DI FABIO, *supra* note 36.

A) THE CENTRE

The EU's ability to establish itself as a "Community of law", i.e. as polity under the Rule of law, has been critically important for propping up its fledging political legitimacy. The EC treaty provides for judicial review of the acts of the Community organs,[48] enforcement of the treaty obligations incumbent on the Member States[49] and, most importantly, contains the preliminary ruling procedure of art. 234 EC, by which national courts can refer questions to the European Court of Justice concerning either the interpretation of a Community act or its validity. But the Court of Justice has also been instrumental in the establishment of an autonomous European legal order.[50] The hallmarks of that jurisprudence bear repeating: the recognition of the self-executing quality of potentially all Community law including the treaties and the fundamental freedoms set out therein,[51] supremacy of Community law over national law, including national constitutional law,[52] and parallelism of internal and external competences of the Community.[53] To what extent Member States remain bound by their national constitutions when acting within the purview of Community law is a difficult, and not yet fully settled structural question that calls into question the hierarchy within the centre.[54] The Court of Justice also has ensured the effective enforcement of Community law in the Member State courts. Sovereign immunity of Member States from private suits with Community causes of action is limited to Community court but does not extend to the national courts. Aside from establishing the rule that remedies available under national law must be administered in a non-discriminatory fashion and in such a way so as not to

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48 See art. 230 EC.

49 See art. 226 EC.

50 See Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM J INT'L L 1 (1985).

51 ECJ, Judgment of 5 February 1963, van Gend en Loos, [1963] ECR 1.

52 ECJ, Case 6/64, Judgment of 15 July 1964, Costa/ENEL, [1964] ECR 585.

53 ECJ, Case 22/70, Judgment of 31 March 1971, Commission v. Council (ERTA), [1971] ECR 263.

54 The ECJ has held that Member States are bound by the general principles of Community law without saying specifically that Member States are preempted from additionally applying their relevant higher law. However, because of the supremacy of Community law over national law the Court's view does not seem to leave room for an application of national law that would reach a result different from the one reached when applying the parallel Community law provisions.

render the substantive Community law ineffective, the Court has judicially created specific Community law remedies.[55]

As important as this body of law has been for establishing firmly the rule of Community law throughout the treaties' purview, it would have remained a dead letter had the Court not been able to turn the national courts into its loyal cooperators through the referral procedure of art. 234 EC. However, national courts have to refer whenever they consider a Community act invalid and intend not to apply it in the case at hand.[56] With regard to the specific point of the authoritative interpretation or striking down of a Community law, therefore, the hierarchy also operates within the system of judicial protection formed by the Court of Justice and the national courts. Why national courts have responded so favorably to the referral procedure can be probed by using a rational choice approach, which highlights the leverage that the courts gain over the national legislatures whose laws they may strike down as violating Community law.[57] National judges may also be particularly receptive to the high moral ground that European integration has claimed from the beginning. But the prospect of a fully self-referential legal system the central organization of which is so obviously a court should appeal to anyone operating within it.

The Member States as constituent powers have taken the institutional steps necessary to sustain the functionality of the Court of Justice for the rule of Community law. To the previous establishment of a Court of First Instance[58] the Treaty of Nice adds important

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[55] Preliminary injunctions (see ECJ, Factortame) and claims for money damages for failure of the national legislature to comply with its EU obligations (see ECJ, Cases 6 & 9/90, Francovic, [1991] ECR I-5357) are now available under Community law. Such hard-edged versions of enforcement, where Community law is found to require a certain interpretation or application of the national procedural law, can be distinguished from the soft-edged enforcement that is accomplished by "mere" influence of Union law, see JÜRGEN SCHWARZE (ED.), ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE (1996).

[56] See ECJ, Case 314/85, Judgment of 22 October 1987, Foto-Frost, [1987] ECR 4199. The treaty itself obligates last-instance courts to refer under art. 234(3) EC.

[57] See Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: a Critical Evaluation of Theories of Legal Integration*, in: ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH H.H. WEILER, EDS., THE EUROPEAN COURT AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE 227 (1998) (analyzing the alternative explanations).

[58] See Council Decision 88/591 of 23 October 1988 establishing a Court of First Instance of the European Communities, 1988 OJ L 391/1. The Treaty of Maastricht rooted the CFI in the EC treaty itself, art. 225(1) EC.

reforms in the overall judicial architecture of the Union.[59] The Draft Constitutional Treaty strengthens the Court by doing away with the execeptions to the standards procedure of art. 234 EC provided for currently in art. 68 EC and art. 35 EUV concerning home affairs.

