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The European Constitution and the Courts
Adjudicating European constitutional law in a multilevel system

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Abstract

This paper is about the role and the function of the European Court of Justice and the highest courts of the Member States and the relationship between the two levels of courts. The interplay of the respective courts is not only the subject of the study of European constitutional law doctrine, but the courts themselves are also active participants in the shaping of this same European constitutional law. The paper includes an assessment of the jurisprudence of the courts, followed by a theoretical breakdown of the case-law.

The European Constitution and the Courts

Adjudicating European constitutional law in a multilevel system

Franz C. Mayer *

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I. INTRODUCTION

“In Europe the judge has never been merely *la bouche qui prononce les paroles de la loi*”,¹ exclaimed the German Constitutional Tribunal (the *Bundesverfassungsgericht (BVerfG)*) in 1987. This statement applies as well to European constitutional law, regardless of the distinct legal traditions of its Member States. Thus, the question of who has the final say in legal matters within the EU multilevel system of governance, and hence in the relationship between the European Court of Justice (ECJ) and the highest courts of the Member States is twofold in nature. The interplay of the respective courts is not only the subject of the study of European constitutional law doctrine, but the courts themselves are also active participants in the shaping of this same European constitutional law.

This analysis of the relationship between the two levels of courts therefore has to begin with an assessment of their jurisprudence (see *infra*, I.), followed by a theoretical breakdown of the case-law (see *infra*, II.). I will conclude with observations on the prospects for future development of the relationship between European and national courts (see *infra*, III.).

II. TAKING STOCK: THE ECJ AND THE SUPREME NATIONAL COURTS – CONFLICT OR COOPERATION?

The highest court at the European level is the ECJ in Luxembourg,² but the situation is less clear at the national level. Therefore, the first step is to identify the national adjudicating

¹ BVerfGE 75, 223 (243) – *Kloppenburg*, referring to the famous sentence by Montesquieu (English translation in 3 *CMLR* 1988, 1 and A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases*, 1994, 496). See also I. Pernice, *Die Dritte Gewalt im europäischen Verfassungsverbund*, *EuR* 1996, 27 (35).

² The Court of First Instance is mentioned together with the ECJ in Art. 220 EC as of the Treaty of Nice version of the EC-Treaty, but the ECJ’s position as the highest court of the European Union is confirmed by Art. 225 EC

bodies that function as the ECJ's 'interlocutors'.

The relevant adjudicating entities in the present context are constitutional courts and supreme courts.³ Special constitutional courts exist, alongside specialised high courts in Germany (*BVerfG*), Austria (*Verfassungsgerichtshof*), Italy (*Corte Costituzionale*), Portugal (*Tribunal Constitucional*), Spain (*Tribunal Constitucional*), and since 1996 also in Luxembourg (*Cour Constitutionnelle*). Ireland (Supreme Court) and Denmark (*Højesteret*) have supreme courts that are also constitutional courts. In Great Britain, it is the second chamber of Parliament, the House of Lords, that exercises the functions of a constitutional and a supreme court.

In the Netherlands, we can find a number of specialised courts of equal rank, *inter alia* the *Raad van State* and the *Hoge Raad*. The situation is similar in Sweden, where the highest (specialised) courts are the Supreme Court (*Högsta domstolen*) and the Supreme Administrative Court (*Regeringsrätten*), as well as in Finland (*Korkein oikeus*, Supreme Court, and *Korkein hallinto-oikeus*, Supreme Administrative Court). Swedish judges of the two supreme courts also form a Council (*Lagrådet*) to exercise a non-binding review of draft legislation, whereas Finland has a Constitutional Committee of Parliament (*Perustuslakivaliokunta*), to control its draft legislation. (*Lagrådet*)

In France, there is no formal constitutional court aside from the highest courts for administrative law (*Conseil d'Etat*⁴) and for civil and criminal law (*Cour de cassation*). The *Conseil constitutionnel*, originally limited to the review of draft legislation, does increasingly exercise the role of a constitutional court.

in the Treaty of Nice-version.

³ See for the supreme and constitutional courts in the respective Member States C. Starck/A. Weber (eds.), *Verfassungsgerichtsbarkeit in Westeuropa I*, 1986; Europäisches Parlament (ed.), *Constitutional Courts in the Member States of the European Union*, 1995; A.-M. Slaughter/A. Stone Sweet/J.H.H Weiler (eds.), *The European Courts and National Courts*, 1998; F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung*, 2000, 71 *et seq.*; C. Tomuschat, *Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte*, in: P. Badura/H. Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht*, 2001, 245 *et seq.*

⁴ Institutions modeled on the French Council of State-structure (*Conseil d'Etat*) in Belgium, Netherlands, Greece, and until 1996 also in Luxembourg typically have specialized adjudication-sections which exercise the functions of a supreme

Finally, Belgium has specialised supreme courts (*Conseil d'Etat* and *Cour de cassation*), and since 1983 a constitutional court that specialises in, but is also limited to, controlling the exercise of competencies, the *Cour d'arbitrage*. In Greece, there are several supreme specialised courts, the *Symvoulío Epikrateias* (Council of State), the *Elegktiko Synedrio* (Court of auditors) and the *Areios Pagos* (Supreme Court). Beyond that, there is a Special Supreme Court, the *Anotato Eidiko Dikastirio*, which is composed of judges from the highest specialised courts.

To solve conflicts and contradictions between these courts, similar institutions can typically be found in other systems with specialised high courts of equal rank. In France, there is a *Tribunal des Conflits* between *Cour de cassation* and *Conseil d'Etat*, and in Germany, there is a *Gemeinsamer Senat der obersten Bundesgerichte* (Joint Chamber of the Highest Federal Courts).

This summary of the highest courts of the Member States leaves us with a rather heterogeneous picture.⁵ On one side, there are some parallels and similarities, sometimes even amounting to familial relationships. Consider the Austrian Constitutional Court, the *Verfassungsgerichtshof* (*öVfGH*), to some extent 'the mother' of all constitutional courts in Europe, as it served as a model for the German, Italian and the Spanish Constitutional Courts. Likewise, the French model of supervising the use of administrative law in the form of a Council of State may also be found in Belgium, the Netherlands, Greece and Luxembourg.

But contrasts prevail: traditional and venerable institutions (such as the House of Lords in Great Britain or the *Conseil d'Etat* in France) may be found alongside newly created institutions (the *Cour d'arbitrage* in Belgium or the *Cour Constitutionnelle* in Luxembourg).

administrative court, while other sections have advisory functions. The specific names of the adjudication-section, e.g. in France *Section du Contentieux*, in the Netherlands (since 1994) *Afdeling Bestuursrechtspraak*, are omitted here.

⁵ Of course, this heterogeneity extends to the role of the judge in the different legal cultures, see in that context P. Pernthaler, *Die Herrschaft der Richter im Recht ohne Staat*, *JBl.* 2000, 691.

Courts with comprehensive powers (*BVerfG*, *öVfGH*) operate side by side with less powerful tribunals. Sometimes, there are no specific constitutional courts at all (Denmark, Ireland); sometimes, it is the mere idea of constitutional adjudication or judicial review that is not compatible with the constitutional traditions of a Member State (e.g. in France, Finland, and the Netherlands).

One way to improve our understanding of the relationship between the ECJ and the respective supreme national courts is to examine the link between the court-levels already foreseen by the treaties. This is a procedural link: the preliminary reference procedure under Art. 234 EC (see *infra*, 1.) Apart from this, there are areas of substantive constitutional law that have shaped the relationship between the courts. These include the issue of fundamental rights protection as well as the question of who controls the limits of the EU's⁶ competencies (see *infra*, 2.)

1. Adopting a procedural perspective: The duty to make preliminary references under Art. 234(3) EC

European law imposes a duty on national courts to make preliminary references, that is to request certification, to the ECJ in two cases. In the first case, any court or tribunal of a Member State that has doubts about the validity of European law has to make a reference, as the ECJ claims a monopoly to decide upon the validity of European law.⁷ The second case is the duty to make references to the ECJ under Art. 234(3) EC, which requires that “a court or tribunal of a Member State against whose decisions there is no judicial remedy under national

⁶ I will use European Union and EU/EC as umbrella terms for European integration.

law” shall bring also questions of mere interpretation of European law before the ECJ.⁸ Thus, there are concrete obligations for supreme national courts flowing from primary law as interpreted by the ECJ (see *infra*, a). The national courts’ obedience to these duties, however, is here subject to empirical scrutiny (see *infra*, b).

a) Supreme national courts and the duty to make references from the perspective of European law

Following attempts of national courts, in particular⁹ the attempt of the French *Conseil d’Etat*,¹⁰ to establish a category of ‘clear and obvious interpretation’ (*acte clair*¹¹) in interpreting EC law, the ECJ decided the matter by means of its own EC-law doctrine of *acte clair* which establishes an extremely strict standard.¹² According to the CILFIT decision, the only cases in which it is safe to assume that there is no duty to refer a question to the ECJ is either when the question is not relevant for the national court’s decision or when the interpretation of EC law is obvious. This is the case only when the correct application of Community law is so obvious as to leave no room for any reasonable doubt.¹³ Under the CILFIT-criteria, the national court or tribunal has to be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ. The existence of such a possibility must be “assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the

⁷ ECJ, Case 314/85, *Foto-Frost*, [1987] ECR 4199 (the cases can be found online at <<http://curia.eu.int>>).

⁸ See in that context ECJ, Case C-99/00, *Lyckeskog*, [2002] ECR I-4839 paras. 10 *et seq.* See also Art. 35 EU.

⁹ See also the German *Bundesfinanzhof* in BFH *EuR* 1985, 191 - *Kloppenburg*.

