



Justice, only justice shalt thou pursue...(Deut.XVI:20)

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## MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW

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### EUROPEAN INTEGRATION: THE NEW GERMAN SCHOLARSHIP

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Armin von Bogdandy

#### **Doctrine of Principles**

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## **Abstract**

Over the last years a differentiation within European scholarship has taken place: the creation and development of European constitutional law scholarship. Delineating a doctrine of principles offers a prime method to develop this scholarship as has happened in national legal systems. Certainly, such a construction will not advance a logical unity or pre-established concord of primary European law. Rather, the diffuseness in the Union's constitutional law will, to a large extent, be able to be explained as the partly hazy content of important constitutional principles and the ambiguous relationship between them. Jurisprudence will not be able to resolve these problems alone. Yet there is something to be gained if the sizeable number of recognized principles and important elements of their legal concretizations are stipulated and controversial questions precisely defined.

# Doctrine of Principles

Armin von Bogdandy\*

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# I. THE DOCTRINE OF A DOCTRINE OF PRINCIPLES

## 1. Principles and Constitutional Scholarship

A doctrine of principles, that is, a systematic exposition of the most essential legal norms of the European legal order, offers a fine method to develop European constitutional scholarship. In fact, this discipline still has to define its subject and to establish itself as a part of legal science.<sup>1</sup> Just as European law<sup>2</sup> and then European Community law<sup>3</sup> have become sub-disciplines, a further step in this differentiation is unfolding: the development of European constitutional law scholarship.<sup>4</sup> The potential contribution of a doctrine of principles can best be explained in the context of other approaches.

At first glance, a strict orientation to the sources of law offers a reliable approach to the determination of what is part of European constitutional law.<sup>5</sup> When using such an approach, the decisive criterion for identification is whether a provision or legal institution belongs to a body of law that can only be changed under qualified requirements – above all the procedures according to Art. 48 EU.<sup>6</sup> This is how *Lenaerts* and *van Nuffel* determine European constitutional law.<sup>7</sup> This learned but traditional portrayal of primary Union law neglects, however, important issues which, at least according to the German tradition, are crucial to the science of constitutional law: focusing on structuring elements and a corresponding core of legal doctrines that determine the discipline's identity. European constitutional scholarship should consist of more than a change of labels (i. e. presenting traditional works of European

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\* Translated by Eric Pickett, revised by Markus Wagner.

<sup>1</sup> On legal science's function of constituting the object of study G. Jellinek, *Allgemeine Staatslehre*, 3rd ed., 1913 (reprinted 1976), 50; N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, 1999, 113.

<sup>2</sup> H. Mosler, "Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl. Entstehung und Qualifizierung", *ZaöRV* 14 (1951-1952), 1 (23 et seq.); H. Mosler, "Die Europäische Integration aus der Sicht der Gründungsphase", in: O. Due/M. Lutter/J. Schwarze (eds.), *Festschrift für Ulrich Everling*, vol. II, 1995, 911 et seq.

<sup>3</sup> Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 4 et seq.

<sup>4</sup> On the step-by-step development of European administrative law see E. Schmidt-Aßmann, "Strukturen des Europäischen Verwaltungsrechts: Einleitende Problemskizze", in: E. Schmidt-Aßmann/W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts*, 1999, 9, 10 et seq.

<sup>5</sup> This contribution does not discuss whether the current primary law can be considered as the constitutional law of the European Union. It departs from the premise that this is the case.

<sup>6</sup> On the amendment procedures as the decisive formal criterion Jellinek, see note 1, 51; Kelsen's approach reaches similar results, H. Kelsen, *Allgemeine Staatslehre*, 1925 (reprinted 1966), 249.

<sup>7</sup> K. Lenaerts, P. van Nuffel, *Constitutional Law of the European Union*, 1999.

primary law as works of constitutional doctrine).<sup>8</sup> Rather, the treatment of primary law as constitutional law should bring about a new quality of understanding and exposition.

Not all the provisions of the Treaties and Protocols should be accorded the same importance. Rather, a selection must take place. European constitutional scholarship should develop its field from those normative bases that *Hans Peter Ipsen* cautiously described as "Inbegriff des Primärrechts", or the "core" of primary law.<sup>9</sup> Scholarship has responded to that call,<sup>10</sup> but nobody doubts that much remains to be done.

The relevance of a doctrine of principles to constitutional scholarship is confirmed by good treatises of national constitutional law. Such expositions, which generally have much less of a problem identifying and structuring their subject, are often built upon a doctrine of principles.<sup>11</sup> By means of structuring and informing principles it is possible to understand the constitution as an "organic whole" and the constitutional text as the expression of a "grand",

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<sup>8</sup> F. Snyder, *The unfinished constitution of the European Union: principles, processes and culture*, in: Weiler/Wind (eds.), *European Constitutionalism Beyond the State*, 2003, 55 (58).

<sup>9</sup> Ipsen, see note 3, 64.

<sup>10</sup> Pathbreaking J. Frowein, "Die Herausbildung europäischer Verfassungsprinzipien", in: A. Kaufmann/E.-J. Mestmäcker/H. F. Zacher (eds.), *Rechtstaat und Menschenwürde, Festschrift für W. Maihofer*, 1988, 149; J. Frowein, "Wesentliche Elemente einer Verfassung", in: R. Bieber/P. Widmer (eds.), *Der europäische Verfassungsraum*, 1995, 71; further W. Bernhardt, *Verfassungsprinzipien – Verfassungsgerichtsfunktionen – Verfassungsprozessrecht im EWG-Vertrag*, 1987, in particular 62 et seq.; R. Bieber/B. Kahl-Wolff/L. Müller, "Cours général de droit communautaire", in: Academy of European Law (ed.), 1994, *Collected Courses of the Academy of European Law*, 1992-Vol. III-1, 49; J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe*, 1997, 183 et seq.; F. Toriello, *I principi generali del diritto comunitario*, 2000; J. H. Weiler, "European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order", *Political Studies* 1996, 517. The scholarship appears to be quite meager in particular with regard to the treatment of founding principles. A. Arnulf, *The General Principles of EEC Law and the Individual*, 1990, contains a traditional presentation of primary law. J. Usher, *General Principles of EC Law*, 1999, as well as T. Tridimas, *The General Principles of EC Law*, 1999, restrict themselves largely to *principles protecting the citizens*. The book edited J. Craig/G. de Búrca (eds.), *The Evolution of EU Law*, 1999, does not contain a doctrine of principles.

Research on the general principles of Community law has a long tradition (cf. P. Pescatore, *Le droit de l'intégration*, 1972, 70 et seq.; H. Lecheler, *Der Europäische Gerichtshof und die allgemeinen Rechtsgrundsätze*, 1971), but has largely restricted itself to principles protecting the citizen. It has not led to a doctrine with the power to shape the law like founding principles have, since it essentially concerns the limitation of governmental power. See e.g., G. Tesaurò, *Il ruolo della Corte di Giustizia nell'elaborazione dei principi generali*, in: Associazione italiana dei costituzionalisti, *Annuario* 1999, 297 et seq.

However, one must take into account a rich comparative legal literature on constitutional principles, see P.C. Müller-Graff/E. Riedel (eds.), *Gemeinsames Verfassungsrecht in der Europäischen Union*, 1998; A. Pizzorusso, *Il patrimonio costituzionale europeo*, 2002.

<sup>11</sup> Cf. K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, reprint of the 20<sup>th</sup> ed., 1999, Grundzüge, 2<sup>nd</sup> part; L. Tribe, *American Constitutional Law*, 2. ed. 1988, 2 (check neueste Auflage).

though only partially fixed, plan,<sup>12</sup> an idea perhaps alien to most Anglo-Saxon lawyers, but dear to continental scholarship.<sup>13</sup> Drafting such a “grand plan” for European constitutional law appears all the more urgent in view of the Treaties’ generally recognized insufficient structure.

## 2. Functions of a doctrine of principles

As a practical science, legal scholarship participates in law’s function to settle conflicts. The development of a European doctrine of principles may channel and perhaps rationalize political and social conflicts treating them as conflicts of principles which can be resolved according to the rules of legal rationality.<sup>14</sup>

Another important practical function of legal scholarship is the maintenance of an essential social “infrastructure” by creating and securing the transparency and coherence of the law. In order to fulfil this task, a doctrine of principles provides a “framework for orientation”.<sup>15</sup> Such a framework should be particularly helpful in the Union’s fragmented legal order which lacks grand codifications such as the French Code Civil.<sup>16</sup> It is hardly possible to find a greater challenge for legal science than the (re-)construction of this legal material so as to create order and promote coherence.<sup>17</sup>

A doctrine of principles is not merely descriptive or a systematic tool, but it also intervenes in the body of law. The “infrastructure maintenance” function of legal scholarship is not static,

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<sup>12</sup> G. F. Schuppert/C. Bumke, *Die Konstitutionalisierung der Rechtsordnung*, 2000, 28 (39); see also Gerkrath, see note 10, 303.

<sup>13</sup> Most helpful J. Maxeiner, U.S. “methods awareness” (Methodenbewußtsein) for German jurists, in: Großfeld et al. (eds.), *Festschrift Wolfgang Fikentscher*, 1998, 114 (117 et seq.).

<sup>14</sup> This function is impressively confirmed by those who do not believe in “formalism”, M. Koskeniemi, *The Gentle Civilizer of Nations*, 2002, 497 et seq.; L. Siedentop, *Democracy in Europe*, 2000, 100.

<sup>15</sup> Schuppert/Bumke, see note 12, 40.

<sup>16</sup> The term “constitutional chaos” is its best-known description, D. Curtin, “The constitutional structure of the Union”, *CMLRev.* 30 (1993), 17 (67).

<sup>17</sup> Certainly, a doctrine of principles will not advance a logical unity or pre-established harmony of primary European law. Rather, the diffuseness in the Union’s constitutional law can to a large extent be explained because of the partly hazy content of important constitutional principles and the ambiguous relationships between them. Jurisprudence will not be able to resolve these problems alone. Yet there is something to be gained if the sizeable number of recognized principles and important elements of their legal concretizations are stipulated and controversial questions precisely defined. Last, but not least, a doctrine of principles as the offspring of jurisprudential (re-) construction cannot be identical to the actual legal practice. This is not a deficiency, but rather the proof of the *critical content* of jurisprudential constructions. A construction based on current law can develop elements for critique of current legal practices thanks to abstraction and generalization.

but demands to participate in the development of the law to keep it in line with changing social relationships, interests and beliefs. This development happens to a great extent without the participation of the political realm – and often with recourse to constitutional principles. These principles can fulfill the function of “gateways” through which the legal order is attached to the broader public discourse. A doctrine of principles has the task to prepare and accompany this process.

Furthermore, the constitutionalization of European law, the process which lies at the heart of the legal development over the last forty years,<sup>18</sup> can probably only be completed by a doctrine of principles. A complete constitutionalization of a legal order requires that the constitution “permeates”<sup>19</sup> all legal relationships, which is most easily accomplished through constitutional principles. Hereby, a doctrine of principles should participate in the completion of the development from a “law of integration” into a multifunctional framework.<sup>20</sup>

Yet, a doctrine of principles as such does not necessarily suggest judicial activism on the basis of principles.<sup>21</sup> In particular, such activism which is uncoupled from the concrete provisions of the Treaties, would misunderstand essential elements of the Union’s constitution: it is for many important questions a law of detail.

A doctrine of principles plays a role in the creation of an emerging European identity. A European identity requires a common “understanding of the polity” by the citizens, something for which constitutional principles could be an important vehicle.<sup>22</sup> Here, some even see the path towards a European *demos*.<sup>23</sup> Certainly, a doctrine of principles developed by legal science cannot directly trigger the creation of an identity for broad parts of the population.

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18 J.H.H. Weiler, “The Reformation of European Constitutionalism”, *Journal of Common Market Studies* 35 (1997), 97 et seq.

<sup>19</sup> G. F. W. Hegel, *Rechtsphilosophie*, 1821 (1970, edition Moldenhauer/Michel), § 274.

<sup>20</sup> Similarly F. Snyder, “General Course on Constitutional Law of the European Union”, in: Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, 1995-Vol. VI-1, 1998, 41 (47 et seq.).

<sup>21</sup> This is, by contrast, *a main function* of the Basic Law’s principles according to the common German constitutional understanding, for details H. Dreier, in: H. Dreier (ed.), *Grundgesetz-Kommentar* Vol. II (Art. 20-82), 1998, Art. 20 (Einführung), para. 10; G. F. Schuppert, *Rigidität und Flexibilität von Verfassungsrecht*, *AöR* 120 (1995), 32, 51 et seq.

<sup>22</sup> K. Eichenberger, “Vom Umgang mit Strukturprinzipien des Verfassungsstaates”, in: J. Burmeister (ed.), *Verfassungsstaatlichkeit, Festschrift K. Stern*, 1997, 456 (465 et seq.); Siedentop, see note 14, 81, 94, 96 et seq., 101.

<sup>23</sup> D. Fuchs, *Demos und Nation in der Europäischen Union*, in: Klingemann/Neidhardt (eds.), *Zur Zukunft der Demokratie. Herausforderung im Zeitalter der Globalisierung*, 2000, 215 (230 et seq.).



Yet, it can be understood as a part of a public discourse through which the European citizenry ascertains the foundations of its polity.

### 3. Integration as a Formation of Principles

If, notwithstanding these potentials, presentations of EC or EU law based on principles are rare, this is to be explained by the history of integration. The path to integration has not been constitutional, but rather functional. After the failure of the European Defense Community the early Community was *explicitly* an economic and not a political Community. As such, it followed and was legitimated by goals that were to a large extent neutral with regard to constitutional issues. It concerned the avoidance of war, economic prosperity as well as, although not spelled out explicitly, the containment of Germany, as well as the ability to stand up to the Communist East and – perhaps – even the United States.<sup>24</sup> From this, hardly anything can be deduced with respect to the constitutional principles. The prohibitions on discrimination contained in Arts. 7 and 119 EEC Treaty (now Arts. 12 and 141 EC) were the EEC Treaty's only "conventional" constitutional principles.

This orientation influenced decisively the jurisprudential construction. The federal conception<sup>25</sup> failed to gain a larger following in legal science; economic law approaches and administrative law approaches were – at least in Germany – much more successful. Thus the first specific principles, as developed by *Ipsen*, namely integration and supranationality, were based squarely on the realization of the tasks in Art. 2 EEC and had little relation to the traditions of constitutional thinking. This "dominance of the tasks" continues up to the present. Thus *Lenaerts'* and *van Nuffel's* presentation of European constitutional law, for example, places Art. 2 EC squarely at the center – in a study that explicitly attempts a systematic and principle-oriented exposition.<sup>26</sup> Principles qualifying as *structuring* constitutional principles developed only slowly.

The constitutionalization of the Treaties can be seen as this largely judicial and scholarly development of constitutional principles which were then codified in 1997 through the Amsterdam Treaty in Art. 6 EU. This provision and its installment can be understood as a call upon legal science to reconsider and reconstruct primary law according to enunciated

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<sup>24</sup> B. Olivi, *L'Europa difficile. Storia politica dell'integrazione europea 1948–1998*, 1998, 338 et seq., 341 et seq., 361 et seq.

<sup>25</sup> C. F. Ophüls, *Quellen und Aufbau des Europäischen Gemeinschaftsrechts*, NJW 1963, 1697 (1698).

<sup>26</sup> *Lenaerts/van Nuffel*, see note 7, 71 et seq.

constitutional principles.<sup>27</sup>

## II. GENERAL ISSUES OF A EUROPEAN DOCTRINE OF PRINCIPLES

### 1. The Subject Matter

For the purposes of this study it is not necessary to precisely define the concept “principle”<sup>28</sup> since the study will work with a generally accepted minimal understanding: principles are legal norms laying down essential elements of a legal order. The purpose of this study is above all to identify and clarify these principles, in particular on the basis of further legal concepts, more specific norms, settled case-law as well as established constitutional theories and doctrines.<sup>29</sup>

The doctrine of principles presented here will not discuss all principles of primary law. Rather, this study is concerned with *founding* principles analogous to Art. 20(1)<sup>30</sup> German Basic Law<sup>31</sup> or Art. 1 Spanish Constitution.<sup>32</sup> Art. 6 EU is of great assistance in their identification.<sup>33</sup> It expresses an overarching normative frame of reference for all primary law, indeed for the whole of the Union’s legal order.