B) THE PERIPHERY

It is precisely the integrity of the treaties as a legal order binding on both the Union and the Member States that is guaranteed by the periphery. To the extent that the Court of Justice does not have jurisdiction over the treaties, Member States' abiding by the law remains crucial.

1. Integrity of the treaties

The Court of Justice has asserted the integrity of the treaties by ruling that secondary legislation by Council, Parliament and Commission cannot add to the rules of the Treaties.[60] However, the key to the Rule of law in the European legal order remains art. 308 EC. Quite unassumingly included in the original treaties, this provision stipulates a truism under general international treaty law: that the treaty's limits remain subject to the States Parties acting unanimously. The unanimous action under art. 308 EC is through the Council, acting on a Commission proposal and in consultation with the Parliament, to achieve a Community objective in the operation of the common market.[61] But it is precisely this malleability that calls into question the legal autonomy of the treaty and the legal and thus final interpretation by the Court of Justice over its legislature. The way out of this conundrum is to defer to a decision-maker outside of the institutional balance between Union judiciary and legislature, namely to the Member

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[59] Arts. 220 and 225a EC rev. provide for the establishment of judicial panels to be attached to the Court of First Instance to which an appeal may lie; art. 222 EC rev. permits that the number of Advocate Generals be increased and grants the latter discretion as to whether to make reasoned submissions in a case. Art. 225 EC rev. broadens the jurisdiction of the Court of First Instance, including the preliminary ruling procedure of art. 234 EC.

[60] See ECJ, Case C-240/90 Germany v Commission [1992] ECR I-5383, para. 42; Case C-378/00, Judgment of 21 January 2003 (n.y.r.), para. 39.

[61] See art. 308 EC: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission

States. The Court of Justice made a foray into this area in its opinion 1/94 on the accession of the European Community to the European Convention on Human Rights (ECHR).[62] The Court held that, for the Community to adhere to the ECHR, an explicit amendment of the treaty was required. Thus, accession to the ECHR is a constitutional question that cannot be decided by the *constituted* powers of the centre, including the Council of Ministers acting unanimously pursuant to its residual powers under art. 306 EC, but rather requires action by the *constituent* powers of the periphery, the Member States.

2. Intergovernmental cooperation

A true challenge to the rule of law in the sense of the binding character and overall consistency of the legal order of the Union arises out of two particular strands of the structure of European integration: the areas of intergovernmental cooperation and the provision for enhanced cooperation. The Court of Justice has no jurisdiction over action by the Union pursuant to the Common Foreign and Security Policy. With regard to Police and Criminal Justice cooperation, under art. 35 EU, jurisdiction of the Court of Justice depends on an express act of acceptance by Member States. The Court's jurisdiction is limited to the secondary acts adopted under Title VI EU but does not include interpretation of the primary treaty law as such.[63] With respect to enhanced cooperation among certain Member States, the jurisdiction of the Court does not extend to the substantive provisions set forth in art. 43 EU.[64]

Ensuring observance of these provisions is therefore left to the political branches, i.e. the Commission, the Council and the European Council, which art. 45 EU charges with "ensur[ing] the consistency of activities undertaken on the basis of this Title [VII] and the consistency of such activities with the policies of the Union and the Community." That

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and after consulting the European Parliament, take the appropriate measures." The Draft Constitutional Treaty proposes to retain the concept with different wording in its Part IV.

62 Under art. 308 EC, the Council and the Commission can ask the ECJ to give an opinion on the compatibility of an international agreement with the treaties prior to its conclusion. Amendment by the Treaty of Nice confers that right on the European Parliament as well.

63 See art. 234 EC: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; …"

64 See art. 43 EU.

leaves the three with the task of securing the rule of law within the Union. The political branches of government in a nation State are capable of interpreting a constitution self-consciously and are actually expected to do so.[65] This insight was confirmed by the practice of the European Council in the 2000 Austria case concerning the interpretation and application of art. 7 EU.[66] This clause requires Member States to abide by certain standards both in the field of Union law and of Member State autonomous action.[67] Having to apply the provision for the first time, the European Council devised a procedure involving the report by a group of independent experts to help determine whether such standards had been met. This (authentic) interpretation of a constitutional question of the Union treaty by the European Council is now laid down in art. 7(1) rev. EU; judicial review of action by the Union under art. 7(2) rev. EU remains limited to the ”purely procedural stipulations”.