¹⁰ CE 9.1.1970, *Sieur Cohn-Bendit*, Rec. 15; CE Ass. 22.12.78, *Ministre de l’Intérieur c. Sieur Cohn-Bendit*, Rec. 524, Concl. Genevois *RTDE* 1979, 157 = *EuR* 1979, 292 (German translation) = 3 *CMLR* 1980, 543 (English translation, see also Oppenheimer, see note 1, 317).

¹¹ For the notion see E. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, Vol. 1, 1887, 449 *et seq.*; B. Pacteau, Note, *D.* 1979, 164.

¹² For recent objections to the strict CILFIT standard from a Member State perspective (Denmark) see s. Case C-99/00, *Lyckeskog*, [2002] ECR I-4839 (see also Concl. AG Tizzano 21 February 2002, paras. 51 *et seq.*).

¹³ ECJ, Case 283/81, *CILFIT*, [1982] 3415, paras. 16 *et seq.*

Community.“ In this situation, the ECJ will normally not make a statement on the relevance of the reference for the judgment of the national court.¹⁴

From the perspective of European law, a national court decision that violates these principles established by the ECJ is a breach of Arts. 226 and 227 EC.¹⁵ A court or tribunal of last instance that disregards its duties to make a preliminary reference violates Art. 234(3) EC. The principle of the independence of the judiciary¹⁶ notwithstanding, acts of courts or tribunals are attributed to the respective Member State. In that respect, European law adopts a public international law approach towards the Member States.¹⁷ According to Art. 228 EC, the ECJ may even, on request of the Commission and under certain conditions, impose a lump sum or penalty payment on a Member State that does not comply.

To date, there have been no Treaty infringement proceedings against Member States resulting from decisions of the national courts. To the extent that the Commission has engaged into the preliminary procedure foreseen in Art. 226 EC,¹⁸ the Commission has confined itself to ensuring that its view be made clear to the non-complying courts, thus acknowledging the principal of judicial independence, and only in cases of repeat problems admonishing the respective national government to take legislative action.¹⁹ Notorious member state court decisions, such as the Cohn-Bendit decision of the French *Conseil d'Etat*²⁰ or the Maastricht

¹⁴ ECJ, Case C-369/89, *Piageme*, [1991] ECR I-2971; it does not have jurisdiction, though, to reply to questions which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of community law which do not correspond to an objective requirement inherent in the resolution of a dispute: ECJ, Case 244/80, *Foglia/Novella*, [1981] ECR 3045, para. 18.

¹⁵ See e.g. C. Hillgruber, Grenzen der Rechtsfortbildung durch den ECJ - Hat Europarecht Methode?, in: T. v. Danwitz et al. (eds.), *Auf dem Wege zu einer europäischen Staatlichkeit*, 1993, 45 note 40.

¹⁶ See for example Art. 97(1) of the German Constitution; Art. 6(1) ECHR; Art. 47(2) Charter of Fundamental Rights.

¹⁷ Cf. PICJ *Polish Nationals in Danzig* 1932, Series A/B, No. 44, 24.

¹⁸ See G. Meier, Zur Einwirkung des Gemeinschaftsrechts auf nationales Verfahrensrecht im Falle höchstrichterlicher Vertragsverletzungen, *EuZW* 1991, 11; J. Sack, Verstoßverfahren und höchstrichterliche Vertragsverletzungen - eine Klarstellung, *EuZW* 1991, 246; Editorial, Use of the preliminary procedure, *CMLRev.* 28 (1991), 241 (243).

¹⁹ Case Hendrix GmbH (“Pingo-Hähnchen”), Preliminary procedure under Art. 169 ECT [now Art. 226 EC] A/90/0406, Reasoned opinion of the Commission SG (90)/D/25672 of 3 August 1990, Part V (dealing with a non-reference by the BGH, the German Supreme Court), see Meier, see note 18, 11 mwN.

²⁰ *Supra* note 10.

decision of the German *BVerfG*,²¹ have not led the Commission to begin formal infringement proceedings.

The absence of infringement proceedings in these cases can be explained by a strategy that the Commission has adopted towards national courts. Answering a written question from a member of the European Parliament, the Commission stated in 1983 that infringement proceedings do not constitute an appropriate basis for cooperation between the ECJ and the national courts. According to the Commission, the procedure was not designed as a blanket means to review national court decisions, but rather for use only in cases of systematic and intentional disregard of Art. 177 EEC (now Art. 234 EC).²²

In this development, the limitations of an exclusively positivist view towards more accurately defining the relationship between the national supreme courts and the ECJ becomes apparent.

b) The preliminary reference practice of supreme national courts

The German *BVerfG* has to date not made any reference to the ECJ.²³ It has stated in the *Solange I* decision of 1974 and in the *Vielleicht* decision of 1979 that it is in principal bound

²¹ BVerfGE 89, 155 - *Maastricht*. To the extent that the Court's constitutional law reserve of power is an *obiter dictum* and thus lacking immediate legal effect (§ 31(1) BVerfGG), there may be no infringement of the treaties. A different view is adopted by H.-P. Folz, *Demokratie und Integration*, 1999, 16 (the Maastricht decision itself is already an infringement of EC law). For English translations of the decision see Oppenheimer, see note 1, 526; 22 *ILM* 1994, 388; I. Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993*, 1994, 751, this book also includes French and Spanish translations. The BVerfG's case-law is online at <<http://www.bverfg.de>> or in the DFR database at <<http://www.oefre.unibe.ch>>

²² OJ 1983, No C 268, 25. Note that the Commission establishes special criteria for infringements of EC law by the courts that are not foreseen in the treaties.

²³ The highest German courts have started to make references relatively early: the *Bundessozialgericht* in 1967 (ECJ, Case 14/67, *Welchner*, [1967] ECR 331 (English special edition)); the *Bundesfinanzhof* also in 1967 (ECJ, Case 17/67, *Firma Max Neumann*, [1967] ECR 441 (English special edition)); the *Bundesarbeitsgericht* in 1969 (ECJ, Case 15/69, *Südmilch AG*, [1969] ECR 363 (German edition, no English translation)); the *Bundesverwaltungsgericht* in 1970 (ECJ, Case 36/70, *Getreide-Import GmbH*, [1970] ECR 1107); the *Bundesgerichtshof* in 1974 (ECJ, Case 32/74, *Haaga*, [1974] ECR 1201). These courts have continued to use the preliminary reference procedure on a regular basis. For an example of *Länder* (state) constitutional courts see the reference from *Hessen*, HessStGH, *EuGRZ* 1997, 213.

to Art. 234 EC.²⁴ However, the *BVerfG* has not reviewed the issue of its own obligations under Art. 234 EC following the ECJ's CILFIT decision of 1982. It has limited itself to specifying the conditions under which the highest specialised German courts are obliged to make references.²⁵ The Tribunal's reluctance to use Art. 234 EC or even to clarify its own position on Art. 234 EC was particularly noteworthy in the *Maastricht decision* of 1993, in which the Tribunal reserved for itself the right to review the exercise of competencies of European institutions in light of the German constitution (see *infra*). During the proceedings, the *BVerfG* utilized a rather original solution in solving questions of EC-law interpretation, by hearing the Director General of the Commission Legal Service as a witness, instead of making a reference to the ECJ.²⁶ Furthermore, in the NPD-proceedings of 2001, the *BVerfG* had the unique opportunity to make a principal statement on its obligations under Art. 234 EC in a case where it was unquestionably the court of first and last instance (the proceedings to declare a political party unconstitutional under Art. 21 of the German constitution). The *BVerfG* also did not use this chance.²⁷

The German court is not alone, however. Other supreme courts have also avoided making references to the ECJ. The Italian *Corte Costituzionale* in its *Giampaoli* decision of 1991²⁸ admitted the possibility, albeit not the obligation, to make references under Art. 234 EC, only

²⁴ BVerfGE 37, 271 (282) - *Solange I* (English translation in Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht. Volume 1/Part II*, 1992; and in Oppenheimer, see note 1, 440 = 2 CMLR 1974, 540); BVerfGE 52, 187 (202) - *Vielleicht*.

²⁵ See for example BVerfG 9.1.2001, *EuZW* 2001, 255 - *Non-reference by the BVerfG* (ECJ Case C-25/02, pending). The *BVerfG* asks whether non-reference by a specialised court violates a fundamental right 'to have access to the lawful judge' (Art. 101 (1) of the German constitution). In addition to the CILFIT-criteria, the German constitutional law question hangs on whether the court acted arbitrarily (*willkürlich*) in not making a reference, for more detail see F. C. Mayer, *Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof*, *EuR* 2002, 239; for how one may construe an individual right to have a court make a reference see C. Grabenwarter, *Die Europäische Union und die Gerichtsbarkeit öffentlichen Rechts*, in: *14. ÖJT Wien 2000*, Vol. I/2, 15 (65).

²⁶ See M. Zuleeg, *The European Constitution under Constitutional Constraints: The German Scenario*, *ELRev.* 22 (1997), 19.

²⁷ BVerfG 22.11.2001, *EuR* 2002, 236 - *NPD*; on that decision Mayer, see note 25.

²⁸ Decision No 168/91 - *Giampaoli*, *Foro italiano*, I, 1992, 660 paras. 5 *et seq.*

to reverse itself at a later date: pointing to the fact that it is not a court in the sense of Art. 234 EC and thus unable to enter into direct contact with the ECJ by means of a preliminary reference, the *Corte Costituzionale* declared in the *Messaggero Servizi*²⁹ of 1995 that it did not consider itself bound by Art. 234 EC. Instead, the *Corte Costituzionale* ordered the court of the previous instance to make a reference to the ECJ.

The Spanish *Tribunal Constitucional* (TC) has also not made any references yet, and is even reluctant to involve itself in the cases of non-reference of the other Spanish courts.³⁰

According to the TC, the application of European law is not an issue of constitutional law, and thus not part of the TC's jurisdiction. Legal protection against Spanish acts that infringe upon European law, the TC holds, is accorded by the regular Spanish courts and the ECJ.³¹

The Portuguese *Tribunal Constitucional* considers itself bound under Art. 234(3) EC,³² but still has yet to make a reference.