This study examines only the European Union’s constitutional principles. Although European constitutional law is closely intertwined with the national constitutions, forming the

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<sup>27</sup> Previously such principles were to be found only in the third recital to the preamble of the EU Treaty (Maastricht version); on the importance of such principles in the legislative process see Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000, 22-26, second recital; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02 December 2000, 16-22, first recital.

<sup>28</sup> For a good overview of the diverse understandings R. Alexy, *Theorie der Grundrechte*, 3<sup>rd</sup> ed., 1996, 71 et seq.; M. L. Fernandez Esteban, *The Rule of Law in the European Constitution*, 1999, 39 et seq.

<sup>29</sup> E. Riedel, *Der gemeineuropäische Bestand von Verfassungsprinzipien zur Begründung von Hoheitsgewalt*, in: Müller-Graff/Riedel (eds.), see note 10, 77 (80 et seq.) demonstrates that this is a “typical German” approach.

<sup>30</sup> The decisions concerning Art. 20 German Basic Law are considered to be “fundamental statements with respect to the constitutional identity”, “the normative core of the constitutional order”, provisions determining the “character of the Federal Republic of Germany”, “blueprints”, for more details Dreier, see note 21, Art. 20 (Einführung), para. 5 et seq.

<sup>31</sup> For an English version of the Basic Law, see <[http://www.bundesregierung.de/static/pdf/GG\\_engl\\_Stand\\_26\\_07\\_02.pdf](http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf)> (8 August 2003).

<sup>32</sup> For an English version of the Spanish Constitution, see <[http://www.oefre.unibe.ch/law/icl/sp00000\\_.html](http://www.oefre.unibe.ch/law/icl/sp00000_.html)> (8 August 2003).

<sup>33</sup> M. Scudiero, *Introduzione*, in: idem (ed.), *Il diritto costituzionale comune Europeo. Principi e diritti fondamentali*, 2002, ix. Of further significance – under current law – are in particular Art. 2 EU and

“European constitutional space”, principles of the national constitutions will not be discussed. To focus almost exclusively on the European level is justified by the concept of autonomy of European primary law, analytical necessities and questions of space.

## **2. National and Supranational Principles: On the Question of Transferability**

Many of the principles laid down in Art. 6 EU are well-known from national constitutions and have been the object of thorough research. A key question for a European doctrine of principles (and indeed for the whole of European constitutional law) is to what extent and with what provisos the relevant national jurisprudence can be used in order to develop the supranational principles.<sup>34</sup> Not a few deny the possibility of such a recourse by claiming that the new form of governance requires “unprecedented thinking ”.<sup>35</sup>

Yet this demand clashes with the “very nature” of legal thinking, which, at its heart, is comparative and dependent on the repertoire of established doctrines of viable institutions.<sup>36</sup> Nor is it necessary to renounce any such comparison since there is a sufficient similarity between the supranational and the national legal orders. The Union’s and Member States’ constitutions confront the same central problem: the phenomenon of public power as the heart of every constitutional order.<sup>37</sup> Union and Member State authorities can impose duties on the citizen without necessitating his or her real consent. This one-sidedness collides with a central idea of modern Europe, namely that of freedom. To balance freedom with public power is the central problem for public law in general and constitutional law in particular. In both Union and national constitutional law the primary question thus becomes how this problematic one-sidedness is to be constituted, organized and canalized. Most if not all constitutional principles are in the end concerned with this problem.<sup>38</sup> In view of this “issue identity” there is

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Arts. 2, 5 and 10 EC.

<sup>34</sup> In detail R. Dehousse, *Comparing National and EC Law*, *AJCL* 42 (1994), 761 (particularly 762 and 771 et seq.).

<sup>35</sup> G. F. Schuppert, *Anforderungen an eine europäische Verfassung*, in: Klingemann/Neidhardt, see note 23, 237 (249). Schuppert himself demonstrates the utility of comparative thought in: G. F. Schuppert, *Überlegungen zur demokratischen Legitimation des europäischen Regierungssystems*, in: J. Ipsen/E. Schmidt-Jortzig (eds.), *Recht – Staat – Gemeinwohl*, *Festschrift für D. Rauschnig*, 2001, 201 (207 et seq.). On the theoretical aspect see P. Zumbansen, *Spiegelungen von “Staat und Recht” - Governance-Erfahrungen in der Globalisierungsdebatte*, in: M. Andersheiden et al. (eds.), *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts*, 2001, 13.

<sup>36</sup> On the “memory function” E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 1998, 4.

<sup>37</sup> MacCormick, see note 1, 138 et seq.

<sup>38</sup> Moreover, the Union enjoys the power to impose duties on Member States, which is the core feature

a sufficient degree of similarity to justify transferring the insights from the one order to the other.

The critics of such a transfer are correct in that a simple transfer of concepts and insights from the national context in many instances will not be adequate for the issues that arise in the EU context. The transfer of constitutional concepts of one single Member State is already prohibited by the principle expressed in Art. 6(3) EU, namely the equality of the 25 national constitutions.

Nor is it possible to simply project a common European denominator of national concepts onto the Union.<sup>39</sup> Every analogy and transfer must reflect the fact that the Union is not – according to the prevailing and convincing view – a State, but rather a new form of political and legal order.<sup>40</sup> The structuring principles must reflect this. A doctrine of European principles must therefore purify the content of the principles known from the national constitutions from elements which apply only to a state. It then has to develop their content with a view to the specific form of polity that the Union is. The insight that the Union is not a state (and perhaps should not become one), is in itself of little help: it explains the need for restructuring the Union, but provides no substance or direction. One way of concretizing the Union's *sui generis* nature (*Gestalt*) is through the adaptation of established concepts of public law, and here a doctrine of principles might prove especially helpful.

One core difference between Union and national constitutional law is that the former, both in conceptual terms and as a reality, displays to a much lesser degree that characteristic which constitutional scholarship often summarizes as *political unity*. The exercise of power by the Union appears not as the will of a single sovereign, but rather as the common exercise of public power by various actors.<sup>41</sup> The importance of consensual and contractual elements, of networks between various public authorities and last but not least of the nation-states and their peoples must decisively shape the understanding and concretization of the structuring principles.

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of federal constitutional law.

<sup>39</sup> Yet, a comparative approach is most useful in this respect; for a fine example cf. M. Scudiero (ed.), *Il diritto costituzionale comune Europeo. Principi e diritti fondamentali*, 2002.

<sup>40</sup> J. H. H. Weiler/M. Wind, Introduction. *European Constitutionalism Beyond the State*, in: Weiler/Wind (eds.), *European Constitutionalism Beyond the State*, 2003, 1 (3).

<sup>41</sup> This may explain the renaissance of contractual thinking in constitutional theory, G. Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, *King's College Law Journal* 12 (2001), 39; I. Pernice/F. C. Mayer/S. Wernicke, *Renewing the European Social Contract*,

### 3. Supranational Federalism as a Guiding Idea

The *sui generis* nature (*Gestalt*), the peculiarities of the structuring principles and of the strategies for their realization rest on the fact that the Union is predicated on developed nation-states conscious of their own identities. While these states want a common Europe reflecting their common constitutional traditions, they have no intention of being relegated to mere regions of a European federal state. This premise will influence the substance, method and style of European constitutional scholarship in general and that of constitutional principles in particular.

The model of supranational federalism attempts to develop this understanding into a heuristic instrument.<sup>42</sup> Its federal element refers to numerous important aspects of this public authority and its legal order:<sup>43</sup> one should recall – beyond the well-known elements such as primacy, direct effect and majority voting – the concentration of European integration within the Union (e.g. of political cooperation, Schengen Agreements, the Brussels Convention), its rise to a collective order (Art. 7 EU), its territorial and civic orientation as a common political entity as well as the broad and relevant competences. In view of the Union's lack of power to compel, its limited budget, its polycentric organization that tends to be antithetical to hierarchies, its inability to present itself as a political unity in the tradition of nation states, its co-existence with self-confident national institutions concerned to preserve their autonomy,<sup>44</sup> as well as the almost total lack of a political will to found a new state, there are hardly any signs for the formation of a federal state. Whereas the constitutional state is, according to a broad understanding, based on the principle of a political unity, it is characteristic and probably even

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King's College Law Journal 12 (2001), 61.

<sup>42</sup> On the conception presented here A. von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999; idem., "The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty", *Columbia Journal of European Law* 6 (2000), 27 et seq.; the same terminology, with partially different contents, are to be found in P. Badura, *Wandlungen der europäischen Wirtschaftsverfassung*, *EuR Beiheft* 1/2000,45; P. M. Huber, *Europäisches und nationales Verfassungsrecht*, *VVDStRL* 60 (2000), 194 (240); on the Anglo-Saxon federalism discussion see the contributions in K. Nicolaidis/R. Howse (eds.), *The Federal Vision*, 2001.

<sup>43</sup> System and federation are closely connected: the question of whether the Holy Roman Empire was a federation depended on whether it could be considered a system. The identification of principles was central to this, Schmitt, *Verfassungslehre*, 8<sup>th</sup> ed., 1993 (1928), 47.

<sup>44</sup> For a contentious view, see the comments of the judge currently responsible for European matters on the bench of the German Federal Constitutional Court, S. Broß, *Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte*, *VerwArch* 92 (2001), 425; idem., "Überlegungen zum gegenwärtigen Stand des europäischen Einigungsprozesses – Probleme, Risiken, Chancen", *EuGRZ* 2002, 574 et seq.

constitutive of the Union that this political unity does not exist and is not even asserted. The model of supranational federalism sees this – in contrast to conceptions oriented towards federal states – not as a transitory phenomenon, but rather as a fundamental and stabilizing characteristic of the Union’s constitutional order, as expressed for example in Art. 6(3) EU.<sup>45</sup> These characteristics must find expression in the structuring principles.

This model informs the ensuing doctrine of principles as a heuristic instrument. At the same time, the model hopes to find confirmation by a doctrine of principles if it should prove useful for the development of dogmatic-constructive work. A first confirmation of the model rests on its capability to explain the relevance to the Union of founding principles (in particular democracy) that are known from the nation-state context, whereas this is by no means the case for other models, such as that of the Union as a mere international organization or as an administration for specific purposes.<sup>46</sup> Furthermore, the model of supranational federalism suggests a conception of discrete, but complementary constitutions rather than a complete fusion into a new, overarching political and constitutional unity.

#### **4. Constitutional Principles in View of Varying Sectoral Provisions**

The principles set forth in Art. 6(1) EU are valid for the whole of Union law. Yet numerous concretizing figures are valid only in certain sectors, for instance the dual legitimacy structure through the Council and Parliament for the principle of democracy. The Union’s legal order reveals a significant fragmentation.<sup>47</sup> This gives rise to doubts about the usefulness of an overarching doctrine of principles, and might even nurture the suspicion that a doctrine of principles is not the fruit of scholarly insight, but rather a policy instrument for more integration. Yet these doubts and suspicions are unfounded.

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<sup>45</sup> On supranationality see below IV.2.c.

<sup>46</sup> A. Randelzhofer, Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft, in: Hommelhoff/Kirchhof (eds.), *Der Staatenverbund der Europäischen Union*, 1994, 39 (40); H. P. Ipsen, Zur Exekutiv-Rechtsetzung in der Europäischen Gemeinschaft, in: P. Badura/R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens*, Festschrift für P. Lerche, 1993, 425 (428). I also oppose a legal classification as a dynamic multi-level system due to the fact that this term – with an emphasis on “continuous shift of competences” (*ständige Kompetenzverschiebung*, Schuppert, see note 35, 253) – lacks the stabilizing character, which is of utmost importance in the relationship between center and periphery.

<sup>47</sup> At a less abstract level, there are significant differences between individual sectors in all legal orders, A. Hanebeck, *Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber*, *Der Staat* 41 (2002), 429 et seq.

As the principles set forth in Art. 6 EU are applicable to all areas of Union law, an overarching doctrine of principles built on Art. 6 EU encompassing the entire primary law is a logical consequence. If the introduction of Art. 6 EU in 1997 is not understood as being merely a declaratory act – a contradiction of established rules of interpretation –, this provision almost requires that it be developed into a general doctrine of principles against which all areas of Union law and in particular the older layers of Community law must be assessed. Art. 6 EU declares that the Union is “founded” on these principles. This contains an ambitious normative program, the details of which probably only legal science and the courts are able to develop, though the mentioned limitations of a doctrine of principles as applied to a concrete legal situation must be respected.

In view of the fragmentation within primary law it might appear problematic to determine which provisions may be understood as concretizing abstract principles. Theoretically, both the co-decision procedure under Art. 251 EC as well as the Council’s autonomous decision-making competence under the requirement of unanimity (e. g. Art. 308 EC) can be understood as realizations of the principle of democracy. Yet, the co-decision procedure, conceived as the “standard” by the model of supranational federalism, applies to ever more situations.<sup>48</sup>

An overarching doctrine of principles targeted in this “standard” manner must not, however, downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important constitutional principle: Art. 6(3) EU in conjunction with Art. 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments.<sup>49</sup>

### **III. FOUNDING PRINCIPLES OF SUPRANATIONAL AUTHORITY**

#### **1. Equal Liberty**

Art. 6(1) EU names liberty as the first of the principles upon which the Union is founded. This principle must transcend the various specific freedoms if it is to have an independent normative meaning since the latter are fully included in the words “respect for human rights and fundamental freedoms, and the rule of law”, which appear later in this provision.<sup>50</sup> The

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<sup>48</sup> Also K. Lenaerts, in: Sénat et Chambre des représentants de Belgique (eds.), *Les finalités de l’Union européenne. Objectifs, compétences et méthodes*, 2001, 14 (15).

<sup>49</sup> ECJ, Opinion 2/94 – ECHR, ECR 1996, I-1763, para. 10 et seq.; C-376/98 – Germany/Parliament and Council, ECR 2000, I-8419.

<sup>50</sup> An independent meaning is not rarely disputed, see S. Griller/D. Droutsas/G. Falkner/K. Forgò/M.

fact that liberty is named separately should be understood as meaning that “liberty” is a principle which “goes beyond” the others. It could be reduced to the rejection of a corporative social order or “freedom denying” forms of government as practiced by the Nazis, fascists, communists or other forms of authoritarian regimes. That would be a minimal reading.

Yet, it can also be understood as a declaration that the liberty of the individual is the starting and reference point for all European law: everyone within its jurisdiction is a free legal subject and all persons meet each other as legal equals in this legal order.<sup>51</sup> Conceptually it leads to an individualistic understanding of law and society.<sup>52</sup> This understanding of a person is by no means imposed by nature, but is rather the most important artifact of European history, fundamental for the self-understanding of most individuals in the Western world.

One may object that said liberty is the universal principle *par excellence*. Yet, one cannot deny that this principle has by no means found a footing in all legal orders. And the law of the European Union is the only transnational legal order that effectively realizes this principle in concrete legal relations on a broad scale.

In light of this principle, fundamental yet often technically (mis)understood concepts of European law become closely connected to the European constitutional tradition. The first is the concept of direct effect, according to which the individual is not only the object but also the subject of Union law. It is no coincidence that this idea initiated the transformation of the EC Treaties into a constitutional law for Europe.<sup>53</sup>

The principle of the individual’s liberty has been a core element of integration theory from its earliest steps. *Walter Hallstein* understood European integration to expand the individual’s space of autonomous action towards a continental scope. The constitutional dimension of this expansion is based on the attribution of a constitutional function to private law, above all contract law: many consider private law as the living order of liberty of autonomous individuals.<sup>54</sup> Even though the early Community enacted practically no rules pertaining to

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Netwich, *The Treaty of Amsterdam*, 2000, 186.

<sup>51</sup> Hegel, see note 19, § 4; Siedentop, see note 14, 200 et seq.

<sup>52</sup> I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in: I. Kant, *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik*, K. Vorländer (ed.), 1964, 67 (87); E. Gellner, *Nationalismus und Moderne*, 1991 (Original 1983), 89.

<sup>53</sup> ECJ, 26/62, *van Gend & Loos/Niederländische Finanzverwaltung*, ECR 1963, 1 (24); P. Pescatore, *The Doctrine of “Direct Effect”*, ELR 1983, 155 (158).

<sup>54</sup> W. Hallstein, *Die Wiederherstellung des Privatrechts*, *Schriften der Süddeutschen Juristen-Zeitung* 1 (1946), 530 et seq.; E.-J. Mestmäcker, *Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts*,



private law (in opposition to public law), it had since its inception an important private law dimension as it helped the individual to conclude contracts on a much wider scale. From this perspective, one can understand the fundamental importance of the market freedoms and competition law as well as Art. 4(1) EC, which aim to provide and secure a continental space to be shaped by free, private forces, a goal which cannot be realized by the European nation-state which is territorially far more limited. This is one specific, genuine value of integration.<sup>55</sup>

This private autonomy has a particular significance in a heterogeneous political community of nearly continental scope such as the Union. The larger and more diverse a political community is, the harder it is to understand politics and law as instruments of free self-governance. The opportunity for private autonomy becomes correspondingly more important if liberty is to be increased in the process of integration.