V. INDIVIDUAL RIGHTS IN THE UNION

Every polity is based on a conception of the relation between public power, society and the individual. In the humanistic view of the individual, inherent human rights are universal, their source cannot be found in a State or an international act. Yet a constitution allows for a secondary formulation of human rights as *rational* self-limitation of power, thus legitimizing the public authority by limiting its reach. Fundamental rights, under this reading, complement the conceptual framework of legitimate power by surmounting the exclusive power through democratic inclusion,

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65 See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS, 2 vol. (1999, 2001), 12.

66 Following the formation of a coalition government in Austria comprising the far-right Austrian Freedom Party, the ”XIV” (the fourteen other Member States of the EU) decided to limit bilateral contacts with that Member State. Those sanctions extended to the workings of the Union institutions but stopped short of excluding Austria from them. The sanctions were discontinued pursuant to the report of a “Committee of Wise Men” that evaluated the internal situation in Austria with regard to the standards set forth in the Committee’s mandate. While the “XIV” avoided specifying whether they acted under art. 7 EU or rather under general or regional public international law much points towards the conclusion that EU law was controlling. Thus, the Member State holding the Presidency of the Union articulated the position of the “XIV” vis-à-vis Austria. See FRANK SCHORKOPF, DIE MASSNAHMEN DER XIV EU-MITGLIEDSTAATEN GEGEN ÖSTERREICH (2002).

67 The Draft Constitutional Treaty would incorporate the mechanism set out in art. 7 EU for enforcing the standards set forth in art. I-2. The explanatory note for art. I-2 says that it concentrates on the

rationalizing the exercise of political power through legal forms, and providing distance between society and public power through enforceable individual rights. The essential unity of the concept of human rights allows to [re-]formulate human rights again, this time as a rational self-limitation of public power created by sovereign States at the international level.

A) THE CENTRE

In its individual rights jurisprudence, the Court has had to grapple with four separate yet interrelated questions: the autonomy of its fundamental rights law, the scope of its application, the coherence of its interpretation and of its application to acts of the Community and of the Member States.

1. The fundamental rights jurisprudence of the European Court of Justice

With no written bill of rights enshrined in the treaties, the Court of Justice was forced to develop fundamental rights jurisprudentially. This brought the Court to the brink of moving from the legal into the political system, in the process threatening the legitimacy of its entire enterprise of judicial activism. In this process, the Court resorted to treating the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), drawn up in the international organisation Council of Europe, as a bill of rights de facto binding on the Union.[68] As to the scope of application, the Court of Justice has consistently ruled that Union fundamental rights are binding on Member States only when they are implementing Union law.[69] Fundamental rights indicate areas of value judgments that the primarily economic rationality of the treaties cannot

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essentials, the manifest risk of a breach of which would be sufficient to initiate the procedure for alerting and sanctioning the Member State in its Part IV.

[68] For express references to both the ECHR and case law of the European Court of Human Rights see, e.g., Case C-7/98, Judgment of 28.3.2000, Krombach, [2000] ECR I-1935, para. 31.

[69] Member States are bound not only when implementing Union law in the strict sense (ECJ, Case 5/88, Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609) but also when derogating from (ECJ, Case C-260/89, ERT v. DEP [1991] ECR I-2925, para. 25) or claiming to act outside of (ECJ, Case C-368/95, Familiapress v Bauer Verlag [1997] ECR I-3689) the fundamental freedoms of the EC treaty. This limited application of Union human rights law is, of course, a crucial difference with the U.S. protection system under the doctrine of incorporation to the Fourteenth Constitutional Amendment. See KOEN LENAERTS, LE JUGE ET LA CONSTITUTION AUX ETATS-UNIS D'AMÉRIQUE ET DANS L'ORDRE JURIDIQUE EUROPÉEN, 187 et seq. (1988) (comparing the European and the U.S. systems).