The French *Conseil d'Etat* has made references to the ECJ both before and after the Cohn-Bendit case, dating back to 1970.³³ Still, the *Conseil d'Etat* issued decisions not compatible with ECJ jurisprudence and in disregard of Art. 234(3) EC, even after the ECJ's CILFIT decision.³⁴ The *Cour de cassation* made its first reference in 1967,³⁵ while the *Conseil constitutionnel* has not yet done so.

The highest Belgian courts, the *Conseil d'Etat*³⁶ and the *Cour de cassation*³⁷ began to make

²⁹ Decision No 536/95 - *Messaggero Servizi*, *Gazz. Uff. n. 1 I*, 3.1.1996; see also Decision No 319/96 - *Spa Zerfin*, *Gazz. Uff. n. 34 I*, 21.8.1996.

³⁰ TC decision 111/1993 25.3.1993, *BOE* 27.4.1993; TC decision 180/1993 31.5.1993, *BOE* 5.7.1993 – *FOGASA*; TC decision 372/1993 13.12.1993, *BOE* 19.1.1994 - *Lao*.

³¹ TC decision 28/1991 14.2.1991, *BOE* 15.3.1991 - *EP-elections* (English translation in Oppenheimer, see note 1, 702); TC decision 64/1991 22.3.1991, *BOE* 24.4.1991 – *ASEPESCO* (English translation in Oppenheimer, see note 1, 705).

³² TC decision 163/90 23.5.1990, *Moreira da Costa e Mulher*, *Diário da República*, 2 No 240, 18.10.1990.

³³ The first reference 1970: ECJ, Case 34/70, *Syndicat national du commerce extérieur des céréales et al./O.N.I.C.*, [1970] ECR 1233.

³⁴ For the (still) diverging approach of the *Conseil d'Etat* on Art. 249(3) EC and the timely limitations of the effect of ECJ decisions, see *Commissaire du gouvernement Savoie* in his Conclusions in the *Tête*-case (CE Ass. 6.2.1998, *Tête*, Rec. 30, Concl. 32) and P. Cassia, *Le juge administratif français et la validité des actes communautaires*, *RTDE* 1999, 409.

³⁵ ECJ, Case 22/67, *Goffart*, [1967] ECR 321 (English special edition).

³⁶ Since 1967, ECJ, Case 6/67, *Guerra/INAMI*, [1967] ECR 219 (English special edition).

references early, in 1967 and in 1968. The *Cour d'arbitrage*, created in 1983, first made a reference in 1997.³⁸ The highest Dutch courts started making references in the early seventies (the *Raad van State* in 1973,³⁹ the *Hoge Raad* in 1974⁴⁰) and have continued doing so on a regular basis. The Luxembourg *Cour de Cassation* made its first reference in 1967,⁴¹ and the Luxembourg *Conseil d'Etat* joined in only in 1981.⁴² The *Cour Constitutionnelle* is probably still too new an institution, and has not made any references yet.

The British *House of Lords* made a first reference in 1979. Further references have followed on a regular basis.⁴³ The Danish *Højesteret* may be one of the more sceptical courts as far as European integration is concerned, but it has made numerous references to the ECJ, the first one in 1978.⁴⁴ The Irish *Supreme Court* began to make references in 1983⁴⁵ and has continued such practice regularly since then. The highest Greek courts are also on record with references. The *Symvoulío Epikrateias* (Council of State) has made references on a regular basis, starting early in 1983.⁴⁶ Occasional references have been made by the *Elegktiko Synedrio* (Court of Auditors) since 1993,⁴⁷ and since 1996, there are also references every now and then from the *Areios Pagos* (Supreme Court).⁴⁸ The Supreme Special Court (*Anotato Eidiko Dikastirio*) has not made any references yet.

The Swedish *Högsta domstolen* made a first reference almost immediately after Swedish accession in 1995.⁴⁹ The Swedish *Regeringsrätten* followed just two years later in 1997.⁵⁰ The

³⁷ Since 1968, ECJ, Case 5/68, *Sayag et al./Leduc et al.*, [1968] ECR 395 (English special edition).

³⁸ ECJ, Case C-93/97, *Fédération belge des chambres syndicales de médecins*, [1998] ECR I-4837.

³⁹ ECJ, Case 36/73, *Nederlandse Spoorwegen/Minister van Verkeer en Waterstaat*, [1973] ECR 1299.

⁴⁰ ECJ, Case 15/74, *Centrafarm BV et al./Sterling Drug*, [1974] ECR 1147.

⁴¹ ECJ, Case 2/67, *De Moor/Caisse de pension des employés privés*, [1967] ECR 197 (English special edition).

⁴² ECJ, Case 76/81, *Transporoute/Ministère des travaux publics*, [1982] ECR 417.

⁴³ ECJ, Case 34/79, *Henn and Darby*, [1979] ECR 3795. The House of Lords is on the record with 27 references until 2001.

⁴⁴ ECJ, Case 151/78, *Sukkerfabriken Nykøbing*, [1979] ECR 1.

⁴⁵ ECJ, Case 182/83, *Fearon/Irish Land Commission*, [1984] ECR 3677.

⁴⁶ ECJ, Case 142/83, *Nevas*, [1983] ECR 2969.

⁴⁷ ECJ, Case C-443/93, *Vougioukas/Idryma Koinonikon Asfaliseon (IKA)*, [1995] ECR I-4033.

⁴⁸ ECJ, Case C-348/96, *Calfa*, [1999] ECR I-11. In the following case of 1998, Case C-235/98, *Pafitis*, the proceedings were not continued (OJ 2000 No C 3, 21).

⁴⁹ ECJ, Case C-43/95, *Data Delecta Aktiebolag und Forsberg*, [1996] ECR I-4661.

Lagrådet, which effectuates non-binding control of draft legislation, has not made any references. The supreme Finnish administrative court *Korkein hallinto-oikeus* has been making references on a regular basis since 1996.⁵¹ The supreme court, *Korkein oikeus* is on record with its first question stemming from 1999.⁵² The Constitutional Committee of Parliament (*Perustuslakivaliokunta*) has not made any references so far, while the Austrian Constitutional Court, the *VfGH*, early on acknowledged the option to submit references under Art. 234 EC,⁵³ and it has first made a reference to the ECJ in 1999.⁵⁴

c) The national supreme courts' reference practices – a mixed bag?

This brief assessment above of the national courts' reference practices reveals several contradictory points. On the one hand, the strict standard imposed by the ECJ's CILFIT-formula is cushioned by a Commission practice that does not sanction non-certification as an infringement under the treaty infringement proceedings. On the other hand, there are important courts and tribunals at the Member State level that do not make references to the ECJ. A similar approach to the *BVerfG*'s non-reference practice, which is actually not compatible with the German constitution's fundamental right of 'access to the lawful judge' (*Recht auf den gesetzlichen Richter*, Art. 101(1) of the German constitution) and with Art. 23 of the German constitution, exists as well in Italy and in Spain. This thus indicates that those nations that established particularly strong constitutional courts in the aftermath of dictatorial regimes follow a different path in their dealings with a European court. These three courts remain a minority, however, when contrasted with other courts in the EU.

⁵⁰ ECJ, Case C-241/97, *Försäkringsaktiebolaget Skandia*, [1999] ECR I-1879.

⁵¹ ECJ, Case C-412/96, *Kainuun Liikenne and Pohjolan Liikenne*, [1998] ECR I-5141.

⁵² ECJ, Case C-172/99, *Liikenne*, [2001] ECR I-745.

⁵³ ÖVfGH 11.12.1995, *ÖZW* 1996, 24 – *Bundesvergabeamt*. See also K. Heller/F. Sinnl-Piazza, *Verfassungsrechtliche Aspekte der Anwendung des Gemeinschaftsrechts in den Mitgliedstaaten der EU*, *JBl.* 1995, 636 and 700 (711).

⁵⁴ ECJ, Case C-143/99, *Adria-Wien Pipeline*, [2001] ECR I-8365.

References are made by both the ancient British House of Lords and the rather Euro-sceptical Danish *Højesteret*, as well as from the Austrian *VfGH*, a genuinely specialised constitutional court in a similar position as the Spanish, Italian and German constitutional tribunals.

A closer look at the courts that have not yet made references reveals several motivations, ranging from the way these courts see themselves, to constraints imposed by their respective national constitutions, to a simple lack of opportunities to make references. There is also the question whether the ECJ's alleged self-constraint to the matters of European law – as opposed to directly commenting on national law – is not a fiction,⁵⁵ which would also explain national courts' scepticism. From these motivations, the hypothesis of the courts' self-image, i.e. seeing themselves as guardians of their (respective) constitution,⁵⁶ seems to have the greatest weight.

In any case, an analysis of the national courts' procedural points of contact with the ECJ suggests that there are open questions. The sole binary empirical question of reference or non-reference is too simple, though, to explain what exactly the constitutional law patterns are that drive the relationship between the national courts and the ECJ. To answer this question, we will have to turn to a more substantive analysis.

2. Adopting a substantive perspective on the courts' relationship

a) The perspective of the ECJ

The ECJ claims the monopoly on invalidating (secondary⁵⁷) European law. The ECJ reviews

⁵⁵ See more on this in K. Alter, *Establishing the Supremacy of European Law*, 2001, 10, referring to ECJ judge Mancini.

⁵⁶ See the divergent opinions of H. Kelsen, *Wer soll Hüter der Verfassung sein?*, *Die Justiz* 1931, 5 *et seq.*, in favor of a constitutional court as guardian of the constitution, and C. Schmitt, *Der Hüter der Verfassung*, 1931, 12 *et seq.*, in favor of the head of the executive (the *Reichspräsident*) as the guardian of the constitution. Schmitt's position is severely weakened by the pathetic role President Hindenburg played in the final days of the Weimar Republic in Germany.