Yet the concept of liberty would be misunderstood if one were to understand it only formally as private autonomy: such liberty is always in danger of being transformed into privilege.<sup>56</sup> True liberty can only be conceived as the same liberty for all legal subjects. It is this conception of *equal liberty* that explains a most important line of the ECJ's jurisprudence: equalizing the legal status of the European legal order's subjects in view of concrete freedom. It finds expression in the judgments on discrimination, above all in those on the freedom of movement of workers, on the general prohibition of discrimination, on rights deriving from Union citizenship and on association agreements.<sup>57</sup> These judgments show the great potential for emancipation which this principle still contains after decades of integration. It is from this perspective of equal liberty that the objective of establishing an area of freedom, security, and justice (Art. 2 EU) is to be understood, rather than by narrowly focusing on its use for the single market.

In order to fulfill the criteria for accession to the EU – according to Arts. 49 and 7(1) EU – a state's legal order and social culture must be founded on this conception of the individual and there must be no internal segregation, such as irreconcilable religious, ethnic or social divisions that lead to individuals not being legal equals.

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RJ 10 (1991), 177.

<sup>55</sup> BVerfGE 89, 155, 174; this explains the special importance of the economic constitution.

<sup>56</sup> G.-P. Calliess, *Die Zukunft der Privatautonomie*, *Jahrbuch junger Zivilrechtswissenschaftler* 2000, 2001, 85 (90 et seq.).

<sup>57</sup> Path breaking ECJ, C-268/99 – Jany et al., 2001, I-8615; in detail M. Hofmann, *The Right to Establishment for Nationals of the European Union Associated Countries in the Recent Jurisprudence*

## 2. The Rule of Law

The basic elements of the rule of law were the first aspects of European constitutional thought in the 60s that have coalesced into legal principles. *Joseph H. Kaiser* declared programmatically in 1964: “Es ist der Beruf unserer Zeit einen europäischen Rechtsstaat zu schaffen”.<sup>58</sup> Most jurisdictions subsume the pertinent elements under a term equal or similar to “Rechtsstaatlichkeit” or “l’État de droit”; almost all language versions of the Treaty use the same terminology linked to the state. This terminology is – due to the inclusion of the element of statehood – not really convincing.<sup>59</sup> It seems more accurate to use the term “rule of law” (*prééminence du droit* or *Herrschaft des Rechts*) in the sense of the concept of “law” as used by the ECJ under Art. 220 EC.<sup>60</sup> Establishing a culture of law has been of central importance to the development that European integration has taken.

### a. A Community of Law

Perhaps the theoretical concept which has had the most far-reaching consequences for legal integration was that of the *Rechtsgemeinschaft*, “community of law”,<sup>61</sup> the various elements of which establish *both* continuity *and* innovation with respect to national constitutional thought. As a principle it has had the greatest “independent life” with regard to the Treaties’ provisions: it is crucial for far-reaching judicial activism. Obviously the actors in the legal order are of the opinion that the question of democracy must largely be left to the political realm. It is not however true for the many aspects of the rule of law.

A legal norm regulates social relationships. Its correlative (actual) effectiveness and nonpartisan (objective) application are constitutive for the rule of law. They are – to put it in normative terms – the first expression of the legal equality of individuals.<sup>62</sup> The effectiveness of a state’s legal norms is usually beyond question. Due to the usually common origin of a

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of the ECJ, *German Yearbook of International Law* 44 (2001), 469.

<sup>58</sup> J. H. Kaiser, *Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften*, *VVDStRL* 23 (1966), 1 (33): “The creation of a European state based on the rule of law is the task of our time“. There is thus a striking parallel to the constitutional developments of the 19<sup>th</sup> century, on this see E.-W. Böckenförde, *Recht, Staat, Freiheit*, 2<sup>nd</sup> ed., 1992, 143 et seq.

<sup>59</sup> M. Zuleeg, in: H. von der Groeben/J. Thiesing/C.-D. Ehlermann (Hrsg.), *Kommentar zum EU-/EG-Vertrag*, 5<sup>th</sup> ed., 1997, Art. 1 EGV, para. 4.

<sup>60</sup> Gerkrath, see note 10, 347.

<sup>61</sup> W. Hallstein, *Die Europäische Gemeinschaft*, 5<sup>th</sup> ed., 1979, 51 et seq.; on the reception see Esteban, see note 28, 154 et seq.

<sup>62</sup> M. Nettesheim, *Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts*, in: A. Randelzhofer et al. (eds.), *Gedächtnisschrift für E. Grabitz*, 1995, 447 (448 et seq.).

state's competence to legislate and to coerce, this aspect of the rule of law is mostly a marginal topic, if it is not taken for granted. It is only with respect to the equal application of the law that this question enjoys any constitutional attention in the domestic legal orders.<sup>63</sup>

As Community law was public international law in origin, its first problem has been and still is precisely its effectiveness and equal application to social relationships. This is the first aspect of Hallstein's term "community of law": the EU is *only* a community of law and not also a community of compulsion by means of its own.<sup>64</sup> The situation is therefore different to that in a state's legal system. In a transnational community of law the community's systemic interest in the effectiveness of its law and the individual's corresponding interest in enforcing a norm that benefits him or her are consonant: the legislator (EU) and the beneficiary (citizen) both need the nation state's domestic courts. The relevant legal concepts, above all direct applicability,<sup>65</sup> primacy<sup>66</sup> as well as the principle of effectiveness and uniform application,<sup>67</sup> serve indissolubly both interests. The widespread assertion that European law "instrumentalizes the individual" for the advancement of European integration<sup>68</sup> (with the implicit reproach of an infringement of human dignity) expresses a misunderstanding of this basis of Community law.

Perhaps the Union is even more dependant on the rule of law than an established nation-state. When *Walter Hallstein* said that the Community is a *creation* of law,<sup>69</sup> this must be understood against the dominant understanding of the nation-state, which attributes to the nation-state a "pre-legal substrate" (e. g. a people, an established organization). One can

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<sup>63</sup> Art. 3(1) German Basic Law; on the phenomenon of selective application as a legal problem BVerfGE 66, 331 (335 et seq.); BVerfGE 71, 354 (362).

<sup>64</sup> Hallstein, see note 61, 53 et seq.

<sup>65</sup> ECJ, see note 53; C-8/81, *Becker/Finanzamt Münster-Innenstadt*, ECR 1982, 53, para. para.29 et seq.; *Pescatore*, see note 53.

<sup>66</sup> ECJ, 6/64, *Costa/E.N.E.L.*, ECR 1964, 1251 (1269); 92/78, *Simmenthal/Commission*, ECR 1979, 777, para. 39; C-213/89, *The Queen/Secretary of State for Transport ex parte: Factortame*, ECR 1990, I-2433, para. 19; C-285/98, *Tanja Kreil/Germany*, ECR 2000, I-69, assumes supremacy as unproblematic.

<sup>67</sup> ECJ joined cases 205-215/82, *Deutsche Milchkontor*, ECR 1983, 2633, 2665, para. 22; C-261/95 *Palmisani/Istituto nazionale della previdenza sociale (INPS)*, ECR 1997, I-4025, 4046, para. 27; C-404/97, *Commission/Portugal*, ECR I-4897, 4938, para. 55; S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß*, 1999, 117 et seq. and 267 et seq.

<sup>68</sup> T. v. Danwitz, *Verwaltungsrechtliches System und Europäische Integration*, 1996, 175; J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts*, 1997.

<sup>69</sup> Hallstein, see note 61, 53; U. Everling, *Bindung und Rahmen: Recht und Integration*, in: W. Weidenfeld (ed.), *Die Identität Europas*, 1985, 152.

contest the pre-existence of the state before the constitution<sup>70</sup> as well as the explication of integration solely by the binding force of law.<sup>71</sup> Yet, the outstanding importance of a common law as a bond which embraces all Union citizens is, in view of the dearth of other integrating factors such as language or history, hardly contestable. Moreover, as already pointed out by *de Tocqueville*, the bigger and freer a polity is the more it must rely on law.<sup>72</sup> This is also recognized in political science.<sup>73</sup>

The difficulties of securing the effectiveness of transnational law against opposing national provisions and practices explain some of the rigidities of European law that collide with the concern to preserve diversity within Europe. In view of the degree of effectiveness it has meanwhile achieved and the development of principles that attribute constitutional weight to colliding interests, it is now possible to find more balanced solutions according to general doctrines on the collision of principles.<sup>74</sup>

Law requires that conflicts be settled by an unbiased third party.<sup>75</sup> The principle of a community of law implies correspondingly that “neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, [...] the Treaty established a complete system of legal remedies”.<sup>76</sup> This principle of comprehensive legal protection at the Community as well as at the Member State level has led to legal developments of the highest importance.<sup>77</sup> Against this background and in view of the obvious loophole in legal protection,

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<sup>70</sup> Informative H. Schulze-Fielitz, Grundsatzkontroversen in der deutschen Staatsrechtslehre nach 50 Jahren Grundgesetz, *Die Verwaltung* 32 (1999), 241.

<sup>71</sup> R. Dehousse/J. H. Weiler, The legal dimension, in: W. Wallace (ed.), *The Dynamics of European Integration*, 1990, 242.

<sup>72</sup> A. de Tocqueville, *Über die Demokratie in Amerika* (1835), 1985, 78 et seq., 99 f; G. Bermann, The Role of Law in the Functioning of Federal Systems, in: Nicolaidis/Howse, see note 42, 191.

<sup>73</sup> Siedentop, see note 14, 94.

<sup>74</sup> Kadelbach, see note 67, 270 et seq.

<sup>75</sup> A. Kojève, *Esquisse d'une phénoménologie du droit*, 1982, § 13.

<sup>76</sup> ECJ 294/83, *Les Verts/Parliament*, ECR 1986, 1339, para. 23; Court of First Instance T-17/00 R, *Rothley et al./Parliament*, ECR 2000, II-2085, para. 54.

<sup>77</sup> Kadelbach, see note 67, 368 et seq.; D. Classen, *Europäisierung der Verwaltungsgerichtsbarkeit*, 1996, 182 et seq.; cf. e.g., ECJ 222/84, *Johnston/Chief Constable of the Royal Ulster Constabulary*, ECR 1986, 1651, para. 13 et seq.; joined cases C-6/90 and 9/90, *Francovich/Italy*, ECR 1991, I-5357, para. 31; C-70/88, *EP/Council*, ECR 1990, I-2041, para. 15 et seq.; C-2/88, *Zwartveld et al.*, ECR 1990, I-3365, para. 16.

the ECJ should reconsider its restrictive interpretation of Art. 230(4) EC.<sup>78</sup>

The rule of law is not uncontested.<sup>79</sup> Titles V and VI EU hardly live up to this principle. The European Council's role is particularly problematic. Although, legally speaking, it is an institution of the Union, its self-understanding is that of an institution operating outside the ambit of the Union,<sup>80</sup> as is demonstrated by the circumstance that it has failed to proclaim the Charter of the Fundamental Rights of the European Union. Similar to the king in the constitutional regimes of the 19<sup>th</sup> century, it is not answerable to any European institution and can "do no wrong."<sup>81</sup> This institution, which often decisively shapes legislative projects, places itself outside the constitutional order and beyond legal and political responsibility.<sup>82</sup>

#### b. Principles of Protection for the Citizen and of Orderly Procedure

The principle "rule of law" contains numerous (sub-)principles that aim at the rational exercise of public power and protect qualified interests of its subjects.<sup>83</sup>

At an early stage of integration, much effort was dedicated for that reason to the principle of the separation of powers. This is hardly surprising: its importance emerges from Art. 16 of the French Declaration of the Rights of Man and of the Citizen of 1789. Already in the 1950s the EJC used the principle of the separation of powers with the purpose to protect the citizen and to rationalize the exercise of public power by the Community institutions.<sup>84</sup> Yet, the separation of powers principle has lost much of its meaning, probably because it could not

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<sup>78</sup> The approach taken in Court of First Instance, T-177/01, *Jégo-Quéré/Commission*, ECR 2002, II-2365 et seq. Decision of 3 May 2002, para. 41 et seq. is to be welcome; cf. also AG Jacobs, Opinion of 21 March 2002 in C-50/00 P, *Unión de Pequeños Agricultores/Council*, para. 59 et seq.; the ECJ, however, refused to follow, considering this step as requiring a Treaty amendment; B. de Witte, *The Past and the Future Role of the European Court in the Protection of Human Rights*, in: P. Alston (ed.), *The EU and Human Rights*, 1999, 859 (877, 889 et seq.). Unfortunately, the ECJ has declined to change its interpretation, ECJ, C-50/00, ECR 2002, I-6677 et seq. For a detailed analysis, see J.-D. Braun/M. Kettner, „Die Absage des EuGH an eine richterrechtliche Reform des EG-Rechtsschutzsystems“, *Die öffentliche Verwaltung* 2003, 58 et seq.

<sup>79</sup> For a pessimistic view on whether the "Community of law" is still a working premise to develop EU law C. Joerges, *The Law in the Process of Constitutionalizing Europe*, EUI Working Paper LAW No. 2002/4.

<sup>80</sup> J. P. Jacqué, in: von der Groeben/Thiesing/Ehlermann, see note 59, Art. D EUV, para. 5.

<sup>81</sup> C. von Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften*, Bd. 2, *Lehrbuch der allgemeinen Staatslehren*, 2<sup>nd</sup> ed., 1840 (reprinted 1964), 249-251 (250 et seq.).

<sup>82</sup> Court of First Instance, T-584/93, *Roujansky/Council*, ECR 1994, II-585, para. 12; C-253/94, *Roujansky/Council*, ECR 1995, II-7, para. 11; R. Lauwaars, *Constitutionele Erosie*, 1994, cited by Gerkrath, see note 10, 150.

<sup>83</sup> Hallstein, see note 61, 55 et seq.

<sup>84</sup> ECJ, 9/56, *Meroni/Hohe Behörde*, ECR 1958, 11 (44).

adequately respond to the manifold issues.<sup>85</sup> More specific requirements replaced it, when the ECJ developed from the late 1960s on principles for the protection of fundamental rights and rational procedure; they are far more precise and effective.

The development of the numerous (sub-)principles which aim at a rationalization of the exercise of public power and the protections of the individual is that part of the constitutional development which has received most scholarly dedication.<sup>86</sup> The relevant principles display a high degree of differentiation<sup>87</sup> and development, as demonstrated not least by the Charter of the Fundamental Rights of the European Union.<sup>88</sup> The relevant discussions show how a European doctrine of principles takes recourse to the developed repertoire of national fundamental rights, yet at the same time must take account of the Union's specific constitutional framework as a supranational authority.<sup>89</sup>

A doctrine of principles has to point out the conflicts between the rule of law principle on the one hand and other principles on the other that such a development will produce. In particular, the various principles protecting diversity demand restraints on a principle- or value-based homogenization through the judiciary. Moreover, the specific features of the Union's organizational constitution, for instance the lack of a constitution giver organized at the Union level, must be taken into account when determining the principles' normative reach and depth. Considered in light of the full range of constitutional principles, expanding the reach and the depth of supranational fundamental rights in the current Union is by no means a clear-cut affair, but rather a deeply ambiguous one. Perhaps the ECJ is trying to respond to this danger by not developing its own fundamental rights jurisprudence, but rather incorporating the ECHR's standards. Yet, it is doubtful whether the ECHR is more responsive to issues of constitutional diversity and more acceptable for the national constitutional systems.

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<sup>85</sup> But cf. H.-J. Seeler, Die rechtsstaatliche Fundierung der EG-Entscheidungsstrukturen, EuR 1990, 99 et seq.; K. Lenaerts, Some Reflections on the Separation of Powers in the European Community, CMLRev. 1991, 11 et seq.

<sup>86</sup> A. Arnulf, *The General Principles of EEC Law and the Individual*, 1990; I. Pernice, Grundrechtsgehalte im Europäischen Gemeinschaftsrecht, 1979; T. Schilling, Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts, EuGRZ 2000, 3; T. Tridimas, *The General Principles of EC Law*, 1999; J. Usher, *General Principles of EC Law*, 1999.

<sup>87</sup> Zum Schutzstandard J. Limbach, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ 2000, 217 (219 et seq.).