adequately accommodate and which therefore prescribe areas of Member State competence. For example, the distribution of information in Ireland on the availability of abortion in British clinics was not covered as an EU protected service under art. 49 EC (*Grogan*) and was thus not an enforceable Union right.[70] Similarly, the question whether an employer could deny certain compensatory employment benefits to employees' same-sex partners while at the same time allowing them for an unwed employee's (different sex) partner did not come under the prohibition of sex-based discrimination in art. 131 EC (*Grant*).[71] In each of these cases the Court of Justice was acutely aware of the fundamental rights questions they raised, the right to an abortion[72] and discrimination based on sexual orientation.[73] Yet the ECJ expressly declined to rule on these issues for lack of Community competence. Thus, the fundamental rights questions serve to highlight a bright line in the delimitation of competences between the Community and the Member State. The Community cannot decide contentious fundamental right questions involving social choices beyond the specific rationale underlying the limited Community competence in question. Seen from this angle, *Grogan* and *Grant* are correctly decided. The cases highlight the specific weakness of the ECJ's fundamental rights jurisprudence as opposed to that of any national constitutional court: the Court of Justice will not decide all the fundamental rights issues of the day. Again, the limits to the centre's approach follow from a constitutional choice that Member States have made. There can be no consistent fundamental rights jurisprudence at the centre because the periphery does not come under its purview. Member States are bound by Union fundamental rights only insofar as they are implementing Community law. There is no equivalent to the equal protection clause of the 14th Amendment, which allows the

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70 See ECJ, Case C-159/90, Judgment of 4 October 1991, Society for the Protection of Unborn Children Ireland (Grogan), [1991] ECR 1991, I-4685. The European Court of Human Rights, under its jurisdiction for the interpretation and application of the ECHR, later took the case but decided it on rather narrow grounds (ECtHR, No. 64/1991, Judgment of 23 September 1992, Open Door and Dublin Well Women v. Ireland). This Court noted that the States Parties to the Convention enjoyed a large margin of appreciation in moral matters and that there was no European consensus discernible on the protection of unborn life. The Court found nevertheless that the Irish authorities had violated the right of the applicant to free expression enshrined in art. 10 ECHR on the facts of the case since the incriminated information was freely available by other means.

71 See ECJ, Case C-249/96, Judgment of 17 February 1998, Grant, [1998] ECR I-621.

72 See *Grogan*, supra note 82, at paras. 22, 31.

73 See *Grant*, supra note 82, at paras. 24-46.

Supreme Court to create a more or less uniform standard of individual rights protection and under which the States' fundamental rights competence concerns marginal questions only. As the Court of Justice is faced with the diversity of fundamental rights protection in the Member States, and is constitutionally barred from homogenizing it, it has to rely on the periphery to guarantee those rights.

2. The Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights of the European Union spells out for the first time in a written document the fundamental rights binding on the organs of the Union.[74] Even though the adoption as a "solemn proclamation" precludes currently seeing the Charter as an legally binding instrument, the Charter has been shaping the fundamental rights jurisprudence of the Court of Justice.[75] The Draft Constitutional Treaty envisages it as an integral part of the future constitution.[76] The Charter is not just a re-statement of the Court of Justice's jurisprudence.[77] Rather it amalgamates preferences and structures of

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[74] This Charter is the result of a special procedure without precedent in the history of the European Union. The Cologne European Council (3-4 June 1999) entrusted the drafting of the Charter to a body composed of representatives of the Member States governments and parliaments and the European under the chairmanship of Roman Herzog, former President of the Federal Republic of Germany. This body held its constituent meeting in December 1999 where it named itself Convention and adopted the draft on 2 October 2000, which the European Council (Biarritz, 13-14 October 2000) approved. The Convention drew up the draft Charter with a view to its possible incorporation ('as if'-approach), and the European Parliament voted in favor of incorporation. The Presidents of the European Parliament, the Council of Ministers and the Commission signed and proclaimed the Charter on behalf of their institutions at the meeting of the European Council in Nice on 7 December 2000. The Nice European Council decided to consider the question of the Charter's legal status during the general debate on the future of the European Union (see Presidency conclusions, Annex I).

[75] See the Commission's Communication on the legal nature of the Charter of Fundamental Rights of the European Union, COM(2000) 644 final, 11 October 2001. The Advocates General of the Court have referred to the Convention several times, see, e.g., the Conclusions of Advocate General Tissue, ECJ, Case C-173/99, BECTU, 26 June 2001.