⁵⁷ On the issue of primary law as incompatible with the treaties, see J. da Cruz Vilaca/N. Picarra, *Y a-t-il des limites matérielles à la révision des Traités instituant les Communautés européennes?* *CDE* 1993, 3; U. Everling, *Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge"*, in: U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung - Festschrift für Rudolf Bernhardt Bernhardt*, 1995, 1169.

Community acts under Art. 230 EC, as either incidental questions under Art. 241 EC or in the context of a reference under Art. 234 EC.⁵⁸

In 1987, the ECJ held in the *Foto-Frost*-case⁵⁹ that national courts are entitled to consider the validity of community acts and to conclude that a community act is completely valid, as “by taking that action they are not calling into question the existence of the Community measure”.⁶⁰ But the ECJ also made it very clear that national courts do not have the power to declare acts of community institutions invalid,⁶¹ arguing for the unity of the Community legal order and for the need for legal certainty. Moreover, the Court points to the “necessary coherence of the system of judicial protection established by the Treaty”, that gives the ECJ “the exclusive jurisdiction to declare void an act of a Community institution”. The ECJ emphasises that it is in the best position to decide on the validity of Community acts, as all Community institutions whose acts are challenged are entitled to participate in the ECJ proceedings and can therefore supply the information that the ECJ considers necessary for the purposes of the case before it.

As far as interim measures are concerned, the ECJ has given national courts some leeway to make statements on the validity of European law, all the while insisting on its exclusive powers to determine the validity of these acts as well.⁶²

The proceedings lined out derive their conclusiveness from Art. 219 EC, according to which the Member States commit themselves to not solving disputes over the interpretation or

⁵⁸ See also Art. 35 EU. Member State administrations can only make references to the ECJ if they fall under the ECJ’s European law definition of a court (for Public Procurement Awards Supervisory Boards, see ECJ, Case C-54/96, *Dorsch Consult*, [1997] ECR I-4961); see also ECJ, Case C-431/92, *Commission/Germany (Wärme Kraftwerk Großkrotzenburg)*, [1995] ECR I-2189, on the duties of administrations to respect European law.

⁵⁹ ECJ, Case 314/85, *Foto-Frost*, [1987] ECR 4199 (paras. 11 *et seq.*).

⁶⁰ *Ibid.*, para. 14.

⁶¹ *Ibid.*, para. 15.

⁶² ECJ, Cases C-143/88 & C-92/89, *Süderdithmarschen*, [1991] ECR I-415, paras. 14 *et seq.*; ECJ, Case C-465/93, *Atlanta*, [1995] ECR I-3761. Apparently, the ECJ is not even willing to give national courts the right to decide upon legally non-existent acts, see for this concept ECJ Cases 1/57 & 14/57, *Société des usines à tubes de la Sarre/High Authority*, [1957/58] ECR 105 (English special edition).

implementation of the treaty in any other way than is provided for in the treaty.⁶³ Moreover, the obligation of national courts to respect the interpretation of European law as established by the ECJ under Arts. 220 *et seq.* EC could also be justified as an obligation arising under Art. 10 EC (the Member States' obligations arising out of the Treaty).

In addition to arguments provided by the ECJ in its relevant decisions, another possible explanation for the ECJ's restrictive approach lies in the Court's image of itself as the 'driving force' behind European integration. If this indeed is the court's conception of itself,⁶⁴ conflicts of interest with national courts would seem unavoidable. This cautious attitude of the ECJ may also be explained by a certain distrust the ECJ harbours against the national courts, which - given a wide latitude in their decision-making - could well try to resist increasing integration through jurisprudence.

The real argument behind the ECJ's reluctance to give the national courts more control, however, lies in the principle of the supremacy of European law in the case of a conflict of laws as it was developed⁶⁵ by the ECJ. The ECJ's core justifications for the supremacy of European law are independence, uniformity and efficacy of Community law.⁶⁶ In this perspective, Community law is "an integral part of [...] the legal order applicable in the territory of each of the Member States", provisions of Community law "by their entry into force render automatically inapplicable any conflicting provision of current national law".⁶⁷ This concept of supremacy in application, *Anwendungsvorrang* (as opposed to supremacy in validity, *Geltungsvorrang*), also applies to the Member States' constitutional law provisions:

"The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs

⁶³ See ECJ Opinion 1/91, *EEA*, [1991] ECR I-6079, paras. 2 *et seq.*

⁶⁴ Pernthaler, see note 5, 696, considers this role the 'engine' of European integration, i.e. the core role of a 'constitutional' court in a system without a constitution.

⁶⁵ ECJ, Case 6/64, *Costa/ENEL*, [1964] ECR 585 (English special edition). For the definition and the typology of the conflict of laws see S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß*, 1999, 23 *et seq.*

⁶⁶ ECJ, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 3.

counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.”⁶⁸

The critics of the Court’s supremacy concept are numerous.⁶⁹ Among other things, they have pointed out a structural parallel between supreme European law and the law of (military) occupation⁷⁰ (!) and have criticised the ‘rigorous simplicity’ of the concept of supremacy.⁷¹ The absoluteness of the ECJ’s vision of European law supremacy over each and every norm of municipal law - including any provision of the municipal constitutions - has raised the question of whether the ECJ might have overstepped its competencies by establishing such an absolute concept of supremacy.⁷² According to this view, the ECJ’s role is to interpret European law – but the question of how the Member States’ legal orders handle conflicts between the Member States’ legal orders and European law, so the critics say, goes beyond a mere question of interpretation.⁷³

Admittedly, the ECJ has remained oddly unclear in its statements on the exact source of supremacy and of European law itself - even relative to the limited language the ECJ normally utilises in its decisions -⁷⁴ merely alluding to what kind of organisation the Community is. The formula used by the Court, however, has evolved over the years, from a

⁶⁷ ECJ, Case 106/77, *Simmenthal*, [1978] ECR 629, paras. 3 and 21 *et seq.* See also ECJ, Case C-213/89, *Factortame*, [1990] ECR I-2433, paras. 20 *et seq.*

⁶⁸ ECJ, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 3; ECJ, Case C-473/93, *Commission/Luxembourg*, [1996] ECR I-3207, para. 38. See also ECJ, Case C-285/98, *Tanja Kreil/Germany* [2000] ECR I-69.

⁶⁹ See, for example, H.-H. Rupp, *Die Grundrechte und das Europäische Gemeinschaftsrecht*, *NJW* 1970, 953. See Alter, see note 55, 88 *et seq.* for an account of how this article may have triggered subsequent developments such as the ECJ decision in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, which openly claimed European law supremacy over national constitutions, and the *BVerfG*’s fierce reaction to that in 1974, *BVerfGE* 37, 271 - *Solange I*. Rupp actually remains unconvinced, *Anmerkungen zu einer Europäischen Verfassung*, *JZ* 2003, 18. See also the references in H.-P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 267 ff.; a typical example of such critique may be found in T. Schilling, *Zu den Grenzen des Vorrangs des Gemeinschaftsrechts*, *Der Staat* 1994, 555. Alter, see note 55, 19, explains why the Italian Constitutional Court could not refute the initial supremacy claim in the *Costa/ENEL*-case.

⁷⁰ See the references in Perenthaler, see note 5, 700.

⁷¹ R. Abraham, *L’application des normes internationales en droit interne*, 1986, 155. See also A. Schmitt Glaeser, *Grundgesetz und Europarecht als Elemente Europäischen Verfassungsrechts*, 1996, 156 *et seq.* with further references.

⁷² Abraham, see note 71, 154 *et seq.*

⁷³ *Ibid.*

⁷⁴ For a critique and an explanation of the ECJ’s style see for example Perenthaler, see note 5, 694.

new “legal order of international law“ (1963),⁷⁵ followed by the formula “own legal system“ (1964),⁷⁶ and the concept of the Treaty as “the basic constitutional charter“ (1986)⁷⁷ or “the constitutional charter of a Community based on the rule of law“ (1991).⁷⁸ This constitutional dimension of the European legal order does emphasise the autonomy of European law, but it does not clearly state a separation between EU law and the legal order of the Member States. Rather, this interpretation holds out European law as the overarching legal order within a community of law, which at the same time is taken up and complemented by the Member States’ respective legal orders.

b) The perspective of the supreme national courts

(1) The German BVerfG

In its decision of 5 July 1967,⁷⁹ its first to discuss Community law in detail, the *BVerfG* emphasised a central role for the “act of assent“ to the founding treaties (the *Zustimmungsgesetz*, a federally enacted law under Art. 24, today⁸⁰ Art. 23 of the German constitution). Later commentators likened this central role to that of a bridge⁸¹ between EC law and national law, in that – in the German view – the act of assent functions as the decisive ‘order to give legal effect’ (*Rechtsanwendungsbefehl*) to European law. That very same year, the *BVerfG* expressed its view of the Community as distinct public authority in a distinct legal

⁷⁵ ECJ, Case 26/62, *Van Gend en Loos*, [1963] ECR 1 (English special edition).

⁷⁶ ECJ, Case 6/64, *Costa/ENEL*, [1964] ECR 585 (English special edition).

⁷⁷ ECJ, Case 294/83, *Les Verts/EP*, [1986] ECR 1339, para. 23. The French language version is “Charte constitutionnelle de base”, in German “Verfassungsurkunde der Gemeinschaft”.

⁷⁸ ECJ Opinion 1/91, EEA, [1991] ECR I-6079 para. 1.

⁷⁹ BVerfGE 22, 134 (142).