<sup>88</sup> Charter of the Fundamental rights of the European Union, OJ C 364/8 of 18 December 2000.

<sup>89</sup> J.H.H. Weiler, *The Constitution of Europe*, 1999, 102 et seq.

### 3. Democracy

#### a. Development and Basic Features

For over 30 years legal science focused not on the principle of democracy, but rather on the rule of law. The thesis that the Community *should* have its own democratic legitimacy developed a long time only as a *political* request of some and not as a legal principle. Up until the 1990s the view was held that the supranational authority did not legally require democratic legitimacy beyond the general requirements for an international organization.<sup>90</sup> Then, a rapid development took place which followed two different, albeit connected paths: one, based on civil rights thinking, focusing on Union citizenship, and another, based on institutional thinking, oriented at the legitimacy of the Union's organizational set-up.

The development from being a political demand for an independent democratic legitimacy to becoming a *legal* principle has been arduous. Tellingly, even the 1976 Act concerning the election of the representatives the Parliament by direct universal suffrage does not contain the term “democracy”.<sup>91</sup> Beginning in the 80s, the ECJ very cautiously started to use the concept of democracy as a legal principle.<sup>92</sup> The Treaty of Maastricht then employed this term, though it mentions its role for the supranational level only in the 5<sup>th</sup> recital to the preamble. With Art. F EU in the Maastricht version democracy found its way into a Treaty text – yet not as a basis for the Union, but rather with a view to the Member States' political systems. The leap was only made in the Treaty of Amsterdam in Art. 6 EU by laying down that the principle of democracy also applies to the Union. This internal constitutional development is buttressed by external *provisions*. Of particular importance is Art. 3 Protocol No. 1 to the ECHR in its recent interpretation by the ECHR,<sup>93</sup> as well as – even if less clearly – national provisions

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<sup>90</sup> A. Randelzhofer, see note 46, 39 (40 et seq.).

<sup>91</sup> Act concerning the election of the representatives the Parliament by direct universal suffrage of 20 September 1976, OJ 1976, L 278/1.

<sup>92</sup> The principle has been used very carefully, and above all to strengthening existing provisions; see in particular ECJ 138/79, Roquette Frères/Council, ECR 1980, 3333, para. 33; C-300/89, Commission/Council (Titanium Dioxide), ECR 1991, I-2867, para. 20; C-65/93, Parliament/Council, ECR 1995, I-643, para. 21; 21/94, Parliament/Council, ECR 1995, I-1827, para. 17; C-392/95, Parliament/Council, ECR 1997, I-3213, para. 14. But see the Court of First Instance Decision T-135/96, UEAPME/Council, ECR 1998, II-2335, para. 89, that interprets the principle of democracy with greater liberty. On this, see G. Britz/M. Schmidt, Die institutionalisierte Mitwirkung der Sozialpartner an der Rechtsetzung der Europäischen Gemeinschaft, EuR 1999, 467 (481 et seq.); K. Langenbucher, Zur Zulässigkeit parlamentsersetzender Normgebungsverfahren im Europarecht, ZEuP 2002, 265.

<sup>93</sup> ECHR, *Matthews v. the United Kingdom*, Rep. 1999-I, 251 et seq.; on this see G. Ress, Das Europäische Parlament als Gesetzgeber – Der Blickpunkt der EMRK, ZEuS 1999, 219, 226.

such as Art. 23(1) German Basic Law.<sup>94</sup>

The word “democracy” in Art. 6 EU carries no definition. It has yet to be determined what the principle of democracy precisely means on the European level. However, such innovative scholarship is needed. More than for any other constitutional principle, it is beyond question that the principle of democracy requires a *specific* concretization and that any analogy to nation-state institutions must be carefully argued. A remarkably complex interdisciplinary discussion on European democracy has developed on the basis of this insight.<sup>95</sup>

From the perspective of a European doctrine of principles the preliminary question of the possibility of democracy at the Union level can be neglected.<sup>96</sup> First, a doctrine of principles can hardly say anything about this question which rather belongs to the realm of political sociology. More importantly, the Union’s constitutional law has, with Art. 6(1) EU, normatively, and thus for a doctrine of principles decisively, decided the question: democracy *is* a constitutional principle of the Union.

A European doctrine of principles has to define the unional principle of democracy. The easier part of that exercise is to discard inappropriate understandings which are prominent in numerous national legal discourses on the concretization of the principle of democracy. This is particularly true for the theory that understands democracy as being the rule of “the people” in the sense of a “*Volk*” insofar as the term is to be understood in a substantive sense. Such an understanding implies empirical bases that scarcely emerge at the European level; it would also be difficult to square with manifold provisions of the current Treaties (e. g. Art. 189 EC). Of course it is possible to proceed formally and conceive “*das Volk*” as being the sum of all

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<sup>94</sup> On similar provisions in other constitutions see I. Pernice, Art. 23 GG, in: Dreier, see note 30, para. 9 et seq., on the requirements of Art. 23 German Basic Law, see para. 49-57.

<sup>95</sup> F. Schimmelpfennig, Legitimate Rule in the European Union. The Academic Debate, *Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung* 27, 1996, identifies 64 positions on the European democracy problem. The article is available at: <<http://www.uni-tuebingen.de/uni/spi/taps/tap27.htm>> (30 January 2003).

<sup>96</sup> Cf. on the one hand Graf P. Kielmansegg, *Integration und Demokratie*, in: M. Jachtenfuchs/B. Kohler-Koch (eds.), *Europäische Integration*, 1996, 47; C. Offe, *Demokratie und Wohlfahrtsstaat*, in: W. Streek (ed.), *Internationale Wirtschaft, nationale Demokratie*, 1998, 99; F. Scharpf, *Demokratieprobleme in der europäischen Mehrebenenpolitik*, in: W. Merkel/A. Busch (eds.), *Demokratie in Ost und West*, 1999, 672; D. Grimm, *Does Europe Need a Constitution?*, *ELJ* 1 (1995), 382; Fuchs, see note 23, 222 et seq.; on the other hand M. Zuleeg, *Demokratie ohne Volk oder Demokratie der Völker?*, in: J. Drexler/K. F. Kreuzer/D. H. Scheuing/U. Siebert (eds.), *Europäische Demokratie*, 1999, 11-26; J. Habermas, “Warum braucht Europa eine Verfassung?”, *Die Zeit*, 27/2001, <[http://zeit.de/2001/27/Politik/200127\\_verfassung\\_lang.html](http://zeit.de/2001/27/Politik/200127_verfassung_lang.html)> (30 January 2003).



Union citizens,<sup>97</sup> yet even such a strategy to concretize the principle of democracy would create severe strains on other central Union principles, in particular Arts. 1(2) and 6(3) EU and Art. 189 EC. These norms suggest that the principle of democracy within the context of the Union must be concretized independently from the (pre-legal and problematic) concept of “people”.<sup>98</sup>

As an alternative, the individual’s opportunities to participate come into the foreground. *Peter M. Huber* conceives the European principle of democracy as “giving the individual through unional as well as national procedures a sufficiently effective opportunity to influence the basic decisions of European policy. The European principle of democracy thus contains an optimization requirement insofar as it aims at the full utilization of possibilities to participate at both levels.”<sup>99</sup> This understanding of democracy does not necessarily require breaking with understandings developed under the national constitutions, but rather correlates with the civil rights understanding of democracy. This strategy of concretizing the principle of democracy finds confirmation in the legal institute of Union citizenship (Art. 17 EC).

Yet it would be a misunderstanding of the unional principle of democracy to place *only* the individual Union citizen in the center. The Union does not negate the democratic organization of the citizens in and by the Member States (Art. 17(1)). Thus, alongside the Union citizens there are the Member States’ democratically organized peoples (Art. 1(2) EU, Art. 6(3) EU, Art. 189 EC), who are to be active in the Union’s decision-making process as organized associations. A concretization strategy should build on these two textual elements: the current Treaties speak on the one hand of the peoples of the Member States and on the other hand of the Union’s citizens insofar as the principle of democracy is at issue.

The central elements that determine the Union’s principle of democracy at this first level are thus named. The Union is based on a dual structure of legitimacy: the totality of the Union’s citizens *and* the peoples of the European Union as organized by their respective Member State constitutions.

At the conceptual level, the understanding of the unional principle of democracy suggests

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<sup>97</sup> A. Augustin, *Das Volk der Europäischen Union*, 2000, 62 (110 et seq.).

<sup>98</sup> For a detailed analysis, see S. Dellavalle, *Für einen normativen Begriff von Europa: Nationalstaat und europäische Einigung im Lichte der politischen Theorie*, in: A. von Bogdandy (ed.), *Die Europäische Option*, 1993, 217 et seq.

<sup>99</sup> P. M. Huber, *Demokratie ohne Volk oder Demokratie der Völker? Zur Demokratiefähigkeit der Europäischen Union*, in: Drexler et al. (eds.), see note 96, 27 (55).

abandoning the conception of democracy as the self-determination of a people. Moreover, the conception of self-determination in the Member States becomes implausible, since the peoples of the Member States, as members of the Union, do not exercise such self-determination any more (if they ever did). Also conceptions that consider democracy as an instrument of individual self-determination<sup>100</sup> do not have much of a chance for success within the Union context. On all levels the civil rights and control oriented conceptions of democracy appear more appropriate.<sup>101</sup>

#### b. The Principle of Democracy and the Institutional Structure

Under almost all understandings of democracy, the most important element lies in the choice of the political personnel through free elections by the citizens. There is no reason why there should be a different starting point for the for the Union. Elections provide two lines of democratic legitimacy for the Union's organizational structure.

The most important institutions are the European Parliament, which is based on elections of the totality of the Union's citizens, and the Council and European Council, whose legitimacy is based on the Member States' democratically organized peoples.<sup>102</sup> In the current constitutional situation there is a clear dominance of the line of legitimacy from the national parliaments, as shown in particular by Art. 48 EU as well as the preponderance of the Council and European Council in the Union's procedures.

One may even doubt whether a principle of dual legitimacy as a concretization of the principle of democracy can be formulated at all since the co-decision of the European Parliament has by no means been incorporated into all areas of competence, nor do all important personnel decisions require its approval nor are the other institutions answerable to it for all acts. Nevertheless, there is broad consensus that the European Parliament's current scope of competences already permits the assumption of a principle of dual legitimacy.<sup>103</sup> The

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<sup>100</sup> G. Frankenberg, *Die Verfassung der Republik*, 1997, 148 et seq. and passim tends in this direction; J. Habermas, *Faktizität und Geltung*, 1992, 532 et seq. and passim; I. Pernice, *Europäisches und nationales Verfassungsrecht*, VVDStRL 60 (2000), 148, 160.

<sup>101</sup> A. Augustin, *Das Volk der Europäischen Union*, 2000, 246 et seq., 319 et seq., 388 et seq.; A. Wallrabenstein, *Das Verfassungsrecht der Staatsangehörigkeit*, 1999, 138 et seq. The dicotomies used herein are developed in A. von Bogdandy, *Democracy, Globalization, and the Path of International Law*, EJIL 2004, forthcoming.

<sup>102</sup> On the concept of dual legitimacy, see A. Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, 556 et seq.

<sup>103</sup> BVerfGE 89, 155, 184; on this A. von Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, KritV 2000, 284; cf. also II 4.

decision on appointments to the Commission and thus the “political engine of integration” is based on dual legitimacy pursuant to Art. 214 EC as is an important part of legislative process pursuant to Art. 251 EC, the budget according to Art. 272 EC or a decision on accepting a new Member, Art. 49 EU.

Yet, in view of the current legal situation, the principle can only be understood as meaning that the democratic legitimacy of Union acts *can* be conferred through the Council and European Parliament. This European principle does *not*, however, say *which* institution in any concrete case *must* take a concrete decision.<sup>104</sup> The conferral of legitimacy on any specific act is a question of the relevant competence: the principle of democracy can *only* exercise a stabilizing function, not a modifying one.<sup>105</sup> The demand to expand parliamentary powers remains in the political sphere; it can scarcely be grounded in the Union’s principle of democracy.

If the legal impact of the principle of democracy is limited, its implications are enormous. A transnational parliament which is not representative of a people can confer democratic legitimacy. Moreover, a *governmental* institution (the Council) is also able to do so. This contrasts sharply with national constitutional law. Here, the democratic legitimacy of *governmental* decisions is usually considered to be problematic.<sup>106</sup> Even in federal constitutions the representative institutions of the sub-national governments are rarely acknowledged to have a role in conferring democratic legitimacy.<sup>107</sup> The idea of a *unitary* people is too strong.<sup>108</sup> The modification of traditional strategies to realize democracy is especially evident at this juncture.

In Member States’ constitutional law the principle of democracy is further concretized by the parliament’s specific position in the overall constitutional structure. At this point, the

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<sup>104</sup> This notwithstanding the political demand that, at least in those areas in which the Council decides by majority decision, the Parliament should be involved by way of the co-decision procedure.

<sup>105</sup> The principle of democracy is thus not a criterium for the horizontal distribution of competences, ECJ, see note 92, para. 20, 21; different, however, AG Tesouro, *ibidem*, I-2892 et seq.

<sup>106</sup> On the discussion see A. von Bogdandy, *Gubernative Rechtsetzung*, 2000, 108 et seq.; Ipsen in: Badura/Scholz, see note 46, 425; on the controversial democratic legitimacy of the German Federal Council cf. J. Jekewitz, vor Art. 50 GG, in: E. Denninger et al. (eds.), *AK-Grundgesetz*, 3<sup>rd</sup> ed., 2001, para. 11 on the one hand, M. Bothe, Art. 20 Abs. 1-3 II (Bundesstaat), in: *ibidem*., para. 27; H. Bauer, Art. 50 GG, in: Dreier, see note 33, para. 18, on the other.

<sup>107</sup> ECHR, see note 93, para. 52.

<sup>108</sup> Similarly E.-W. Böckenförde, *Sozialer Bundesstaat und parlamentarische Demokratie*, in: J. Jekewitz (ed.), *Festschrift für Friedrich Schäfer*, 1980, 182 (190).

European democracy remains hazy. One encounters an open situation, displaying this principle's lesser degree of development.

Some aspects should be highlighted briefly.

One concern is whether and to what extent the system of government is a parliamentary one. Applied to the Union this concerns the relationship between the European Parliament and the Commission. Legally the Parliament's control over the Commission's composition is, in certain respects, greater than that of the French National Assembly over the French government.<sup>109</sup> Yet whereas a semi-parliamentarian system of government has been realized on the weak French basis, nothing of the sort has occurred on the European level. It is quite conceivable that the Union's constitutive plurality prevents such a system from developing. Thus, the congressional model is also being discussed as an option for the European Parliament.<sup>110</sup> It appears to be an empirically, constitutionally and politically open question, what form the European parliamentary system will finally take.

The Parliament's lack of a right to legislative initiative might also amount to be a characteristic element. It gives support to a conception grounded in the realistic parliamentary theories of the 20<sup>th</sup> century.<sup>111</sup> The lack of a right to legislative initiative can be construed in such a way that a society gives up the understanding of legislation as *self*-legislation, dear to important strands of democratic thinking. The European Parliament's whole organization can be understood as a controlling institution which should prevent the "governance-bureaucratic complex" from becoming autonomous.<sup>112</sup> This conception points to a sober understanding of the principle of democracy, but may have good prospects for that very reason. This fluidity shows that the ECJ has been wise not to use the principle of democracy for far-reaching developments of the law in the inter-institutional area, since, in contrast to the principle of the rule of law, sufficiently concretized strategies are missing.

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<sup>109</sup> According to Art. 8(1) *French Constitution* the president nominates the prime minister. The prime minister's dependence on the parliament results from Art. 49 *French Constitution* in conjunction with the obligation to resign according to Art. 50 *French Constitution*. The parliamentary competences contained in Art. 214 EC are to some extent greater, yet the 2/3 quorum required for a motion of censure according to Art. 201 EC is too high to found a parliamentary system of government.

<sup>110</sup> J. Coultrap, *From Parliamentarism to Pluralism*, *Journal of Theoretical Politics* 11 (1999), 107; S. Hix, *Elections, Parties and Institutional Design: A Comparative Prospective on European Union Democracy*, *West European Politics* 21 (1998), 19.

<sup>111</sup> Peters, see note 102, 639; M. G. Schmidt, *Demokratiethorien*, 1995, 115 et seq.

<sup>112</sup> In more detail von Bogdandy, see note 106, 91 et seq.