[76] Art. I-7(1) of the Draft Constitutional Treaty declares the rights, freedoms and principles set out in the Charter to "constitute the Second Part of this Constitution". While Part II renders the Charter in both numbering and content of the provisions the wording of arts. II-1 through II-54 contains drafting adjustments recommended in the Final Report of the Convention's Working Group II, CONV 354/02, 22 October 2002 (available at http://register.consilium.eu.int/pdf/de/02/cv00/00354d2.pdf). The Charter and the Court's jurisdiction over it will probably render obsolete the two other sources of fundamental rights protection that the Draft Constitutional Treaty provides for. This is the accession to the ECHR (art. I-7(2)) and continuing force of the fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, as general principles of the Union's law (art. I-7(3)).

[77] See Preamble, para. 4: "[…] it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

the Member States' fundamental rights orders, the European Convention on Human Rights and certain provisions of the treaties with fundamental rights aspects; the European Convention on Human Rights is declared the minimum standard.[78] In several respects the Charter[79] goes beyond the case law of the Court of Justice, e.g. with respect to those "dignity" rights that have a distinctly non-economic context,[80] certain "freedoms"[81] and "equality rights"[82] and the "citizens' rights".[83] With respect to art. 18 – right to asylum – and art. 19 – protection in the event of removal, expulsion or extradition -, the substance of the Charter provisions had been part of Union treaty law but the individual rights status had not been not clear.[84] It will no doubt fall to the Court of Justice to sort out which parts of the Charter are actually judicially enforceable individual rights and which parts are merely or primarily exhortations to act directed at the political organs. The Member States, however, have sent a powerful signal to the Court of Justice that they are ready to consider these issues from the angle of individual rights protection and expect the Court to follow suit. At the same time, the Member States in the exercise of their treaty-making power have reinforced a clearly limited understanding of the scope of application of Union human rights.[85]

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78 See art. 52(3) of the Charter (art. II-52(3) of the Draft Constitutional Treaty).

79 It is not necessary, for the purpose of this paper, to analyze the several provisions of the Charter in detail. It has seven parts: Chapter I: Dignity (arts. 1 to 5); Chapter II; Freedoms (arts. 6 to 19), Chapter III: Equality (arts. 20 to 27); Chapter IV: Solidarity (arts. 27 to 38); Chapter V: Citizens' rights (arts. 39 to 46); Chapter VI: Justice (arts. 47 to 50); Chapter VII: Final Dispositions (arts. 51 to 54).

80 See, e.g., art. 2 – right to life; art. 3 – right to the integrity of the person; art. 4 – prohibition of torture and inhuman or degrading treatment or punishment; art. 5 – prohibition of slavery and forced labor.

81 Art. 6 - liberty and security; art. 7 - respect for private and family life; art. 9 - right to right to marry and found a family; ought, conscience and religion; art. 13 – freedom of the arts and sciences.

82 See, e.g.. rights of the child (art. 24), of the elderly (art. 25), of persons with disabilities (art. 26).

83 See, e.g., right to vote and stand as a candidate at elections to the European Parliament and at municipal elections (arts. 39, 40), access to documents (art. 42).

84 In a similar vein, the "solidarity" rights set out in arts. 27–38 of the Charter (arts. II-27-38 of the Draft Constitutional Treaty), ranging from workers' rights, through health care to environmental protection, go largely beyond the current state of the Court of Justice's jurisprudence.

85 See art. 51 of the Charter (art. II-51 of the Draft Constitutional Treaty) and Praesidium of the Charter Convention, Explanations on the full text of the Charter, CHARTE 4473/1/00 REV 1 CONVENT 49 (available at http://www.europarl.eu.int/charter/pdf/04473_en.pdf). Furthermore see Koen Lenaerts, *Respect for Fundamental Rights as a Constitutional Principle of the European Union,* 1 COL. J. EUR. L. 21 (2000) (understanding in particular the Treaty of Amsterdam as a warning by the Member States to the Court of Justice to stick to its limited understanding of the scope of application of the Union human rights); R. Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, 8 EUR. L. J. 492, at 494 (2002) (disagreeing with Lenaert's view).