⁸⁰ The Art. 23 provision dealing specifically with European integration was introduced in December 1992, replacing the old Art. 23 which had served as the legal basis for German reunification. Both Arts. 23 and 24 foresee an act of assent for the transfer of public powers. Art. 23 establishes two sets of limits; on the one hand, it institutes limits concerning the European construct, which for example has to guarantee a standard of fundamental rights protection essentially equal to that guaranteed by the German constitution. On the other hand, Art. 23(1) points to the limits of how European integration can affect Germany, as the principles mentioned in Art. 79(3) are inalienable.

order (*Gemeinschaft als eigenständige Hoheitsgewalt in einer eigenständigen Rechtsordnung*). This view is still held today. The *BVerfG* qualified the EEC-Treaty as a ‘constitution, as it were, of this Community’ (*gewissermaßen die Verfassung dieser Gemeinschaft*) and Community law as a ‘distinct legal order, whose norms neither belong to public international law nor belong to the national law of the Member States’ (*eigene Rechtsordnung, deren Normen weder Völkerrecht noch nationales Recht der Mitgliedstaaten sind*).⁸² The *BVerfG* hinted, though, at constitutional limitations on the transfer of public authority rights (*Übertragung von Hoheitsrechten*) to the EC in the context of the German constitution’s guarantee of fundamental rights. An answer to this question, however, was not forthcoming at this stage.⁸³ Not yet.

(a) Fundamental rights: The *Solange I* and *II* decisions (1974/1986)

In the *Solange I* decision of 29 May 1974, the *BVerfG* stipulated constitutional limits on the supremacy of European law and reserved a right of judicial review in order to safeguard the fundamental rights guaranteed by the German constitution. The *BVerfG* asserted that in a case of conflict between EC law and the fundamental rights of the German constitution, the German constitution’s fundamental rights would prevail.

A five to three majority of the second senate of the Court⁸⁴ supported the main elements of the decision.⁸⁵ In regard to the principal limits of EC law supremacy, inalienable essentials of the German constitution and the ‘division of labour’ between the *BVerfG* and the ECJ, the

⁸¹ This (*Brückentheorie*) is based on the metaphor suggested by Paul Kirchhof, for example in *Die Gewaltenbalance zwischen staatlichen und europäischen Organen*, *JZ* 1998, 965 (966).

⁸² *BVerfGE* 22, 293 (296) (English translation in Oppenheimer, see note 1, 410). The reference to the EEC-Treaty’s ‘distinct legal order’ can already be found in *BVerfGE* 29, 198 (210), although it is accompanied by a reference to the ‘numerous intertwinements of Community and national law’. On autonomy, see also *BVerfGE* 31, 145 (174) – *Lütticke* (English translation in Oppenheimer, see note 1, 415). Indeed, the formula is reminiscent of Alfred Verdross’ formula of an internal law of a community of states, based on public international law, 30 *Recueil des Cours* 1929, V 311, as Pernthaler, see note 5, 692, indicates.

⁸³ *BVerfGE* 22, 293 (298 *et seq.*).

⁸⁴ There are two senates at the *BVerfG*, each with eight judges.

⁸⁵ *BVerfGE* 37, 271 - *Solange I* (*Internationale Handelsgesellschaft*). The dissenting opinion starts at p. 291.

decision still stands today.

The position adopted by the dissenting minority, however, is interesting and deserves closer attention. The minority's approach to the relationship between German constitutional law and Community law was not only much closer to the ECJ's view than the Court majority's view, but it also went much further than the *BVerfG's* Solange II decision,⁸⁶ which was in fact a *volte face* from its Solange I judgment.

According to the minority, the German constitution's fundamental rights standard cannot be applied to EC secondary law. The EEC-Treaty has established an original legal order, whose law is safeguarded by the ECJ. The Community legal order, the dissenting judges continue, is autonomous and independent from national law. This Community legal order and German law have each in their sphere their own set of fundamental rights provisions with corresponding court systems. Next, the dissenting judges refer to the fundamental rights established by the ECJ up to 1974, dealing in great detail with the ECJ's Nold decision,⁸⁷ published just two weeks before the Solange I decision.⁸⁸ This proves that the ECJ decision which the *BVerfG* would 12 years later in Solange II refer to as 'an essential step'⁸⁹ towards a sufficient fundamental rights protection standard at the European level was already known to the *BVerfG* in 1974. The minority also emphasises that the duty to acknowledge the acts of supranational institutions, recognised by the *BVerfG* itself,⁹⁰ excludes from the outset any kind of national control over these acts, as the Federal Republic relinquished this right by joining the EEC. Among these acts that are to be accepted without any further national control, the minority continues, are also the legislative acts of the European institutions with European

⁸⁶ BVerfGE 73, 339 - *Solange II (Wünsche)* (English translation in Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht. Volume 1/Part II*, 1992, 613, and in Oppenheimer, see note 1, 461 = 3 CMLR 1987, 225).

⁸⁷ ECJ, Case 4/73, *Nold*, [1974] ECR 491. This decision was issued on 14 May 1974, the dissenting opinion in the BVerfG decision of 29 May 1974, *Solange I*, therefore refers to the typescript version of the Nold decision.

⁸⁸ BVerfGE 37, 271 (292 *et seq.*) - *Solange I (Internationale Handelsgesellschaft)*.

⁸⁹ BVerfGE 73, 339 (379) - *Solange II (Wünsche)*.

⁹⁰ See BVerfGE 31, 145 (174) - *Lütticke*.

law taking precedence over conflicting provisions of national law.

The minority, however, then goes on to confirm the opinion of the majority of the judges that EC law has supremacy over domestic law only to the extent that the German constitution allows a transfer of public authority to the Community institutions. It is also true, the dissenting judges say, that the German constitution does not allow for an unlimited transfer of these powers, as the pre-condition for this transfer is that the public power of the supranational Community, acting under its legal order, is subject to the same restrictions as flow from the basic principles of the German constitution for the German public power. In the case of the EEC, however, the dissenting judges consider these conditions fulfilled. The dissenting judges also warn that the majority decision of the *BVerfG* is at odds with the jurisprudence of the ECJ. The *BVerfG* does not have the right to apply the German constitution's standards in general and the fundamental rights standard in particular to provisions of EC law in order to make statements on the validity of EC law. That the majority claims this power is in the opinion of the minority a clear infringement of the powers reserved to the ECJ and incompatible with Art. 24(1) of the German constitution.

In conclusion, the minority considers the *BVerfG*'s reservation of a constitutional check on EC law – a reservation that the *Solange II* decision maintains (see *infra*) – to be illegal. And although the minority also considers the transfer of public authority to the Community to be limited in principle, they do not establish any controls grounded in national constitutional law.

After indicating a change of its *Solange I* jurisprudence in July 1979,⁹¹ twice in 1981⁹² and then again in February 1983,⁹³ the *Solange II* decision of 22 October 1986⁹⁴ brought the long-

⁹¹ BVerfGE 52, 187 (202 *et seq.*) - *Vielleicht*.

⁹² BVerfGE 58, 1 - *Eurocontrol I*; BVerfGE 59, 63 - *Eurocontrol II*.

⁹³ BVerfG NJW 1983, 1258 - *Mittlerweile*.

⁹⁴ BVerfGE 73, 339 - *Solange II (Wünsche)*.

expected supplement to the Solange I decision, which – without renouncing the principle of a constitutional law check – defused the fundamental rights issue ‘in a pragmatic sense’.⁹⁵ The *BVerfG* did insist that the transfer of public authority to supranational institutions be subject to constitutional limits: there is no authorisation, it held, to give up the identity of the German constitutional order by means of transferring competencies to supranational institutions with the result of an ‘intrusion into the fundamental architecture, the constituting structures’ of the constitution (*durch Einbruch in ihr Grundgefüge, in die sie konstituierenden Strukturen*).⁹⁶ Nevertheless, the *BVerfG* holds after an extensive assessment of the development of EC law: ‘as long as’ (*solange*) an effective protection of fundamental rights is guaranteed at the European level, with a level of protection which is substantially equivalent (*im wesentlichen gleichzuachten*) to the inalienable minimum level of protection of fundamental rights under the German constitution, including a general guarantee of the essential substance (*Wesensgehalt*) of the fundamental rights, the *BVerfG* ‘will no longer exercise its jurisdiction to decide on the applicability of derived Community law, that may constitute the legal basis for acts of German courts or authorities in the Federal Republic’.⁹⁷

The fundamental rights-section of the 1993 Maastricht decision⁹⁸ and the 2000 Banana decision⁹⁹ have basically confirmed the *BVerfG*’s statement of principle in Solange II.¹⁰⁰ The *BVerfG* has re-confirmed in a decision of 2001 that it considers the standard of fundamental

⁹⁵ G. Hirsch, Kompetenzverteilung zwischen EuGH und nationaler Gerichtsbarkeit, *NVwZ* 1998, 907 (909).

⁹⁶ BVerfGE 73, 339 (375 *et seq.*) - *Solange II (Wünsche)*. Here, the Court refers to the jurisprudence of the Italian Constitutional Court.

⁹⁷ *Ibid.*, 387. Since 1992, the two sets of constitutional limits have been explicitly mentioned in Art. 23 of the German constitution (see note 80), including the Solange II formula. Interestingly, this formula was also introduced into the 1975 Swedish constitution (in 1994, Chapter 10(5)), see O. Ruin, Suède, in: J. Rideau (ed.), *Les Etats membres de l'Union européenne*, 1997, 440 *et seq.*

⁹⁸ BVerfGE 89, 155 (175, *Leitsatz* 5 para. 3, 6 and 7) – *Maastricht*.

⁹⁹ BVerfG 102, 147 – *Banana-case*.