### c. Transparency, Participation, Deliberation and Flexibility

The principle of democracy, whether understood as an opportunity to participate, to control or as self-determination of the citizens, confronts greater challenges under the Union's organizational set-up than it does within the nation-state context. The greater *private* freedom in the Union is bought at the cost of less democratic self-determination: the Union's sheer size and its constitutive diversity, the physical distance of the central institutions from most of the Union's citizens and the complexity of its constitution, which can only be modestly reduced, are only some of the factors that place greater restrictions on the realization of the principle of democracy by way of electing representative institutions than is the case for the nation-state. In light of this insight further strategies for the realization of the principle of democracy have received an attention that those within the national context hardly have gotten; indeed, their democratic potential is often disregarded in the domestic context. This is especially true of transparency, participation of those affected, deliberation and flexibility.

Sometimes the discussion about these concretizing strategies (transparency, participation, deliberation, flexibility) appears to be carried by the hope that they might "compensate" the Union's "democracy deficit". However, such considerations can only be useful in the "political realm", but not in the constitutional context. There are no criteria as to how a deficit in electoral legitimacy could be legally compensated.<sup>113</sup> Yet the following concepts permit remarkable strategies for the realization of the principle of democracy.<sup>114</sup>

The transparency of governmental action, that is its comprehensibility and the possibility of attributing accountability, is only peripherally brought into connection with the principle of democracy in the domestic context.<sup>115</sup> European constitutional law has placed itself at the forefront of constitutional development when it required that decisions be "taken as openly as possible", i.e., transparently. This was first declared with the Amsterdam Treaty and was given a prominent place, namely in Art. 1(2) EU. The specifically democratic meaning of transparency in European law was already to be found in the 17<sup>th</sup> Declaration to the Maastricht Treaty on the right to obtain information, which states that the decision-making

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<sup>113</sup> E. Klein, Die Kompetenz- und Rechtskompensation, DVBl 1981, 661; G. Britz/M. Schmidt, Die institutionalisierte Mitwirkung der Sozialpartner an der Rechtsetzung der Europäischen Gemeinschaft, EuR 1999, 467 (490 et seq.).

<sup>114</sup> On the duty to provide reasons T. Müller-Ibold, Die Begründungspflicht im europäischen Gemeinschaftsrecht und deutschen Recht, 1990, 53 et seq.; on transparency G. Lübbe-Wolff, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2000), 246 (278); on participation D. Curtin, Postnational Democracy, 1997, 53 et seq.

<sup>115</sup> Expressly so G. Lübbe-Wolff, see note 114, 276 et seq.

procedure's transparency strengthens the institutions' democratic character.

Transparency requires knowledge of the motives. From the beginning, Community law has recognized a duty to provide reasons (Art. 190 EC Treaty, now Art. 253 EC) even for legislative acts, something which is hardly known in national legal orders.<sup>116</sup> Of course this duty was first conceived primarily from the perspective of the rule of law,<sup>117</sup> yet its relevance for the principle of democracy has meanwhile come to enjoy general acknowledgement. The access to documents, which now also enjoys the dignity of being laid down in primary law in Art. 255 Amsterdam Treaty, is also of great importance to the realization of the transparency principle and is the object of what in the meantime has become a significant jurisprudence,<sup>118</sup> which is slowly eroding the still powerful "tradition of secretiveness".<sup>119</sup> A further aspect is the openness of the Council's voting record on legislative measures.<sup>120</sup>

The second complex concerns forms of general political participation beyond elections. Popular consultations appear as an obvious instrument and referenda have occasionally been used to legitimize national decisions on European issues (such as accession to the Union or the ratification of amending treaties). To extend such instruments to the European level has been proposed for some time.

Whereas the Union has no experience with popular consultations, it has a much experience in allowing special interests to intervene in the political process. Comparative research between the Union and the independent regulatory agencies under the U.S. Constitution has indicated that such participation of interested and affected parties might be a further avenue to realize the democratic principle.<sup>121</sup> There is, so far, no principle in primary law that requires the participation of interested and affected parties in the legislative process. The relevant

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<sup>116</sup> For a comparison von Bogdandy, see note 106, 440 et seq.

<sup>117</sup> H. Scheffler, *Die Pflicht zur Begründung von Maßnahmen nach den europäischen Gemeinschaftsverträgen*, 1974, 44 et seq. and 66 et seq.

<sup>118</sup> ECJ, C-349/99 P, *Commission/ADT Projektgesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter mbH*, ECR 1999, I-6467; joined cases C-174/98 P and C-189/98 P, *Netherlands and Gerard Van der Wal/Commission*, ECR 2000, I-1; EuG, T-309/97, *The Bavarian Lager Company Ltd./Commission*, ECR 1999, II-3217; T-92/98, *Interporc Im- und Export GmbH/Kommission*, ECR 1999, II-3521; S. Kadelbach, *Annotation*, CMLRev. 38 (2001), 179, 186 et seq.

<sup>119</sup> Committee of Independent Experts, *Second Report on Reform of the Commission*, 10 September 1999, para. 7.6.3, <[http://www.europarl.eu.int/experts/default\\_en.htm](http://www.europarl.eu.int/experts/default_en.htm)> (30 January 2003).

<sup>120</sup> Art. 207(3) sentence 4 EC; in detail C. Sobotta, *Transparenz in den Rechtsetzungsverfahren der Europäischen Union*, 2001, 144 et seq. and 198 et seq.; Commission, *White Paper, European Governance*, COM (2001) 428 *final*, 25 July 2001, 15 et seq.

<sup>121</sup> The Commission has displayed a considerable interest, Commission, see note 120, 13 et seq.

secondary legal provisions are nevertheless understood in this light.<sup>122</sup> This concretization of the principle of democracy requires, however, much further elaboration. The issue how to guarantee political equality is still unanswered as is the question of how to avoid political gridlock or *agency capture* by strong organized groups. A related approach sees the principle of democracy to be realized in the deliberative quality of supranational administrative cooperation.<sup>123</sup>

The most important task in this regard is making the Union more flexible, something which was introduced as a general strategy by the Treaty of Amsterdam and considerably expanded by the Treaty of Nice. It allows a democratic national majority to be respected without, however, permitting this national majority, which is a European minority, to frustrate the will of the European majority. However, there are difficult questions of competitive equality in the internal market as well as of guaranteeing democratic responsibility in ever more complex decision-making processes, an area which legal science has scarcely shed light on so far.<sup>124</sup>

#### d. Supranational Democracy: An Evaluation

These considerations demonstrate that the principle of democracy is only slowly taking form at the European level, building on established conceptions while at the same time being characterized by a number of innovative accentuations and far-reaching modifications in order to make them acceptable for the European level.

The most important conceptual modification of the established constitutional doctrines from the national arena can be traced back to the fact that the democratic constitutional state, even in the federal variant, rests, according to many understandings, on political unity. There is a clear lack of such political unity in the Union; it is widely seen as constituted by *different* peoples discretely organized in nation-states and consisting of structural minorities without a majority.<sup>125</sup> This understanding finds its constitutional expression in the guarantee to respect the Member State peoples, in the missing will to found a state, the want of a comprehensive

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<sup>122</sup> Commission, see note 120, 19; on this F. W. Scharpf, *European Governance: Common Concerns vs. The Challenge of Diversity*, Jean Monnet Working Paper 06/2001.

<sup>123</sup> C. Joerges/J. Neyer, *Von intergouvernementalen Bargaining zum deliberativen politischen Prozessen*, in: B. Kohler-Koch (ed.), *Regieren in entgrenzten Räumen*, 1998, 207-230; cf. also the contributions in C. Joerges/J. Falke (eds.), *Das Ausschlußwesen der Europäischen Union*, 2000.

<sup>124</sup> J. Wouters, *Constitutional Limits of Differentiation*, in: B. de Witte/D. Hanf/E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, 2001, 301.

<sup>125</sup> R. M. Lepsius, *Die Europäische Union als Herrschaftsverband eigener Prägung*, in: C. Joerges/Y. Mény/J. H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity?*, 2000, 203, 210.

community of solidarity and defense as well as the central role of the Council and European Council in the decision-making process, to name a few.

Whereas in national constitutional law the principle of democracy in the sense of the political equality of all citizens greatly influences the organizational constitution,<sup>126</sup> the Union's constitutional organizational law must place diversity at the same level.<sup>127</sup> It is this which explains and probably justifies, for example, some limitations placed on the principle of political equality<sup>128</sup> or the weakness of parliamentary institutions with respect to governmental ones. Perhaps these elements can even be seen as defining elements of a supranational understanding of democracy.

From a legal perspective, a core question is whether the principle of democracy invites judicial activism of the European courts. Within the context of the organizational set-up and the inter-institutional relationships, in particular between the Council and the Parliament, *such* judicial activism is only possible within the narrowest limits, as the Council itself serves to realize the principle of democracy according to the principle of dual legitimacy. There is no basis in unional constitutional law for placing a higher value on the European Parliament's democratic legitimacy.<sup>129</sup> Judicial developments in the areas of transparency, participation by affected interests<sup>130</sup> and intra-institutional law<sup>131</sup> could be easier to justify.

#### **4. Solidarity**

The last of the classical fundamental principles of modern European constitutionalism is that of solidarity. Its constitutional basis is not Art. 6 EU, but rather Art. 1(3) EU and Art. 2 EC, which even go beyond it being a principle and formulate it as one of the Union's key objectives. An important textual development is to be evidenced. In the original formulation, Art. 2 EEC Treaty called only for the closer relationship between the Member States, a weak

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<sup>126</sup> Hesse, see note 11, para. 125 (130).

<sup>127</sup> On this relationship G. Frankenberg, in: Denninger, see note 106, Art. 20, Abs. 1-3, I (Republik) para. 37; Schmitt, see note 43, 388 et seq.; Craig, see note 110, 36 et seq.

<sup>128</sup> The question is what the fundamental concept of democracy entails: equality, self-governance, qualified participation by the norm's addressee or elite competition with the citizen's sanction?

<sup>129</sup> Such approaches in the ECHR's case law (in particular ECHR, *Matthews v. the United Kingdom*, Rep. 1999-I, 251 et seq.), are not convincing under Union law.

<sup>130</sup> See the Court of First Instance's first attempts regarding the participation of special partners, T-135/96, UEAPME/Council, ECR 1998, II-2335, para. 88 et seq., critical Britz/Schmidt, see note 92, 491.

<sup>131</sup> See the Court of First Instance's approaches, joined cases T-222/99, T327/99, T-329/99, Martinez, deGaulle et al./European Parliament, Decision of 2 October 2001, para. 195.



reminiscence from the first preamble, according to which the Treaty aimed at “an ever closer union among the peoples of Europe”. The later developments have approximated the wording of Art. 2 to the preamble. The Treaty of Maastricht introduced the current text. The substitution of the term *relations* by the term *solidarity* can be understood as a transition from a conception of the Union being based on international relations to one of the Union being a federal polity. The centrality of solidarity is underscored by the Charter of Fundamental Rights of the European Union, which devotes an entire *Title (Title IV)* to this principle.

The principle of solidarity has for a long time not been the basis for much judicial activism<sup>132</sup> although it has served to reinforce important legal concepts. The community of law,<sup>133</sup> the principle of loyal cooperation,<sup>134</sup> the diverse mechanisms of redistribution,<sup>135</sup> European social law and certain aspects of the fundamental freedoms. Recently, the principle of solidarity is acquiring a much higher profile, being a key element of a most important line of the ECJ’s jurisprudence. The ECJ, perhaps in order to confute critical voices, considers Unions citizenship as being the “fundamental status” of Union citizens which requires equal treatment with the national citizens under the national systems of solidarity.<sup>136</sup> The ECJ bases this seminal decision explicitly on the assumption that there is “financial solidarity of the between nationals of a host Member State and nationals of other Member States”.<sup>137</sup> It hereby takes the understanding of the principle much further than Art. 2 EC which only refers to solidarity between Member States. Obviously, this principle as understood within the Union leaves the often meaningless international conception of solidarity far behind. Perhaps it is these

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<sup>132</sup> Cf. ECJ, C-149/96, Portugal/Council, ECR 1999, I-8395, para. 83 et seq.; 126/86, Giménez Zaera/Instituto Nacional de la Seguridad Social and Tesorería General de la Seguridad Social, ECR 1987, 3697, para. 11.

<sup>133</sup> ECJ, 39/72, Commission/Italy, ECR 1973, 101, para. 24 et seq. Here solidarity serves as the basis for founding the duty to obey the law. Apparently the ECJ felt that the formal legal duty needed a material basis.

<sup>134</sup> ECJ, C-72/95, Aannemersbedrijff P.K. Kraaijefeld BV/Gedeputeerde Staten van Zuid-Holland, ECR 1996, I-5403, para. 58; C-165/91, Van Munster/Rijksdienst voor Pensioenen, ECR 1994, I-4661, para. 32; C-378/98, Commission/Belgium, ECR 2001, I-5107, para. 31.

<sup>135</sup> This idea was introduced by Title V of the Single European Act, Art. 130 a et seq. EEC, now Art. 158 et seq. EC. In modification of the original conception as expressed by Art. 2 EEC this reveals the insight that the single market does not automatically bring the same advantages to everyone. This idea speaks against a legal principle of “juste retour” regarding budgetary distributions, M. Lienemeyer, *Die Finanzverfassung der Europäischen Union*, Diss. Frankfurt 2002, 263 et seq.

<sup>136</sup> ECJ C-184/99, Grzelczyk, ECR 2001, I-6193, para. 31; for possible further developments in the key of social democratic thinking D. Scheuing, *Freizügigkeit als Unionsbürgerrecht*, EuR 2003, 744, 770 ff.

<sup>137</sup> ECJ C-184/99, Grzelczyk, ECR 2001, I-6193, para. 44.

different aspects of solidarity that are meant by the so far enigmatic “duties” of Art. 17 EC.

Yet, the limits of the European community of solidarity in comparison to that of a nation-state can be discerned in the lack of a full defense community, the liability exclusions – slightly weakened by the Treaty of Nice – contained in Arts. 100, 103 EC, the structure of benefactor and recipient Member States as well as the relatively small volume of redistribution organized by and through the Union.<sup>138</sup>

A construction of Union law based on the principle of solidarity is particularly promising since the financial constitution is a federal order’s Achilles heel. With the exception of Union citizenship, however, there are few studies on this subject.<sup>139</sup> Further insight into the tensions between competitive and solidarity-based federalism or between the rather welfare oriented aims of Art. 2 EC and the rather liberal market orientation of Art. 4(1) EC are to be expected.

#### **IV. THE FEDERAL BALANCE BETWEEN UNITY AND DIVERSITY**

There is a red thread that runs through the preceding presentation: the Union’s constitutional law establishes principles known from the national constitutions, yet substantially modifies them in order to respond to the Union’s constitutive diversity. It can therefore be expected that those principles which shape the relationship between unity and diversity, center and periphery, the whole and its parts, higher and lower levels, the national and supranational elements of the European constitutional area<sup>140</sup> have an especially great impact on the structure and nature (*Gestalt*) of the Union. This concerns the most critical aspect of the Union’s constitution, which hitherto has not been able to produce a long term federal balance convincing to everyone. Consequently, even more unanswered questions will arise in this section than was already the case in the preceding above.

##### **1. Diversity in a System of Complementary Constitutions**

Unity is constitutive for diversity.<sup>141</sup> Consequently, principles advancing unity were the first to

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<sup>138</sup> Own Resources Decision, 2000/597 EC, Euratom, of 29 September 2000, OJ L 253/42 of 7 October 2000.

<sup>139</sup> C. Tomuschat, *Solidarität in Europa*, in: F. Capotorti et al. (eds.), *Du droit international au droit de l’integration*, Liber Amicorum P. Pescatore, 1987, 729 et seq.; C. Calliess, in: C. Calliess/M. Ruffert (eds.), *Kommentar zu EU- und EG-Vertrag*, 1999, Art. 1 EU, para. 45; R. Bieber, *Solidarität als Verfassungsprinzip*, in: A. von Bogdandy/S. Kadelbach (eds.), *Solidarität und Europäische Integration*, 2002, 38 et seq.

<sup>140</sup> It will have to be seen which metaphors and terminology are most appropriate.

<sup>141</sup> G. W. F. Hegel, *Wissenschaft der Logik I*, 1932 (Orig. 1812, Lasson), 59.

be developed in the history of integration. Those principles which secure diversity could achieve substance only as a second step. Yet, their exposition can only succeed on the basis of an understanding of the relationship between the national constitutions and that of the Union.