B) THE PERIPHERY

1. The national Constitutional Courts

The periphery exercises influence with respect to the centre's fundamental rights standards through the Member States constitutional courts. The German[86] and Italian[87] Constitutional Courts as well as the Irish Supreme Court[88] have asserted that the integrity of the national Constitutions acts as a limit to any transfer of competences to the EU. At the core of that constitutional integrity lie the fundamental rights guarantees enshrined in the national constitutions.[89] The German Constitutional Court, e.g., first held that it would test any Community act against the fundamental rights standards of the Basic Law as long as the Union had no adequate standards of its own. It then reversed that presumption by holding held that it would not exercise its jurisdiction under the German Basic Law over Community acts as long as the European Court of Justice met a general standard of fundamental rights protection as defined by the German court.[90] The strong demands placed by the constitutional courts of certain Member States on the Court of Justice have been providing it with the incentive to establish fundamental rights standards for the centre's decision-making in the first place. But the high visibility of the demands of the national courts has also given the Court of Justice the legitimacy vis-à-vis the Union's political organs to uphold fundamental rights standards. The complex process of political compromise in a union of nation States places a higher onus on those calling for checks on decisions nevertheless rendered by that process. Developing a stringent fundamental rights jurisprudence meant constraining the powers of the centre that the Court of Justice was otherwise working to expand. This impediment could be overcome

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86 See 73 BVERFGE 239 and 89 BVERFGE 155.

87 See Corte Costituzionale, Judgment of 18 December 1973, dez. no. 83/73, Frontini ed al. v. Amministrazione delle finanze dello Stato, 1973 Giurisprudenze costituzionale, 2401; Judgment of 19 April 1985, dez. no. 113/85, S.p.A. BECA v. Amministrazione delle finanze dello Stato, 68 Rivista diritto internazionale 388 (1985); Judgment of 11 July 1989, dez. no. 369/89, Provinzia autonoma di Bolzano v. Presidente Consiglio Ministri, 72 Rivista diritto internazionale 404 (1989).

88 See Judgment of 9 April 19897, Crotty v. An Taoseach & others, 1987 Irish LR Monthly 443; Judgement of 19 December 1989, Society for the Protection of Unborn Children Ireland v. Grogan, 1990 Irish LR Monthly 350.

89 As a matter of public choice, the constitutional courts have built their status primarily on their fundamental rights jurisprudence and thus were and are not likely to surrender it to the European Court of Justice.

90 See 89 BVERFG 155.

after the Constitutional Courts of certain Member States, most notably Germany and Italy, had continued to subject Community legislative acts to scrutiny for compatibility with their respective national constitutions. Such scrutiny in turn endangered the uniform application of Community law in all Member States, something in which the Council and Commission have been acutely interested. Analysis of the Court of Justice's recent jurisprudence shows a coherent application of fundamental rights standards to acts of the Union and of the Member States that fall within the purview of Union law.[91] The inverse hierarchy thus induced turns on procedure. The (temporal) sequencing of the judicial pronouncements allows the national constitutional courts will be able to make their interpretation of the issue known to the European Court. In the well-documented *Bananas* cases, the Court of Justice at first ruled that the Community regulation abolishing an import contingent of so-called "dollar-zone" bananas to (German) importers raised no fundamental rights issue.[92] Upon a decision of the Federal Constitutional Court of Germany indicating a retroactivity problem with the regulation, in which that court nevertheless avoided a definitive ruling by pointing out that the available recourse had not been exhausted, the case reached the Court of Justice again.[93] This time the Court of Justice reversed itself, seeing the retroactivity problem and interpreting a certain provision of the regulation in such a way as to ease the transition for the hardest hit importers.[94] In its decision ending the *Bananas* saga, the German Constitutional Court then dismissed the question of unconstitutionality of the regulation that had been certified by a lower court.[95] In ruling the referral inadmissible, the Constitutional Court stated that the lower court's referral was not sufficiently argued, for, among other things, it contained no discussion of the relevant judgment of the Court of

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91 See VOLKER RÖBEN, DIE EINWIRKUNG DER RECHTSPRECHUNG DES EUROPAEISCHEN GERICHTSHOFS AUF DAS MITGLIEDSTAATLICHE VERFAHREN 256-312 (1998).

92 See ECJ, Case C-466/93, Atlanta Fruchthandelsgesellschaft, [1995] ECR, I-3799; Case C-280/93, Germany/Council, [1994] ECR, I-4973.

93 See 1st Chamber of the 2nd Senate of the Federal Constitutional Court, Order of 25 January 1995 - 2 BvR 2689/94 and 2 BvR 52/95 - (reported ZEITSCHRIFT FÜR EUROPÄISCHES WIRTSCHAFTSRECHT 126 (1995)).