¹⁰⁰ This is also the view of R. Hofmann, Zurück zu Solange II!, in: H.-J. Cremer et al. (eds.), *Tradition und Weltoffenheit des Rechts, Festschrift für Helmut Steinberger*, 2002, 1207 *et seq.* Any doubts the Maastricht decision may have raised are resolved by the Banana decision: the Court emphasised that an individual’s constitutional complaint under Art. 93(1) or a national court’s reference under Art. 100 of the German constitution simply will be held inadmissible, unless the individual/the referring court proves a complete erosion

rights protection to be safeguarded: although the *BVerfG* does not contribute to this safeguarding of European fundamental rights by making references to the ECJ, it does contribute by supervising the duty to make references of the regular German courts, using as a basis the German constitution's fundamental right of 'access to the lawful judge' (*Recht auf den gesetzlichen Richter*, Art. 101(1) of the German constitution),¹⁰¹ thus considering the European judge a 'lawful judge' under the German constitution.¹⁰²

(b) Powers and competencies: The German Maastricht decision (1993)

With the Maastricht decision of 12 October 1993,¹⁰³ the *BVerfG* established a constitutional law reserve of power over the exercise of competencies by the EU/EC. Accordingly, the *BVerfG* may examine whether acts at the European level conform to the boundaries set for the transfer of public powers to the EU.¹⁰⁴ The Court justifies its right of control over *ultra vires* acts (in the decision, the Court says *ausbrechende Rechtsakte*,¹⁰⁵ 'acts breaking out') by pointing to the constraints of German constitutional law. What the Court actually does within that concept amounts to an independent interpretation of European law: according to the *BVerfG*, the plan of integration¹⁰⁶ outlined in the act of assent (*Zustimmungsgesetz*) and in the EU-Treaty cannot be substantially altered later on by means of European *ultra vires* acts without losing the cover provided by the act of assent. Taking a closer look at this argument, one realises that this amounts to a doubling of the relevant standards. European acts have to

of fundamental rights in accordance with Solange II.

¹⁰¹ *BVerfG* 9.1.2001, *EuZW* 2001, 255 – *Non-reference by the BVerwG* (ECJ Case C-25/02, pending); see also *BVerwGE* 108, 289. There is a small problem, though: the *BVerfG*'s test under Art. 101(1) of the German constitution includes arbitrariness (*Willkür*) as one of its criteria, although this is not part of the ECJ's CILFIT-criteria (see *supra*).

¹⁰² A similar mechanism is applied by the Austrian Constitutional Court (Art. 83(2) of the Austrian constitution), see *öVfGH* 10.12.2001 B405/99 – *Government flights*,

¹⁰³ *BVerfGE* 89, 155 – *Maastricht*. The decision and the proceedings are well documented in I. Winkelmann, see note 21; further references in Mayer, see note 3, 98 *et seq.*

¹⁰⁴ *BVerfGE* 89, 155 (188) – *Maastricht*. For the terminology, literally 'acts that break out' (*ausbrechender Rechtsakt*), see the earlier decision *BVerfGE* 75, 223 (242) – *Kloppenburg*.

¹⁰⁵ For the distinction between *Ultra vires* acts in a narrow sense (i.e. overstepping competencies overstepping competencies defined according to area) and in a broad sense (i.e. the general illegality of an act) see Mayer, see note 3, 24 *et seq.*

¹⁰⁶ Strangely enough, the *BVerfG* also used the idea of an underlying 'integration programme' in the context of

be compatible with the guarantees of the German constitution and, of course, with European law. This becomes the case because the *BVerfG* would actually review the act of assent to the extent that it covers a given European act. This European act would then thus be reviewed by the standard of a ‘German version’ of European law (the ‘Constitutional-law-version’ of EU law). The alleged limitation on scrutinising the act of assent under a German constitutional law-standard only thus seems to be a trick: in actuality, the compatibility of an European act with German constitutional law depends on its compatibility with European law – that is, the way the *BVerfG* interprets European law.

As far as ECJ acts are concerned, the Maastricht decision remains unclear about how, in practice, to draw the line between the (permitted) development of the law by the European judge and the (prohibited) development of judge-made European law, or between substantial alterations of the European competence provisions and still acceptable alterations.¹⁰⁷

The legal consequences of deeming an European act *ultra vires* would be that this act would not be binding in Germany. This amounts to a German constitutional law based reserve of power over European acts, that restricts the supremacy of European law. In such a situation, the *BVerfG* takes on the role of guardian.

All things considered, one may well say that the Maastricht decision is within a certain continuity of the *BVerfG*’s prior jurisprudence on fundamental rights, as far as the concept of a constitutional law reserve of control that restricts the European law-claim for supremacy is concerned. What is striking, though, is the aggressive tone of the decision when compared to

the NATO-Treaty, BVerfGE 104, 151. See Rau, NATO’s New Strategic Concept, *GYIL* 2001, 545, 570.

¹⁰⁷ See M. Zuleeg, Die Rolle der rechtsprechenden Gewalt in der europäischen Integration, *JZ* 1994, 1 (3); C. Tomuschat, Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts, *EuGRZ* 1993, 489 (494).

previous decisions.¹⁰⁸

One should also note a crucial difference between the fundamental rights issue (Solange II) and the competence issue (Maastricht): as for the competence issue, the reproach with which the European level is confronted in case of an *ultra vires*-act goes beyond the bipolar relationship between the German constitutional order and the European legal order. The categories of an *ultra vires*-act on the one hand and an act infringing on the fundamental rights laid down in the German constitution on the other hand are utterly different. And why is that? The absence of a certain aspect of fundamental rights protection in the jurisprudence of the ECJ can occur either for procedural reasons already or because the range of a given fundamental right is defined differently at the European and national levels. In that case, the BVerfG's formula for a cooperative relationship (*Kooperationsverhältnis*) between (*zwischen*¹⁰⁹) the BVerfG and ECJ in the sense of a spare or reserve guarantee in line with the Solange II jurisprudence appears totally plausible. To uphold, in principle, the standard of fundamental rights protection guaranteed by the German constitution does not necessarily imply a reproach against the European level; it does not go beyond the bipolar relationship between German and European legal orders.

This is different in the case of a reproach of an *ultra vires*-act: there is no leeway for a relationship of cooperation between the BVerfG and ECJ where the question of the limits of European competencies is concerned.¹¹⁰ Declaring an act to be *ultra vires* always implies a defect in the act. It would also imply a reproach to the European level and especially to the ECJ. Moreover, the reproach of an *ultra vires*-act would also concern the validity and/or

¹⁰⁸ This view is also adopted by U. Everling, BVerfG und Gerichtshof der Europäischen Gemeinschaften, in: A. Randelzhofer et al. (eds.), *Gedächtnisschrift für Eberhard Grabitz*, 1995, 72.

¹⁰⁹ The actual wording in the decision is 'Kooperationsverhältnis zum EuGH' (to), BVerfGE 89, 155 (175 and *Leitsatz* 7) – *Maastricht*.

¹¹⁰ A different view is adopted by R. Scholz, Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrenrecht, *DÖV* 1998, 261 (267). In fact Scholz establishes a relationship of competition, not cooperation between the ECJ and BVerfG.

application of European law in all other Member States, as an act cannot be *ultra vires* only in the bipolar relationship between one Member State and the EU. This is hence a frontal attack on (European) judge-made European law.¹¹¹

Imposing the strict standard implicitly suggested by the *BVerfG* on the principles of interpretation of European law as developed by the ECJ would significantly reduce the ECJ's latitude. This kind of constraint would reach beyond the EU-Treaty, the actual subject of the Maastricht decision,¹¹² and extend to European law in general. By implying a duty of the ECJ to police the principle of subsidiarity and proportionality at the European level in a specific way, the *BVerfG* claims the power to scrutinise¹¹³ difficult balancing decisions undertaken by the ECJ as well as the development of European law influenced by the ECJ.¹¹⁴

The immediate effects of the Maastricht decision have been limited. Still, at least one court, a Financial Court of the first instance (the *Finanzgericht Rheinland-Pfalz*¹¹⁵) has declared an EC-act to be *ultra vires*. Other courts (the *BGH*, the *OVG Münster*, the *BFH* and also the *VG Frankfurt*¹¹⁶) have been extremely liberal in making use of the concept of EC *ultra vires* acts, without actually declaring any act to be *ultra vires*. These decisions have revealed quite different understandings of what an *ultra vires*-act may be, extending to an understanding that would make any illicit European act an *ultra vires*-act, no matter what nature the legal defect of the act in question actually is.

In doctrinal writings, the *BVerfG*'s concept of *ultra vires* acts has been severely critiqued by

¹¹¹ The concept of judge-made law, its limits and the controversies surrounding it are too broad to be explored here. See instead the references in Pernthaler, see note 5, 691; see also the contributions in *Richterliche Rechtsfortbildung: Erscheinungsformen, Auftrag und Grenzen. Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Rupert-Karls-Universität Heidelberg*, 1986; U. Everling, *Richterrecht in der Europäischen Gemeinschaft*, 1988 and J. Ukrow, *Richterliche Rechtsfortbildung durch den EuGH*, 1995.

¹¹² Zuleeg, see note 107, 7.

¹¹³ Winkelmann, see note 103, 52.

¹¹⁴ See U. Everling, *Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft*, *JZ* 2000, 217 (227).

¹¹⁵ *FG Rheinland-Pfalz EFG* 1995, 378; see also *BFHE* 180, 231 (236).

some,¹¹⁷ but welcomed by others, to the extent that it has been used as an argument against alleged *ultra vires* acts stemming from the EC, in particular from the ECJ (the ECJ decisions in the Süderdithmarschen, Alcan and Kreil-cases).¹¹⁸ What is striking is the sharpness of the debate, at least among some of the German scholars.¹¹⁹ In any case, the Federal administrative court *BVerwG* and even the *BVerfG* itself have clearly rejected any attempt to depict the ECJ's Alcan decision as an invalid and thus irrelevant *ultra vires*-act.¹²⁰

One may ask, though, what the concept of competencies is behind the *ultra vires*-accusations concerning the ECJ's decisions in the Süderdithmarschen- and the Alcan-cases. The argument that the ECJ does not have the 'competencies to regulate' in the sense of legislative powers suggests erroneously that the ECJ decisions in question contain some kind of quasi-legislative regulation of a competence area, such as court procedure or administrative procedure. Even if there may be some truth in depicting numerous decisions of the ECJ where it insists and pretends that it is merely interpreting positive law as blunt,¹²¹ to use a friendly word - what the ECJ does in the Alcan-case is simply enforcing the European control of state-aids, that's all.