The European community of law developed under an understanding as an autonomous legal order.<sup>142</sup> Its nature as an autonomous legal order was not just one principle among others, but rather a normative axiom, defended by the ECJ with utmost decidedness.<sup>143</sup> In fact, this concept of separate legal orders was fundamental to the supranational legal order's establishment. This autonomy of the legal order corresponds to *Monnet's* conception for the Community's politico-administrative system.

The actual development both in the politico-administrative and in the legal realm led, however, not to separation, but rather to a close-knit interlocking or networking of the Union and Member States.<sup>144</sup> In the wake of this development scholarly considerations of how to understand this networking were put forward. Some argue in favor of conceptions of the unity of the supranational and Member State realms.<sup>145</sup> Yet even those who do not follow these conceptions can hardly escape the insight that an adequate understanding of both the Union and of the Member States must take into account the *whole* of the Union and the Member States.

There are three fundamental ways to conceive the relationship between the national and the supranational constitution: one of tension, one of distance and one of complementarity. Of these, the latter attracts most support, not least because of the greater dependence of the Union's constitution from the Member States' constitutions, in law and in fact, in comparison to that of a federal state from its constituent states.<sup>146</sup> In terms of positive law this results from,

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<sup>142</sup> ECJ, see note 53 – van Gend & Loos; see note 66 – Costa/E.N.E.L.; recently C-287/98, Luxemburg/Linster, ECR 2000, I-6719, para. 43.

<sup>143</sup> ECJ, Opinion 1/91, EEA I, ECR 1991, I-6084.

<sup>144</sup> G. C. Rodriguez Iglesias, Gedanken zum Entstehen einer Europäischen Rechtsordnung, NJW 1999, 1; on the political relations and intransparency F. Scharpf, Regieren in Europa, 1999, 70 et seq.

<sup>145</sup> For a political science perspective, see W. Wessels, Die Öffnung des Staates, 2000, 122 et seq. and 413 et seq.; M. Zürn, Regieren jenseits des Nationalstaats, 1998, 235; for legal science perspective, see above all I. Pernice, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2000), 148 (163); G. F. Schuppert, Zur Staatswerdung Europas, StwStP 5 (1994), 35; L. Torchia, Una costituzione senza stato, Diritto pubblico 2001, 405; Cassese, La crisi dello stato, 2002, 67 et seq.

<sup>146</sup> J. Frowein, Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß, EuR 1983, 301 (315 et seq.); and J. Frowein, Die Verfassung der Europäischen Union aus der Sicht der Mitgliedstaaten, EuR 1995, 315 (318) with concept of partial constitutions; P. Häberle, Europäische Verfassungslehre, 2001/2002, 220 et seq.; A. Pace, "La dichiarazione di Laeken e il processo costituente europeo", *Rivista Trimestrale di diritto pubblico*

for instance, Art. 6(2) and (3) EU, and conceptually from the principle of dual legitimacy, which implies that the Union's legitimacy depends on the legitimacy transmitted through the national constitutions.

This development has not yet led to an independent principle. Moreover, significant aspects of the concept of complementary constitutions (*komplementäre Teilverfassungen*) are in dire need of further clarification. Nevertheless, it is certain that, in a system of complementary constitutions, principles protecting diversity carry much greater weight than under a conception of an "autonomous legal order", which is basically "blind" to the national constitutions. This perspective of a common constitutional space of complementary constitutions offers a good approach to develop principles of unity and diversity.

## 2. Principles Promoting Unity

### a. Realization of Goals or Integration *tout court*?

The Community Treaties and the European Union Treaty were concluded to overcome the national limitations placed on many areas of life and to Europeanize the national societies. European primary law has been, more than most national constitutions, an explicit instrument for far-reaching political and social projects:<sup>147</sup> the single market, a common currency, a common area of freedom, security and justice, a common external and defense policy, supplemented by numerous further common policies. In European history, the promotion and realization of such goals have usually represented important moments in the creation of unity in the form of a nation-state. Within the framework of the Union their realization is more neutrally characterized by the term "European integration".

These projects' legal importance flow from Arts. 2 and 3 EC and Art. 2 EU. There is probably no state constitution which confers a similar position to task conferring norms as the EU and EC Treaties in their respective Arts. 2 do.<sup>148</sup> The listed goals (*Zielzustände*) can be conceptualized as principles, as basic concerns of the European legal order. Yet, the ECJ has

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2002, 613 et seq.

<sup>147</sup> This led to the conception of a "planning constitution", C. F. Ophüls, *Die Europäischen Gemeinschaftsverträge als Planverfassungen*, in: J. H. Kaiser (ed.), *Planung I*, 1965, 229 (233); Ipsen, see note 3, 128 et seq.

<sup>148</sup> The lack of scholarly interest that these provisions have found is surprising. Only C. Stumpf, *Aufgabe und Befugnis. Das wirtschaftsverfassungsrechtliche System der europäischen Gemeinschaftsziele*, 1999, explores in a monograph the right to an exemption from prohibited undertakings pursuant to Art. 81(3) EC in light of Art. 2 EC.

not derived duties of the institutions solely on the basis of Arts. 2 and 3 EC.<sup>149</sup>

Nevertheless, these principles are having an influence on the European legal order that is hard to overestimate. They are used for broad construal of Treaty provisions based on the object and purpose,<sup>150</sup> in particular in view of such a relatively clearly described goal as the single market, providing for the dynamic of the European legal order.<sup>151</sup> They provide one basis for the “*effet utile*” interpretation. A prohibition of substantial re-nationalization, which would endanger the material attainment of the Treaties’ goals already achieved, can be derived from the understanding of the goals as principles.<sup>152</sup> These goals underline the importance of legitimacy through achievements (out-put legitimacy), something which, according to widespread opinion, the Union depends on more heavily than the Member States.<sup>153</sup> If the Union is *de facto* more dependent on legitimacy through output than a state is, it appears reasonable to constitutionally require that certain achievements be secured.

On this basis one might assume a principle of integration in European law: integration understood as a fusion of heretofore nationally organized areas of life into ones of European dimensions. Some authors even claim that there is an abstract legal principle of “more Europe” and “more European unity”.<sup>154</sup> The first preamble of the EC, which speaks of “an ever closer union among the peoples of Europe”, does indeed at first glance appear to

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<sup>149</sup> On the case-law A. von Bogdandy, in: E. Grabitz/M. Hilf (eds.), *Das Recht der Europäischen Union. Kommentar*, 2001, vol. I, Art. 2 EG, para. 9; cf. the action for wrongful failure to act ECJ, 13/83 – Parliament/Council “Transport”, ECR 1985, 1513, para. 49 et seq. and 72 et seq.

<sup>150</sup> ECJ, Opinion 1/78, ECR 1979, 2871, para. 44; C-35/90, Commission/Spain, ECR 1991, I-5073, para. 9; R. Streinz, *Der «effet utile» in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, in: FS Everling, see note 2, 1491 (1509).

<sup>151</sup> C. Alder, *Koordination und Integration als Rechtsprinzipien*, 1969, 311 et seq.; Ipsen, see note 3, 66 et seq.; H. Kutscher, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus der Sicht eines Richters*, in: ECJ (ed.), *Begegnung von Justiz und Hochschule 27-28 September 1976*, 1976, I-41; Pescatore, see note 10, 20 (97); Zuleeg, *Die Gemeinschaft als Integrationsverband*, in: B. Börner et al. (eds.), *Einigkeit und Recht und Freiheit*, FS für Karl Carstens, 1984, 289 (301).

<sup>152</sup> E. Grabitz, *Stillhalte-Verpflichtungen vor dem Binnenmarkt*, 1988, 45 et seq. The concept of integration in Art. 43(a) EU as introduced by the Treaty of Nice should be understood in this sense. This does not exclude the abolishment of core elements of the Common Agricultural Policy, especially as they have recently endangered the single market, ECJ C-289/97, *Eridania*, ECR 2000, I-5409 (5457), para. 78.

<sup>153</sup> Scharpf, see note 144, 20 et seq.; Stumpf, see note 148, 119 et seq.

<sup>154</sup> A. Bleckmann/S. Pieper, *Rechtsetzung und Vollzug des EG-Rechts*, in: M. A. Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts (EL 5)*, B.I, para. 162 et seq., in particular para. 164; *ibid*, *Die Rechtsquellen des Europäischen Gemeinschaftsrechts*, NVwZ 1993, 824 (827); Opinion AG *Reischl* in 32/79, *Commission/United Kingdom*, ECR 1980, 2403, (2460 et seq.); generalizing BVerfGE 89, 155 (210); T. von Danwitz, *Die gemeinschaftsrechtliche Staatshaftung der Mitgliedstaaten*, DVBl. 1997, 1 (2, 4); similarly J. Isensee, *Integrationsziel Europastaat?* in: FS Everling, see note 2, 567 (568).

recommend unity as a goal in itself. However, such a principle would be highly problematic. First, it lacks a sufficient basis in the provisions of the Treaties. Moreover, a central function of European constitutional law, namely the stabilization of the vertical relationship between the Union and Member States, would not be well-served by such a principle. Already for this reason one should reject an independent legal principle requiring the attainment of a higher level of integration.<sup>155</sup> Recent presentations only rarely give the principle of integration a prominent position.<sup>156</sup>

In sum, the tasks laid down in Arts. 2 and 3 EC and Art. 2 EU can be understood as principles promoting unity, principles whose great importance in the Treaties contribute to the unique character of unional constitutional law.<sup>157</sup> As the objectives represent permanent tasks that are to be realized under constantly changing economic, political and social conditions, it furthermore follows that the Union is not static, but rather must be understood as a process. An abstract legal principle of “more Europe”, on the other hand, cannot be deduced from the Treaties. To avoid misunderstandings, one should speak of a principle of fulfillment of Treaty objectives and not of an abstract principle of integration *tout court*.

#### b. Structural Compatibility or outright Homogeneity?

Early on in the integration process it was recognized that a certain structural compatibility between the Member States with respect to the market economy, democracy and rule of law is essential for the operation of the Community. These conditions were correspondingly formulated as normative requirements, though they only had a minimal character.<sup>158</sup> In the wake of realization of common constitutional space, the question arises whether these requirements provide the basis for a unity promoting legal principle of constitutional

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<sup>155</sup> Cf. the contributions in R. Bieber/G. Ress (eds.), *Die Dynamik des Gemeinschaftsrechts*, 1987; M. Nettesheim/P. Schiera (eds.), *Der integrierte Staat*, 1999; cf. also the authors in note 151, who understand “integration” solely as the realization of the single market. C.-D. Ehlermann, *How Flexible is Community Law?*, *Michigan LR* 82 (1984), 1274 (1279 et seq.); U. Everling, *Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft*, *RabelsZ* 50 (1986), 193 (195); B. Langeheine, *Rechtliche und institutionelle Probleme einer abgestuften Integration in der Europäischen Gemeinschaft*, in: E. Grabitz (ed.), *Abgestufte Integration*, 1984, 47 (68 et seq.).

<sup>156</sup> Cf. e.g., P. Manin, *Les Communautés européenne l’Union européenne*, 5<sup>th</sup> ed., 1999, 309 et seq.; going further J. González Campos, *La posición del Tribunal Constitucional en la articulación entre Tribunales comunitarios y Tribunales nacionales*, in: E. García de Enterría/R. Alonso García (eds.), *La Encrucijada Constitucional de la Unión Europea*, 2002, 493 (494).

<sup>157</sup> This is also underscored by the current constitutional discussion, which concentrates completely on the organization, competences and fundamental rights.

<sup>158</sup> H. P. Ipsen, *Über Verfassungs-Homogenität in der Europäischen Gemeinschaft*, *FS Dürig*, 1990, 159; P. Richter, *Die Erweiterung der Europäischen Union*, 1997, 37 et seq., 57.

homogeneity.<sup>159</sup>

Art. 7(1) EU demands structural compatibility between the connected constitutional orders. It could function as a normative peg for the *development of a principle of constitutional homogeneity, replete with* substantive and unity-facilitating requirements for the national constitutional systems.<sup>160</sup> Yet, such a principle would face important objections.

To begin with, such a constitutional principle is not currently operative, at least not in constitutional practice. The current diversity under the national constitutions would hardly be consistent with such a principle: republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, competitive and consensual democracies, those with strong and weak party structures, with strong and weak social institutions, unitary and federal systems, strong, weak or absent constitutional courts as well as significant divergences in the content and level of protection of constitutional rights. The Union's eastward and southward expansion will increase this heterogeneity.

Neither does the postulation of such a principle withstand close scrutiny.<sup>161</sup> The norm's wording already implies a structural consonance only at a rather abstract level, not, however, constitutional homogeneity. Systematically, such a principle of homogeneity could scarcely be justified in light of Art. 6(3) EU as national identity finds expression precisely in the peculiar individual constitutional arrangements.<sup>162</sup> This understanding is confirmed not least by the discussion about sanctions against Austria by way of individual action of 14 Member States and the debate about the concretization of Art. 51 of the Charter of the Fundamental Rights of the European Union.<sup>163</sup>

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<sup>159</sup> On the concept Schmitt, see note 43, 65; applied to the Union BVerfGE 89, 155 (186).

<sup>160</sup> In detail Bieber/Kahl-Wolff/Muller, see note 10, 57 et seq.; T. Schmitz, *Integration in der Supranationalen Union*, 2001, 301 et seq.; F. Schorkopf, in: Grabitz/Hilf, see note 149, Art. 7 EUV, para. 32; A. Verhoeven, How Democratic Need European Union Members Be?, ELR 23 (1998), 217 et seq.

<sup>161</sup> L. M. Díez-Picazo, *Constitucionalismo de la Unión Europea*, 2002, 140 et seq.; with the same result, even though the term of constitutional homogeneity is kept, Frowein, see note 10, 157 et seq.; M. Heintzen, *Gemeineuropäisches Verfassungsrecht in der Europäischen Union*, EuR 1997, 1 (8).

<sup>162</sup> M. Hilf, *Europäische Union und nationale Identität der Mitgliedstaaten*, in: GS Grabitz, see note 62, 157 (166 et seq.)

<sup>163</sup> On the first W. Hummer/W. Obwexer, *Die Wahrung der „Verfassungsgrundsätze“ der EU*, EuZW 2000, 485 (492); on the second P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, CMLRev. 39 (2002), 945, 979 et seq.; R. Alonso García, *Las cláusulas horizontales de la carta de los derechos fundamentales*, in: García de Enterría/R. Alonso García, see note 156, 151 (158 et seq.).

It remains legal science's task to concretize Art. 6 EU on three levels with standards of decreasing regulatory density: the first level, which contains the greatest regulatory density, concerns the requirements for the Union's own operation; the second level, which has significantly less regulatory density, concerns the general requirements placed on the Member States; and the third level, which has minimal conditions, informs the Union's requirements to foreign states in the course of its foreign policy.<sup>164</sup> The second level imposes only a duty of structural compatibility which is much less than a principle of homogeneity would require. The considerations must also be applied to the Charter of the Fundamental Rights of the European Union, which should not be turned into an instrument of creeping constitutional homogenization.<sup>165</sup>

### c. Supranationality?

Supranationality was *Jean Monnet's* slogan to effectuating integration, and in its original form it was a codeword for the goal of statehood.<sup>166</sup> A corresponding principle could therefore have the effect of massively furthering unity. In the meantime, the concept of supranationality has mutated as it has taken on the function of conceiving the Union as a public authority and polity, yet at the same time disassociating it from the nation-state, in particular through polycentrism and the lack of resources for physical compulsion.<sup>167</sup> In this form this concept is suitable for classificatory purposes to distinguish the Union's characteristics from those of international organizations.<sup>168</sup>

At the same time, it has been unable to establish itself as a constitutional principle on its own.<sup>169</sup> The objections against a legal principle of supranationality are the same as those against a legal principle of integration: it has no roots in the normative tradition of European modernity and its abstract one-sidedness in the tension-filled relationships that characterize the Union's federal system speaks against a normative understanding of this concept.

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<sup>164</sup> On this model von Bogdandy, see note 147, 162 et seq.

<sup>165</sup> Problematic ECJ C-60/00 – Mary Carpenter, ECR 2002, I-6279.

<sup>166</sup> F. Rosenstiel, Reflections on the Notion of Supranationality, JCMSt 2 (1963), 127 et seq.

<sup>167</sup> See D. Grimm, Does Europe Need a Constitution?, European Law Journal 1 (1995), 282 et seq.

<sup>168</sup> Cf. above, II 3; Ipsen, see note 3, 67 et seq.; M. Zuleeg, Wandlungen im Begriff der Supranationalität, integration 3 (1988), 103 et seq.