94 See ECJ, Case C-68/95, T. Port GmbH & Co. KG, [1996] ECR, I-6065.

95 See BVERFGEE 102, 147.

Justice. This implied a subtle reminder of the jurisdictional quid pro quo:[96] The European Court of Justice will be followed in its interpretation and application of human rights if and as long as that Court remains willing to accept hints from the national constitutional courts when they strongly feel that the Court of Justice is steering a wrong course.

The continuing impact of the Member States constitutional courts appears to be guaranteed. The limited scope of application of the Union fundamental rights system and the paucity of genuine fundamental rights cases to arise before the courts of the European Union even within that scope. Given these strictures, only continuous complementary fundamental rights decisions by the national constitutional courts ensure the overall viability and coherence of fundamental rights jurisprudence in the Union. The sheer frequency and importance of the fundamental rights issues to reach the national constitutional courts reverse the hierarchy claimed by the centre: The EU courts have to look to the national courts for guidance on the substantive fundamental rights issues that they face.

2. The European Court of Human Rights

A separate challenge to the Court of Justice arises from the side of the European Convention on Human Rights and the institutional machinery set up by the Council of Europe to implement the Convention. The Court of Justice went out of its way in *Opinion 2/94* to avoid being subjected to judicial control of its decision by the European Court of Human Rights on the basis of the ECHR.[97] Undeterred, the Strasbourg Court

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[96] By order of 9 January 2001 (2nd Chamber of the 1st Senate of the Federal Constitutional Court, - 1 BvR 1036/99 – reported NEUE JURISTISCHE WOCHENSCHRIFT 1267 (2001)), the Constitutional Court quashed a lower court judgment on the ground that that court had not referred a question of Community law to the Court of Justice. Such non-referral violates the fundamental guarantee enshrined in the Basic Law to have one's case heard by the competent jurisdiction (75 BVERFGE 223). But in this case, the Constitutional Court took the opportunity to state its own view of the Union fundamental right issue involved (equal treatment of men and women). The Court obviously expects this statement to have some impact on the interpretation by the Court of Justice when seized by the lower court upon its referral.

[97] See ECJ; Opinion 2/94 of 28 March 1996, Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] ECR I-1763. The Court said that the treaty on its face nor under art. 306 EC conferred the competence on the Community to accede to the ECHR since such accession would entail a fundamental reordering of the Community's judicial system.

affirmed just a few years later its jurisdiction over the Union treaty law.[98] Art. I-5(2) of the Draft Constitutional Treaty would expressly grant the Union the competence to accede to the ECHR. If the Union made use of this competence, the periphery would further be strengthened.

CONCLUSIONS

Introducing constitutionalism in the specific context of the European Union renders visible the central rational function of constitutionalism as the comprehensible foundation and limitation of public power. The Nice Declaration, the Laeken Mandate, and the Draft Constitutional Treaty really turns on this point in that they aim to re-structure the current positive treaty law. The constitutionalism of the European Union proposes to resolve the paradox of the self-conscious choice for a union of constitutional nations States rather than a federal State. The constitutionalism in the European Union is marked by inverse hierarchy:[99] The centre is a largely autonomous system for decision-making. However, the centre depends for its decision-making on input from the periphery, which the organs at the apex of the respective branches of government in the Member States provide. And as much as the centre depends on the input from the periphery, the periphery depends on the centre harnessing it its forms and procedures involving the Council, Commission and Parliament. Within the constitutionalism of inverse hierarchy the institutions of liberal democracy transcend the constitutional nation State but rely on its continuing viability. The model reflects on its continuous attractiveness through further European nation States applying for membership. 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. Such inverse hierarchy is also an answer to the dilemma that the

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[98] ECtHR, Case of Matthews v. United Kingdom, Judgment of 18 February 1999. States Parties to the Convention may not dispense themselves from their obligations under the Conventions by transferring powers on an international organization.

[99] See LUHMANN, *supra* note 9, at 75-87 (noting the paradox created by placing distinctions into a unity, which is retained in the subsequent operations of the system).

constitutional nation State is both indispensable and insufficient for the political system of *Weltgesellschaft*.[100]

[100] On the notion of world society *s*ee LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT (2002), at 244-48, 351-52.