Moreover, it is also doubtful whether the Maastricht decision's initial concept of *ultra vires* acts actually covers this kind of reasoning in the first place, as there is no doubt that the control of state aids is in the realm of European competencies. The wording of the Maastricht decision seems to indicate that the *BVerfG* was aiming at *ultra vires* acts in a narrow sense, as

¹¹⁶ Further references in Mayer, see note 3, 120 *et seq.*

¹¹⁷ J. A. Frowein, Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht, *DÖV* 1998, 806 (807 *et seq.*).

¹¹⁸ The term *ausbrechender Rechtsakt* is used for example in *Sondergutachten 28* of the *Monopolkommission* [Opinion on a Commission White paper] in 1999, para. 72 (against changing the system of European competition law), see in that context W. Möschel, Systemwechsel im Europäischen Wettbewerbsrecht, *JZ* 2000, 61 (62) with further references; Scholz, see note 110 (against the Alcan decision as an *ausbrechender Rechtsakt*), 267; Scholz, Art. 12a, paras. 189 *et seq.*, in: Maunz/Dürig/Herzog/Scholz (eds.), *Grundgesetz. Kommentar* (against the ECJ's Kreil decision as an *ausbrechender Rechtsakt*); Schoch, § 80, paras. 270 *et seq.* in: Schoch/Schmidt-Aßmann/Pietzner, *VwGO* (against the ECJ's Süderdithmarschen decision as an *ausbrechender Rechtsakt*).

¹¹⁹ See first the newsmagazine-article ‚Sprengkraft der Banane‘, *Focus* 7/1999, 13.2.1999, 11; then by former ECJ judge U. Everling, Richterliche Unbefangenheit?, *EuZW* 1999, 225; followed by the answer in the German Maastricht case, P. Kirchhof, Der Weg Europas ist der Dialog, *EuZW* 1999, 353.

¹²⁰ *BVerwG DZWir* 1998, 503 – *Alcan*; *BVerfG* 17.2.2000, *EuZW* 2000, 445 – *Alcan*. The *BVerfG* has also refused to declare the Banana-regulation (*BVerfG* 102, 147) or the Broadcasting-directive (*BVerfGE* 92, 203) *ultra vires*.

acts beyond the scope of European competencies, in other words, as acts that transcend the realm of European jurisdiction. It did not seem to aim at the separation of powers-question of which institution at that level has what powers. And surely the *BVerfG* did not want to introduce some kind of general legality check on European law, to consider any kind of formal or substantial legal defect of European acts.

(c) The consistency of the *BVerfG*'s case-law: controlling the bridge

In summary, one can say that, in spite of the *BVerfG*'s recognition of the autonomy of the Community legal order, one can say that the *BVerfG* has always seen the acts of assent to the respective treaties, based on Art. 24 (today¹²² Art. 23) of the German constitution, as the link between European law and national law, with the Member States remaining the 'Masters of the Treaties'¹²³. Moreover, this is a linear, continuous link, and not a one-time link that becomes irrelevant once the German legal order has been 'opened up' to European law. Policing this link, or, to come back to Paul Kirchhof's metaphor, controlling this bridge, enables the *BVerfG* to effectuate far-reaching indirect control over the application of European law by applying to it the standard of German constitutional law under the guise of interpreting and controlling the act of assent.

The alleged "auto-limitation" policy of the *BVerfG*, according to which the *BVerfG* and ECJ adjudicate in spheres independent of each other, merely acts to blur the fact that policing the constitutional limits imposed on transfers of public authority under Arts. 23/24 of the German constitution amounts to an indirect control of European law. And the *BVerfG* indeed consistently imposes constitutional law limits on the supremacy of European law. These constitutional limits justify the *BVerfG*'s claim of entitlement to control European law as the

¹²¹ On this aspect see Pernthaler, see note 5, 695.

¹²² After the constitutional amendment of 1993, see note 80.

¹²³ BVerfGE 75, 223 – *Kloppenburg*

guardian of the German constitution.

It should be noted that the *BVerfG* has never surrendered/relinquished its claim to a right to decide [the point at which/on how] it would leverage its constitutional control; it merely modified this threshold. This is especially visible in the Solange I/Solange II shift, where the Court reversed what it considered to be the principle and what the exception. Only the dissenting opinion in the Solange I case indicated a willingness to completely abandon a right of judicial review over the constitutionality of the European law, albeit insisting on constitutional law limits. Of course, the difference between the fundamental rights issue and the *ultra vires* issue should be borne in mind, as ‘*ultra vires* acts’ and ‘acts violating fundamental rights as accorded by the German constitution’ are different categories.

(i) Other high courts¹²⁴

Claims of some form of last instance reserve of power over the legality of European law can be found in Italy (in the *Corte Costituzionale*'s decisions in the Frontini¹²⁵ and Fragd-cases¹²⁶); Ireland (in the Supreme Court-cases on abortion¹²⁷); Denmark (in the *Højesteret*'s Rasmussen decision of 1998, the Danish Maastricht case¹²⁸); Greece (in the Council of State's DI.K.A.T.S.A. decision 1998¹²⁹); Spain (in the *Tribunal Constitucional*'s Maastricht-opinion of 1992¹³⁰) and, as a special case,¹³¹ France (in the *Conseil d'Etat*'s Cohn-Bendit decision of

¹²⁴ For a more detailed account of the the jurisprudence of the different courts see Mayer, note 3, 143 - 271.

¹²⁵ Decision No 183/73 - *Frontini*, *Foro italiano*, I, 1974, 314 (English translation in Oppenheimer, see note 1, 629 = 2 *CMLR* 1974, 372).

¹²⁶ Decision No 232/89 - *Fragd*, *Foro italiano*, I, 1990, 1855 (English translation in Oppenheimer, see note 1, 653).

¹²⁷ *SC SPUC (Ireland) Ltd. v Grogan*, [1989] IR 753.

¹²⁸ *Højesteret* decision 6.4.1998, *Carlsen et al./Rasmussen*, I 361/1997, *UfR* 1998, 800 (German translation *EuGRZ* 1999, 49).

¹²⁹ Council of State No 3457/98, *Katsarou/DI.K.A.T.S.A.*; see in that context also the Opinion Council of State No 194/2000.

¹³⁰ TC Declaration 108/1992 1.7.1992 - *Maastricht-Opinion*, *RIE* 1992, 633 (English translation in Oppenheimer, see note 1, 712).

¹³¹ Because of the constraints of the French legal order, which does not provide for a constitutional judicial review, the *Conseil d'Etat* can not openly refer to constitutional law arguments. Nevertheless, in a legal order without a constitutional court, their decision functions as a leading decision of quasi-constitutional character. It thus has more weight than the non-references of specialised courts of last instance that occasionally in most Member States. These non-references are recorded in the annual Reports on monitoring the application of Community law, see for example the 17th report 1999, OJ 2001 C 30,

1978¹³²).

Jurisprudential developments that may turn into similar claims of the right to judicial review over European law can be detected in Belgium (in the *Cour d'arbitrage's*-jurisprudence on treaty law¹³³). Similar indications, which point at least to the remote possibility of courts claiming a reserve of power over European law, can be found in extrajudicial avenues in Sweden (in a statement from the highest court the constitutional amendments in the context of accession to the EU¹³⁴) and in Austria (in the Official Government Statement on accession¹³⁵). Other Member States have not fully developed a standard of national constitutional law control over European law, but such a possibility remains open. Portugal's constitutional law includes limits on European integration.¹³⁶ In addition, because of the supremacy of parliamentary decisions in Great Britain, the British constitutional reserve of power over European law - which exists in principle with the claim to have retained parliamentary sovereignty - is unlikely to be activated by the courts alone.¹³⁷

Both the structural circumstances of the constitutional law and the general trend of the jurisprudence in regard to the European law-national law relationship make it highly improbable for a reserve of power to be claimed in Luxembourg (no possibility for national courts to control European law plus Community-friendly courts) and the Netherlands (no constitutional court, no judicial review of international agreements and unconditional

1, 30 January 2001; the 18th report 2000, COM(2001) 309 final, 16 July 2001; the 19th report 2001, COM(2002) 324 final, 28 June 2002, see in that context the references at <http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm>.

¹³² See *supra* note 10. See also CE 30.10.1998, *Sarran, RFDA* 1998, 1081; Cass. 2.6.2000, *Fraisse*; CE 3.12.2001, *SNIP*. The issue of supremacy concerning infraconstitutional law was settled with the *Nicolo* decision, CE 20.10.1989, Rec. 190.

¹³³ Decision 26/91 16.10.1991 - *Commune de Lanaken* (Dutch-Belgian double taxation treaty), *Journal des Tribunaux* 1992, 6670; see also Decision 12/94 3.2.1994, *Ecole européenne* (school fees at European schools), *MB* 11.3.1994, 6142; Decision 33/94 vom 26.4.1994 - *CEDH* (ECHR), *MB* 22.6.1994.

¹³⁴ EG och grundlagarna - sammanställning av remissyttranden över betänkandet SOU 1993:14 och departementspromemorian Ds 1993:36, *Ds* 1993:71.

¹³⁵ Erläuterungen zur Regierungsvorlage über das Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, 1546 *BlgNR* 18. GP.