<sup>169</sup> Ipsen, see note Note 3, 67 et seq.; the normative quality is unclear in Weiler, see note 89, 94 et seq., 250 et seq. The newest monograph on the subject, W. Hertel, Supranationalität als Verfassungsprinzip, 1999, does not, despite the title, elevate the concept of "supranationality" to a principle, but rather examines the constitutional quality of primary law. K. von Lindeiner-Wildau, La supranationalité en



#### d. The Single and Supreme Legal Order

By far the most important factor promoting unity is the Union's legal order as such in regulating innumerable social relations through one common and supreme set of rules.<sup>170</sup> In particular, the principle of *equal freedom* is the legal order's real centripetal force. It is – correctly – a general custom in legal science to mark the “real beginning” of Community law with the *van Gend & Loos* and *Costa/E.N.E.L.* decisions, because the direct effect and primacy doctrines are the most important concretizing legal doctrines of the principle of equal liberty. Primacy is of particular importance, as it is with this principle, far more so than with the principle of direct effect, that the question of hierarchy, the most important instrument for advancing unity, arises.<sup>171</sup> First merely conceived as an expression of an autonomous legal order,<sup>172</sup> its constitutional<sup>173</sup> and federal<sup>174</sup> meanings were rapidly realized.

Essential elements in the Union's progression towards a supranational federation can be traced by the development of the concept of primacy. Already with the decision against regarding Community law as higher in a strict sense (supremacy, *Geltungsvorrang*) – and thus against regarding national law as void when inconsistent with Community law – and for considering Community law's supremacy as only one of application (primacy, *Anwendungsvorrang*)<sup>175</sup> – and thus accepting the general validity of the national norm – one discovers a significant moment in shaping the Union, since this decision symbolizes far greater deference to the Member States' legal orders. Nevertheless primacy has been applied at times to extreme degrees, something that has led to vehement criticism from the national

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tant que principe de droit, 1970.

<sup>170</sup> In detail above, III 2 a; emphatically W. Hallstein, *Die Europäische Gemeinschaft*, 1979, 51 et seq.; sceptically R. Dehousse/J. H. Weiler, *The legal dimension*, in: Wallace (ed.), *The Dynamics of European Integration*, 1990, 242; the question of the extent to which law alone can effect “integration” is set aside here; on this M. Cappelletti/D. Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, in: Cappelletti/Secombe/Weiler (eds.), *Integration Through Law*, Vol. I Book 2, 1986, 261, 300, 344, 348 et seq.

<sup>171</sup> ECJ, see note 66 – *Costa/E.N.E.L.*

<sup>172</sup> The reference to the constitutional function can already be found in the AG Lagrange's application in: ECJ, see note 66 – *Costa/E.N.E.L.*, 1289, 1291.

<sup>173</sup> E. Grabitz, *Gemeinschaftsrecht bricht nationales Recht*, 1966, 100.

<sup>174</sup> E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution: American Journal of International Law* 75 (1981), 1 (12); Kadelbach, see note 67, 54.

<sup>175</sup> On supremacy in the strict sense (“*Geltungsvorrang*“) E. Grabitz, see note 173, 113; in contrast M. Zuleeg's conception is essentially the supremacy of application (“*Anwendungsvorrang*“), M. Zuleeg, *Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich*, 140 et seq.; the denomination “*Anwendungsvorrang*“ itself apparently stems from G. Hoffmann, *Das Verhältnis des Rechts der Europäischen Gemeinschaften zum Recht der Mitgliedstaaten*, *DöV* 1967, 433 (439).

perspective. This harshness in application may be partly explained by the problems of a supranational legal order in establishing itself against obstinate national legal orders. Taken together with the principle of equal liberty and the tasks in Art. 2 EC, this approach may be justifiable. Yet, in a developed and established community of law, it is – in view of a federal balance – important to conceive primacy as a principle (and not in all situations as *a* strict rule) so that conflicts can be handled as a weighing of conflicting principles.<sup>176</sup>

Primacy of Union law cannot be fully understood from the perspective of Union law alone. As is well known, the ECJ and meanwhile also the Treaties assume an unconditional primacy even with regard to Member State constitutional law,<sup>177</sup> whereas most Member State high courts do not fully accept such primacy of Union law.<sup>178</sup> The principle of primacy does not succeed in creating complete unity by establishing a strict hierarchy; rather, at the central point there is an “unregulated” relationship due to the competing jurisdictional claims.

From here, one can especially clearly perceive the polycentric structure as a decisive feature of the federation composed of the Union and the Member States. A number of authors understand it as expressing a solution that is appropriate for the polity created by the Union and the Member States.<sup>179</sup> If this relationship remains “unregulated”, principles of the participating legal orders should help to avoid actual conflict, in particular the obligations of mutual cooperation.

Despite the current problematic basis of the primacy of Union law, the Union’s legal order has, thanks to its enormous expansion in almost all areas of law, achieved such a considerable centripetal force that the development of principles to safeguard diversity has become one of the central tasks of the nascent field of European constitutional law.

### **3. Principles Protecting Diversity**

Principles protecting diversity became necessary when principles furthering unity began to shape reality. With the emerging success of the single market program a lively scholarly and

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<sup>176</sup> In more detail Kadelbach, see note 67, 54 et seq.

<sup>177</sup> Most recently ECJ, see note Note 66 – Tanja Kreil, without even discussing the problems of supremacy; the Treaty makes mention of this issue in point 2 of the protocol on subsidiarity and proportionality (Amsterdam Treaty).

<sup>178</sup> Cf. also the contributions in J. Schwarze (ed.), *Die Entstehung einer europäischen Verfassungsordnung*, 2000.

<sup>179</sup> B. de Witte, *The Nature of the Legal Order*, in: Craig/de Burca, see note 10, 177 (201); von Bogdandy, see note 103, 284; A. Peters, see note 102, 263 et seq.

political discussion began concerning European tasks, the effectiveness of European law, its democratic legitimacy as well as the respect for national autonomy and identity. The discussion resulted in the insight that respect for diversity is an essential condition for justice and therefore a condition for the legitimacy of supranational authority. This insight then led to considerable innovations in primary law. Art. 1(2) EU, Art. 6(3) EU, Art. 5 EC and the subsidiarity protocol as well as the new competence provisions whose formulations show a deference to the Member States' autonomy (e.g., Art. 129, 149(4), 151(5), 152(4)(c) EC) deserve to be mentioned in this regard. A principle of cultural diversity can be deduced from Arts. 149(1) and Art. 151(1) EC. The sensitive language question, which was first placed within the discretion of the Community's legislator according to Art. 290 EC,<sup>180</sup> has become at least partly constitutionalized in favor of diversity according to Art. 21(3) EC. Some of the single market principles are also quite open to an interpretation respectful of diversity, for instance the principle of the equality of different national rules (country of origin principle), especially as an indirect harmonizing effect has not materialized.<sup>181</sup> Nevertheless, the first indent of the Treaty of Nice's Declaration on the Future of the Union shows that these innovations do not completely satisfy the need to respect diversity.

#### a. Doctrine of Competences

The first of the principles protecting diversity is that the competence of constitutional amendment is reserved to the Member States acting jointly. This principle finds expression in Art. 48 and 49 EU as well as in the principle of limited powers. It comes forward with particular clarity in Art. 5 EU and Art. 5(1) EC and has developed into an independent principle of interpretation.<sup>182</sup> In the past, substantiated doubts were raised as to whether the Union's institutions always respected the principle of limited competences.<sup>183</sup> More recent

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<sup>180</sup> Council Regulation No. 1 determining the languages to be used by the European Economic Community of 15 April 1958, OJ B 1958 No. 17, 385 et seq.; on this T. Oppermann, *Das Sprachenregime der Europäischen Union - reformbedürftig?*, ZEuS 2001, 1 (8).

<sup>181</sup> On the principle of origin ECJ, 120/78, *Rewe-Zentral-AG/Bundesmonopolverwaltung für Branntwein - Cassis de Dijon*, ECR 1979, 679, para. 14; most recently C-238/98, *Hugo Fernando Hocsman/Ministre de l'Emploi et de la Solidarité*, ECR 2000, I-6623, para. 23 et seq.; a summary is offered by M. Hoffmann, *Die Grundfreiheiten des EG-Vertrags als koordinationsrechtliche und gleichheitsrechtliche Abwehrrechte*, 2000, 61 et seq. and 151 et seq. (on Art. 28 EC), 172 et seq. (on Arts. 39, 43 and 49 EC).

<sup>182</sup> ECJ cases 281, 283–285 & 287/85, *Germany and others/Commission*, 1987, 3203, para. 30 et seq., 41; *Opinion 1/94 – WTO*, ECR 1994, I-5267, para. 9; *Opinion 2/94 – ECHR*, ECR 1996, I-1759, para. 30; C-376/98, *Germany/Parliament and Council*, ECR 2000, I-8419, para. 83; Court of First Instance, see note 78, para. 74 (77).

<sup>183</sup> Problematic ECJ, *Opinion 1/91, EEA*, ECR 1991, I-6079, para. 21; on the development A. Tizzano,

legal developments, which not all current critics have adequately taken account of,<sup>184</sup> should meet these doubts,<sup>185</sup> even if important points still await confirmation, such as the extension to the EU Treaty of the general rules of competence developed under the EC Treaty. A substantial doctrine of the vertical competences has been developed only in the last several years.<sup>186</sup>

Since the Union's competences are broad, national autonomy can be considerably limited even when the limitations on the Union's competences are observed. The most important safeguard for the respect of Member State autonomy is organizational in nature: it is the Council's central role in the Union's decision-making process as the institution for protecting the Member States' interests. However, there are numerous examples for Council acts that demonstrate that the Council does not always convincingly fulfill this role.

Many proposals have been made to improve this principle's observance.<sup>187</sup> Art. 5(2) and (3) EC as introduced by the Treaty of Maastricht is of central importance. This Article has the task of guaranteeing the application of the Union's competences that is respectful of the Member States' autonomy.<sup>188</sup> In particular with regard to subsidiarity one can scarcely gain an overview of the literature published.<sup>189</sup> Yet although this provision has thus far not achieved an important role in the ECJ's jurisprudence,<sup>190</sup> it has nonetheless successfully stamped the legislative culture: nobody has been able to demonstrate recently that the Union has been

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Lo sviluppo delle competenze materiali delle Comunità europee, Riv.Dir.Eur. 1981, 139 et seq.; R. Dehousse, La Cour de justice des Communautés européennes, 1994, 53 et seq.

<sup>184</sup> In particular S. Bross, judge at the federal constitutional court, in charge with European matters, is continuously voicing strong criticism without giving any evidence which acts or judgements nurture his concerns.

<sup>185</sup> Cf. the annotations in note 182.

<sup>186</sup> D. Triantafyllou, Vom Vertrags- zum Gesetzesvorbehalt, 1996; J. Martín y Pérez de Nanclares, El sistema de competencias de la Comunidad Europea, 1997.

<sup>187</sup> I. Boeck, Die Abgrenzung der Rechtsetzungskompetenzen von Gemeinschaft und Mitgliedstaaten in der Europäischen Union, 2000; A. von Bogdandy/J. Bast, Die vertikale Kompetenzordnung der Europäischen Union, EuGRZ 2001, 441 (452 et seq.); M. P. Chiti, Delimitación o reparto de competencias entre Unión Europea y estados miembros?, in: García de Enterría/Alonso García, see note 156, 69 et seq.

<sup>188</sup> Since the Treaty of Amsterdam it has been concretized by the protocol on subsidiarity and proportionality, which is adventurous with regard to the formulation, on this Griller et al., see note 50, 96 et seq.

<sup>189</sup> C. Calliess, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union, 2<sup>nd</sup> ed., 1999.

<sup>190</sup> Beginnings in ECJ, C-84/94, United Kingdom/Council, ECR I-5755; C-233/94, Germany/Parliament and Council, ECR 1997, I-2405; joined cases C-36 and 37/97, Kellinghusen/Amt für Land-und Wasserwirtschaft, ECR 1998, I-6337.

passing legislation that substantially collides with the principle of subsidiarity.<sup>191</sup> Obviously, this is a rather successful innovation protecting the Member States' autonomy.

b. A General Principle of Diversity?

Yet some think that this focus is too narrow, and thus one line of research in European constitutional law is trying to develop a general principle of diversity that, at the level of Union law, tries to establish diversity as an independent value to be legally protected against harmonizing Union measures. It would be a principle at the same level of abstraction as the principles of integration or homogeneity. A normative starting point could be found in Art. 6(3) EU.

It is constitutive for the Union not to be a vehicle of hegemonial aspirations of a people or state; the entire constitution is infused with this idea.<sup>192</sup> The current debate does not engage this rather horizontal problem, but rather addresses itself to supranational homogenization. *Joseph Weiler* tries to capture the constitutional order's pluralistic, non-hierarchical, discursive, post-national character with a principle of tolerance.<sup>193</sup> Some authors propose a paradigm change from a diversity endangering paradigm of "uniformity, homogeneity and one-directional integration" to a diversity protecting paradigm of "of flexibility, mixity and differentiation".<sup>194</sup> *Jo Shaw* attempts to conceptualize phenomena such as "disintegration", "flexibility" and "fragmentation", which have thus far been perceived as a threat to the integration process, as principles that shape European constitutional law as much as integration and uniformity. This should sever the connection between supranational law and integration, thereby bringing a more balanced constitutional framework to the law of the Union, one corresponding to the diversity of the Union's Members.<sup>195</sup> A properly understood

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<sup>191</sup> Cf. the subsidiarity report of the German federal government of 18 August 2000, BT-Drs. 14/4017.

<sup>192</sup> Hallstein, see note 61, 45; on the hegemonial aspirations of the French policy and the Anglo-American culture Siedentop, see note 14, 111, 113, 133.

<sup>193</sup> J. H. Weiler, Federalism without Constitutionalism: Europe's *Sonderweg*, in: K. Nicolaidis/R. Howse (eds.), *The federal vision: Legitimacy and levels of governance in the United States and the European Union*, 2001, 54 (65 et seq.).

<sup>194</sup> G. de Búrca/J. Scott, Introduction, in: *ibid* (eds.), *Constitutional Change in the EU. From Uniformity to Flexibility?*, 2000, 1 (2).

<sup>195</sup> J. Shaw, *European Union Legal Studies in Crisis? Towards a New Dynamics*, OJLS 16 (1996), 231 (240 et seq.); *ibid.*, *Citizenship of the Union*, in: *Academy of European Law* (ed.), 1998, *Collected Courses of the Academy of European Law*, 1995, Vol. VI-1, 237; *ibid.*, *Postnational constitutionalism in the European Union*, JEPP 1999, 579.

principle of federalism could also function as a protection of diversity.<sup>196</sup>

The assumption of abstract legal principles such as diversity, difference, flexibility<sup>197</sup> or tolerance appear to me to be as problematic as an abstract legal principle of unity or integration *tout court*. The contributions thus far have shown what such abstract principles could practically achieve in addition to the doctrine of competences, the protection of national interests by means of the Union's organizational set-up and the legal principles regarding orderly procedure and the protection of the citizen. Significant problems already arise with the concretization of Art. 6(3) EU. Such legal principles would only have a positive role to play if abstract principles such as unity, integration or homogeneity were embodied in *existing law*. Yet it has been demonstrated that the European legal order does not support the assumption of such unity advancing principles. Consequently, there is no need for contrary principles to balance these principles. Just as certain as a concern of respect for diversity can be deduced from primary law, so weak is the evidence that a general legal principle can be formulated above and beyond the various legal norms.<sup>198</sup>

### c. Protection of Diversity through Organization and Procedure

The most important safeguard of European diversity is the Union citizens' will to assert themselves in their diversity and a responsive political structure of the European Union. The most important concretization strategy for the protection of diversity is thus the organization and procedures of the Union's political system. The postulate of diversity determines not only the vertical relationship between the Union and the Member States but also the Union's internal structure, be it the institutions' internal laws or the horizontal inter-institutional relationships.

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<sup>196</sup> Siedentop, see note 14, 26.

<sup>197</sup> The current Union constitution is eloquently silent on this point. It permits closer cooperation and thus flexibility (Arts. 43 et seq., 40 EU, 11 EC) but does not attribute any value to it. Nor has European constitutional law erected serious hindrances to forms of flexible closer cooperation outside the Treaties; B. de Witte, "Old Flexibility", in: de Búrca/Scott, see note 194, 31 (39 et seq.). This notwithstanding numerous possible conflicts and problems; cf. A. Kliemann, *Auf dem Wege zur Sozialunion?*, in: T. von Danwitz et al. (eds.), *Auf dem Wege zu einer Europäischen Staatlichkeit*, 1993, 171 (181 et seq.). An examination of the diverse forms of flexibilization with a view to structuring principles appears to be urgently required. Legal science has in this case thus far not fulfilled its *duty*; but cf. the contributions by J. Wouters, D. Curtin and J.-V. Louis in: B. de Witte/D. Hanf/E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, 2001.

<sup>198</sup> Equally for the German Constitutional Court E. Denninger, *Menschenrechte und Grundgesetz*, 1994, 13 et seq., 44 et seq., 61.

The polycentric nature of the Council's internal organization, along with the European Council, the Union's most powerful institution, may serve as an example. The Council has a plural composition, meets in over twenty different constellations and does not have at its disposal the central mechanism for building unity: a hierarchy.<sup>199</sup> In many respects it appears to be more a multifaceted and fragmented consensus-building process of 16 different politico-administrative systems (15 national and the Commission) than a firmly established institution. The political process is characterized not by hierarchical decree, but rather by contract-like cooperation between different politico-administrative systems that are largely independent of each other.<sup>200</sup> The innovations of Art. 207(2) EC and the strengthening of the Council Secretariat's administrative competences by the Treaty of Amsterdam<sup>201</sup> do not change this.

The diversity-protecting nature of this arrangement, in its present and envisaged form, is evident when compared to state institutions that have an analogous position in the national system. Only the national parliament or the government can be taken into consideration.<sup>202</sup> The national government and the national parliament, the latter due to the party political structure, form far stronger hierarchical institutions. The government's majority, which is embodied in a more or less clear personal hierarchy, is of particular importance. A party structure as well as a personification of political power are largely missing at the European level.

One may object that even in national systems a strict hierarchy is no longer the rule and that in particular federal states generate further centers of power – for example the German Federal Council in which the regional governments are represented.<sup>203</sup> Nevertheless there remains a qualitative difference: the national systems certainly show a tendency to focus political power at the top of the government, not least because of the *domestic* consequences

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<sup>199</sup> F. Grevisse, A propos de quelques institutions, *Revue du Marché commun et de l'Union européenne* 1998, 569 (572 et seq.).

<sup>200</sup> F. Scharpf, Introduction. The Problem Solving Capacity of Multi-Level Governance, *Journal of European Public Policy* 4 (1997), 520 et seq.

<sup>201</sup> On the proposals A. Dashwood, Effectiveness and Simplification of Decision-Making by the Council, in: J. A. Winter/D. Curtin/A. Kellermann/B. de Witte (eds.), *Reforming the Treaty on European Union*, 1996, 147 (156 et seq.).

<sup>202</sup> A development on the part of the Commission towards a government in the sense of a centralization of authority is not discernable and would hardly be consistent with the Union's structure, P. VerLoren van Themaat, The internal powers of the Community and the Union, in: Winter et al. (eds.), see note 201, 249 (251 et seq. and 258 et seq.).

<sup>203</sup> R. Steinberg, *Der ökologische Verfassungsstaat*, 1998, 396 et seq.; T. Vesting, *Politische Einheitsbildung und technische Realisation*, 1990, in particular 211 et seq.

of European integration.<sup>204</sup>

The lack of overarching hierarchical structures, or to put it another way, the political system's polycentric and horizontal character, can be formulated as an independent constitutional principle protecting diversity. The relevant research is still at the beginning.<sup>205</sup> Nevertheless, it can be deduced from this insight that the logic of the repartition of powers in the Union, which generally aims not at separation but rather at cooperation, is not a problematic deformation, but rather an appropriate expression of the Union's system of authority.<sup>206</sup> This situation is normatively underpinned by the principle of *institutional balance*: it serves to stabilize the lines of responsibility established by the Treaties<sup>207</sup> as well as compliance with procedural regulations<sup>208</sup> without, however, pushing the inter-institutional relationships towards any specific direction.<sup>209</sup> At any rate, it is unlikely that the organizational constitution's individual rules will prove to be the organic unfolding of *a single* principle: the provisions concerning the competences and cooperation of the European Council, Commission, Council and Parliament are too convoluted, patchy and without a leading idea.<sup>210</sup> The individual rules are explained in good portion by contingencies in negotiating strategies and power politics. Thus far the success of legal science in piercing the Treaties' procedural

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<sup>204</sup> What is seen as a loss of sovereignty on a very general view is, on closer inspection, the loss of power of individual actors. The governments exchange the loss of national autonomy for opportunities to exercise influence at the supranational level and thereby achieve an extra profit, namely the increase of autonomy with respect to other domestic institutions, such as the national parliament, A. Moravcsik, *Warum die Europäische Union die Exekutive stärkt*, in: D. Wolf (ed.), *Projekt Europa im Übergang?*, 1997, 211.

<sup>205</sup> Cf. in particular the authors in Notes 193 and 195.

<sup>206</sup> D. Simon, *Le système juridique communautaire*, 1997, 97, 107.

<sup>207</sup> ECJ, C-9/56, *Meroni/ECSC*, ECR 1958, 11, 44; 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel/Köster*, ECR 1970, 1161, para. 9; on the correlative agency problems E. Vos, *Reforming the European Commission: What Role to Play for EU Agencies?*, *CMLRev.* 37 (2000), 1113 (1120); E. Chiti, *The Emergence of a Community Administration: The Case of European Agencies*, *CMLRev.* 37 (2000), 309.

<sup>208</sup> ECJ, C-139/79, *Roquette Frères/Council*, ECR 1980, 3333, para. 33; C-70/88, *Parliament/Council (Chernobyl)*, ECR 1990, I-2041, para. 22 et seq.

<sup>209</sup> Further considerations center on apportioning competences according to the specific profile of the institution with a view to its legitimacy structure and out-put potential, in detail Gerkrath, see note 10, 388 et seq.; M. Kaufmann, *Europäische Integration und Demokratieprinzip*, 1997, 224 et seq.; Lenaerts/van Nuffel, see note 7, 418.

<sup>210</sup> The term "organized irresponsibility" is apt, S. Oeter, *Vertrag oder Verfassung?*, in: Th. Bruha/K. Hesse/A. Nowak (eds.), *Welche Verfassung für Europa?*, 2001, 243 (262), who correctly states that the reform of the institutions and their cooperation is the fateful question.



law has been meager.<sup>211</sup> The state of research can only be described as unsatisfactory.<sup>212</sup>

#### 4. The Principle of Loyalty and the Federal Balance

Whereas one eventually meets the face of power behind the law in the national legal orders,<sup>213</sup> one searches in vain for a comparable power behind European law. Much of European law, namely all legal norms that represent, at their core, a communication between different public authorities, are not even symbolically sanctioned by possible compulsion.<sup>214</sup> This aspect already shows that loyalty plays a central, indeed even a founding role in European law.

Moreover, loyalty as a legal principle has a direct role in shaping the manifold relationships between the public authorities involved. Especially in view of the lack of hierarchies<sup>215</sup> and because the legal regulations are often only fragmentary, these relationships must be embedded in supplementary duties that secure the law's effectiveness, yet at the same time ease tensions. The principle of loyalty, usually described by the Court as the principle of cooperation, generates such duties.<sup>216</sup> The relevant judgments are based mainly on Art. 10 EC, but the principle can *now* be extended to all the Union's activities.<sup>217</sup> This principle shapes the manifold interactions between the Union institutions and the national authorities in

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<sup>211</sup> Cf. above all R. Bieber, *Das Verfahrensrecht von Verfassungsorganen*, 1992, in particular 240 et seq.

<sup>212</sup> A good example of the woeful state is offered by M. Axmann, *Genese Europäischer Rechtsetzungsverfahren*, 2001.

<sup>213</sup> Kelsen speaks of the "law as [a] coercive norm", cf. e.g. H. Kelsen, *Introduction to the Problems of Legal Theory*, 1999, 26.

<sup>214</sup> Of course the compulsion foreseen in Art. 37 German Basic Law has also never been exercised; its symbolic value is nevertheless enormous, as the American example shows. Cf. U.S. Supreme Court, *Brown v. Board of Education*, 347 U.S. 483 (1954); on the positions of the relevant jurisprudential discussions A. von Bogdandy, *Beobachtungen zur Wissenschaft vom Europarecht*, *Der Staat* 40 (2001), 3, 19 et seq.

<sup>215</sup> On the coordinating structure of European administrative law W. Hoffmann-Riem, *Strukturen des Europäischen Verwaltungsrechts – Perspektiven der Systembildung*, in: E. Schmidt-Aßmann/W. Hoffmann-Riem, see note 4, 319 (321 et seq.).

<sup>216</sup> ECJ, C-230/81, *Luxemburg/Parliament*, ECR 1983, 255 (287), para. 37; further C-54/81, *Fromme*, ECR 1982, 1449 (1463), para. 5; C-358/85 and C-51/86, *France/Parliament*, ECR 1988, 4821 (4855), para. 34; C-14/88, *Italy/Commission*, ECR 1989, 3677 (3706), para. 20; C-2/88, *Zwartveld*, ECR 1990, I-3365, 3372, para. 17; similarly, 3<sup>rd</sup> Declaration to Art. 10 of the Treaty of Nice; O. Due, *Article 5 du traité CEE. Une disposition de caractère fédéral?*, in: *Academy of European Law* (ed.), 1992, *Collected Courses of the Academy of European Law*, 1991-Vol. II-1, 15 (35); J. Mischo, *Der Beitrag des Gerichtshofes zur Wahrung der föderalen Balance in der Europäischen Union*, 1999.

<sup>217</sup> U. Everling, *From European Communities to European Union*, in: von Bogdandy et al. (eds.), *European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, 2002, 139 (157); A. Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union*, 2001, 39 et seq.

accordance with the needs of the still nameless polity which the Union and the Member States form. Accordingly it can both facilitate unity and protect diversity.

This principle is the basis of many important, sometimes highly differentiated legal concepts that do not seldom have strong unifying effects, for instance the requirements regarding judicial cooperation or the domestic implementation of Union law.<sup>218</sup> In light of the protection of diversity it is, however, remarkable that the principle generally protects *only* the integrity of the results of European legislation against *subsequent* disobedience by individual Member States. In contrast, duties to formulate “Union friendly policies” are not derived from this principle.<sup>219</sup> This is by no means necessarily so; after all, German authorities are bound by the Union’s goals (Art. 2 EU, Arts. 2 and 3 EC): directly when they participate in the Union’s institutions, otherwise indirectly by Art. 10 EC. These norms require them to further the interests of *all* Union citizens; moreover, the principle of primacy might apply in case of conflicts between “national” and “supranational” interests. Nevertheless, it has never come to a legal rejection of “national positions”. This can be explained by the understanding of the Union’s political system presented above: the European commonweal is arrived at through synthesizing the various standpoints which are usually brought into the European process by the national governments. The principle therefore only requires participation in the Union’s political process.<sup>220</sup>

The principle of loyalty also imposes duties on the Union’s institutions with regard to the Member States.<sup>221</sup> These extend to the protection of diversity, though they still await further

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<sup>218</sup> ECJ, joined cases C-205 to C-215/82, *Deutsche Milchkontor and others/Germany*, ECR 1983, 2633, para. 19; on the case-law in more detail see von Bogdandy, in: Grabitz/Hilf, see note 149, Art. 10 EG, para. 32 et seq.

<sup>219</sup> ECJ, 57/72, *Westzucker*, ECR 1973, 321, 341, para. 17.

<sup>220</sup> An “empty chair” policy, as conducted by France from July 1965 to January 1966, is thus a violation of Art. 10 EC, Hatje, see note 217, 67 (77); in detail J. H. *Kaiser*, *Das Europarecht in der Krise der Gemeinschaften*, EuR 1966, 4 et seq. Also internal participatory procedures that largely deprive the representatives in the Council of their ability to conduct or conclude compromises and thus disproportionately compromise the legislative process are inconsistent with this principle, U. Everling, *Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes*, DVBl. 1993, 936 (946); F. C. Mayer, *Nationale Regierungsstrukturen und europäische Integration*, EuGRZ 2002, 111 (119).

<sup>221</sup> From the extensive case-law ECJ, C-230/81, *Luxemburg/Parliament*, ECR 1983, 255 (287 et seq.), para. 37 et seq.; C-52/84, *Commission/Belgium*, ECR 1986, 89 (105), para. 16; joined cases C-358/85 and C-51/86, *France/Parliament*, ECR 1988, 4821 (4855 et seq.), para. 34 et seq.; C-94/87, *Commission/Germany (Alcan I)*, ECR 1989, 175 (192), para. 9; C-75/97, *Belgium/Commission*, ECR 1999, I-3671 (3712), para. 88; C-404/97, *Commission/Portugal*, ECR 2000, I-4897 (4934), para. 40; C-261/99, *Commission/France*, ECR 2001, I-2537 (2556), para. 24; C-378/98, *Commission/Belgium*, ECR 2001, I-5107, para. 31; 20 September 2001, C-263/98,

clarification. It is certain that Art. 6(3) EU, as an expression of the principle of loyalty, requires the Union to take the Member States' constitutional principles and fundamental interests into account.<sup>222</sup> However, there cannot be a prohibition on Union action every time a domestic constitutional position is impinged on. Otherwise, in view of the fact that innumerable questions are constitutionally settled, as is the case in Germany for example, an independent Union policy would be impossible. Rather, the principle is to be applied in case of concrete and serious interferences with the fundamental requirements of the national constitutional order. Their determination will have to be made by the ECJ, probably in a procedure involving the national constitutional or high court.<sup>223</sup> The fact that this difficult and contentious road has never been taken demonstrates the respective effectiveness of the Union's institutions and its constitutional law. Loyalty thus appears to be a key to understanding the Union. Just as the European legal order ultimately rests on free obedience of its Member States and therefore on their loyalty, the principle of loyalty is also capable of generating solutions to open questions and thus containing the conflicts that arise in a polycentric and diverse polity.

## V. CONCLUDING REMARKS

This exposition has revealed on the one hand to what extent a doctrine of the unional founding principles can build on established constitutional scholarship and on the other where innovation is necessary. On some important issues, continuity is possible only if national constitutional law is understood according to disputed positions. There is more continuity the less the national position is indebted to the postulate of unity. If the concepts of a people, of state and sovereignty are not central but rather peripheral, if representation is not the epiphany of an invisible being but rather an instrument of interest aggregation, if the law is not the incarnation of some *volonté générale's* higher truth but rather the result of negotiating processes, if law is not an expression but rather a functional equivalent of common values, then domestic and European constitutional scholarship will share much more than under the opposite approaches. The more national constitutional law is seen to be the constitutional law

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Belgium/Commission, para. 94 et seq.

<sup>222</sup> BVerfGE 89, 155 (174); A. Epiney, *Gemeinschaftsrecht und Föderalismus: "Landes-Blindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen*, EuR 1994, 301 (318); C. Schmid, *Multi-level constitutionalism and constitutional conflicts*, Dissertation. EUI, Florence, 2001, 222 et seq.

<sup>223</sup> P. Kirchhof, *Gegenwartsfragen an das Grundgesetz*, JZ 1989, 453 et seq.; Schmid, see note 222, 228.

of social and political pluralism, the sooner a theoretical and dogmatic connection can be established.

A European doctrine of principles remains a project that will occupy many legal scholars before any satisfactory state of construction will be achieved. Established detailed doctrines concretize unional principles in only few areas; many principles remain largely abstract or their nature as principles is contested. Legal science's permeation of the European legal order on the basis of principles remains a program for the future.

The principle of democracy and the relationship between principles furthering unity and those protecting diversity have shown themselves to be philosophically problematic in the sense of an antinomy.<sup>224</sup> Legal science alone will not be able to pacify the underlying tensions. However, by developing the tensions as conflicts of principles it can introduce some rationality in dealing with them. Moreover, unsolved tensions can be hedged by the principle of loyalty. Definite solutions cannot be expected. *Carl Schmitt* was likely right on one point: a *substantial* stability is largely impossible in a real, i.e. diverse, federation.<sup>225</sup> Yet it is even more likely that substantial stability is in general an out-dated illusion in a rapidly changing, interdependent world. Fortunately, what really matters is not substantial stability, but the realization of the principles discussed in this contribution. Their realization appears demanding, but eventually promising.

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<sup>224</sup> I. Kant, *Kritik der reinen Vernunft*, 2<sup>nd</sup> ed., 1787 (1956), B 392, 444; Frowein, see note 146), 317.

<sup>225</sup> Schmitt, see note 43, 370.