¹³⁶ Art. 7 (6) of the Portuguese Constitution. According to this provision, Portugal may - under the condition of reciprocity - enter into agreements for the joint exercise of the powers necessary to establish the European Union, in ways that have due regard for the principle of subsidiarity and the objective of economic and social cohesion.

precedence of international obligations, even over the constitution). For Finland, court-claims of reserve of power over European law are equally unlikely because of the constitutional order (no possibility for courts to review European law-compatibility with the constitution).

In most Member States where a power to control European law is either being claimed or merely discussed, this power is justified on constitutional law grounds. In other words, in these Member States, the supremacy of European law over national law does not automatically extend to constitutional law. The Netherlands are a special case: there, not only do the Dutch courts lack the authority to judicially review European law, but there are no constitutional constraints on European law at all, as the Dutch constitutional order recognises without reservation the supremacy of Community law.

In contrast, German and Italian jurisprudence establishes a link between a national court's finding an European act *ultra vires* and the violation of core constitutional law. In Germany, the argument centers on the German constitution's principle of democracy,¹³⁷ while in Italy on the fundamental principals of the Italian constitution known as counterlimits or *controlimiti*.¹³⁸ The jurisprudence of the *Højesteret* in Denmark points to a privileged position for constitutional provisions on liberties and on national independence.

What appears to be particularly threatening for legal unity and the uniform interpretation of European law in the case-law of the highest courts and tribunals is the phenomenon of interpreting European law from the perspective of the national constitutional order, generating a parallel-version of European law (a constitutional law-version of European law). Such power to engage in an autonomous parallel-interpretation of European law compatible with

¹³⁷ House of Lords, *Factortame Ltd. v Secretary of State*, [1991] 1 AC 603. See also House of Lords, *Macarthy's Ltd. v Smith (No. 1)*, [1979] 1 All ER 325 (329).

¹³⁸ BVerfGE 89, 155 – *Maastricht*.

¹³⁹ M. Cartabia, *Principi inviolabili e integrazione europea*, 1995, 8 und 95 *et seq.*

the respective constitutions (thus doubling the standard of scrutiny) is claimed by the *BVerfG* in Germany (see *supra*¹⁴⁰), the *Corte Costituzionale* in Italy (in the Frontini-case¹⁴¹); the Supreme Court in Ireland (*inter alia* in the Campus Oil decision¹⁴²) and the *Højesteret* in Denmark (in the Maastricht decision Carlsen/Rasmussen¹⁴³).

All in all, considering the constitutional law framework and the case law of these courts, it seems fair to say that for some national supreme courts, developing a jurisprudence that would resemble the German Maastricht decision remains a possibility. The most important indications in that context are constitutional constraints imposed on the European law principle of supremacy by a given Member States' constitutional order.

Thus, one can say that there are certain tendencies in the jurisprudence of a number of Member States that are not entirely insignificant. These tendencies are marked by an emphasis on elements of the national constitutional order that are unalterable, thus 'supremacy-proof', and by the autonomous interpretation of European law by Member State courts that could lead to results that diverge from the ECJ's findings (that is, parallel interpretation, 'constitutional law versions of European law').¹⁴⁴ In this respect, former German ECJ judge Ulrich Everling's assessment of a 'potential for conflict'¹⁴⁵ existing at the level of the Member States appears to be confirmed

(ii) The highest courts in the new and prospective Member States

With the accession of at least 10 states from Central, Eastern and Southern Europe as of 2004,

¹⁴⁰ See *supra*, I 2 b aa (3).

¹⁴¹ See *supra*.

¹⁴² *SC Campus Oil v Minister for Industry and Energy*, [1983] IR 82, an example for the SC being "plus communautaire que les Communautés" (Phelan/Whelan, Ireland, in: FIDE (ed.), *17th Congress 1996*, 1996, 292 (302), though.

¹⁴³ See *supra*.

¹⁴⁴ See in that context O. Dubos, *Les juridictions nationales, juge communautaire*, 2001, 857 *et seq.*, who openly suggests to give Member State courts EC law jurisdiction.

the role of their highest courts in relation to the ECJ comes into question.¹⁴⁶

In Poland, according to Art. 188 of the Polish constitution of 1997, it is the Constitutional Tribunal that decides *inter alia* on the compatibility of international treaties with the constitution, with the constitution taking precedence over international law obligations (Art. 90). In Hungary, the Constitutional Court has already made explicit reference to the German *BVerfG's* Maastricht decision. As far as the Constitutional Court of the Czech Republic is concerned, there are no indications yet of the position that court will take on the relationship between constitutional law and European law.

The Supreme Court of Estonia's case law on the association agreement with the EU indicates a willingness to bring the interpretation of the constitution and the duties flowing from European law into line. Latvia has had a Constitutional Court since 1996. The statute on Latvia's international agreements of 1994 stipulates that international obligations take precedence over statutes, but not over the constitution. A similar statute (of 1999) and a Constitutional Court also exist in Lithuania.

In Slovenia, the constitution also claims precedence over the international obligations. The Slovenian Constitutional Court has confirmed this in several decisions. As for Malta, the Maltese Constitutional Court seems to have concerns about the relationship with the European Convention on Human Rights. According to the jurisprudence of the Supreme Court in Cyprus, international agreements take precedence over statutes but not over the constitution.

In Slovakia, the constitutional amendment of February 2001 has introduced a specific, detailed provision dealing with European integration (Art. 7), which provides for the

¹⁴⁵ Everling, see note 108, 68. See also R. Streinz, *Verfassungsvorbehalte gegenüber Gemeinschaftsrecht - eine deutsche Besonderheit?*, in: *Festschrift Steinberger*, see note 100.

¹⁴⁶ For the following overview, see the contributions: A. E. Kellermann et al. (eds.), *EU Enlargement. The Constitutional Impact at EU and National Level*, 2001, by J. Justynski (Poland), 279 (283 *et seq.*); A. Harmathy (Hungary), 315 (325); V. Balas (Czech Republic), 243 (246 *et seq.*); T. Kerikmäe (Estonia), 337 (344); A. Usacka (Latvia), 337; V. Vadapalas (Lithuania), 347 (349 *et seq.*); P. Vehar (Slovenia) 367 (371 *et seq.*); P. G. Xuereb (Malta), 229 (239 *et seq.*); N. Emiliou

supremacy of European law over domestic statutes. It is unclear, though, whether the Slovak Constitutional Court would also extend this provision to constitutional law. In Bulgaria, the 1991 constitution attributes international agreements a rank superior to statutes, but inferior to the constitution, which would bind the Constitutional Court on this question. The situation appears to be similar in Romania and the Romanian Constitutional Court.

Finally, in Turkey, it is expected that in the case of accession, the Turkish Constitutional Court would explicitly follow the way lead by the Solange I and II-jurisprudence of the *BVerfG* and the Frontini and Fragd decisions of the Italian *Corte Costituzionale*.

This summary overview indicates that almost all new Member States/candidates to accession have a constitutional court and that in a number of cases, unconditional supremacy of European law over the constitution is not compatible with the current constitution in these countries. It must be noted, though, that the constitutional order is not yet consolidated in some of these states, as constitutional reforms and amendments are intended and pending. Nevertheless, it seems fair to say already that at least some of the highest courts and tribunals of these states may also be reluctant to unconditionally accept the ECJ's claim to be the final arbiter on European law.

3. Interim summary

One must not get carried away with the results of the analysis of the case law: after all, at this point, there is no open conflict in the relationship between the ECJ and the highest national courts.

Still, the lack of willingness to engage in a conversation with the ECJ by means of references under Art. 234 EC points to the potential for disobedience. It indicates to what extent national

(Cyprus), 243 (246 *et seq.*); V. Kunová (Slovakia), 327 (335); E. Tanchev (Bulgaria), 301 (306); A. Ciobanu-Dordea

courts could be willing to insist on an original position vis-à-vis the ECJ. Here, the notorious courts are the German *BVerfG*, the Italian *Corte Costituzionale* and the Spanish *Tribunal Constitucional*.

And without crossing the threshold to open conflict, there are still some worrying tendencies in the case law of the highest courts and tribunals of the Member States. These tendencies may be coined ‘frictional phenomena’. They include the insistence on supremacy-proof elements of the national constitutional order (e.g. fundamental rights) and the autonomous interpretation of European law by Member State courts (in the context of competencies and *ultra vires* acts), which may lead to an interpretation distinct from the ECJ’s interpretation (a parallel interpretation, generating constitutional law versions of EU law). The relevant statements of the national courts are often made outside an actual legal question, as *obiter dicta* or in the context of a mere legal opinion. A plausible explanation for this is that the courts are emitting signals here that are also meant to be received by the ECJ, having an anticipatory effect on the ECJ.¹⁴⁷

Another tendency that can be described is the seeming connection between specialised constitutional tribunals and the issue of a constitutional law reserve of power over European law (Germany, Italy, and Spain). On the other hand, the absence of a central constitutional court in the Member State acting as the guardian of its constitution or, at least, the core of its constitution, against European law appears advantageous for European law.¹⁴⁸ Still, as the Danish example illustrates, this case does not exclude national claims to a final say over European law.

The assessment of the situation in the new Member States and candidate States indicates that

(Romania), 311 (312); M. Soysal (Turkey), 267 (272 *et seq.*).

¹⁴⁷ See Alter, see note 55, 118, who applies this category coined by E. Blankenburg on European policy-making.

¹⁴⁸ A similar view is adopted by M. Claes/B. de Witte, Report on the Netherlands, in: A.-M. Slaughter et al. (eds.), see note 3, 190.

the emergence of frictional phenomena or even frictions between European law and the respective national constitutional orders remain a possibility there as well.

III. ADOPTING AN ANALYTICAL AND A THEORETICAL PERSPECTIVE

Although the frictional phenomena between the ECJ and the highest courts of the Member States detected in Part I have not so far crossed the threshold to open conflict, one may still reflect upon how to resolve the friction (see *infra*, 1) and how to put these frictional phenomena into a theoretical perspective (see *infra*, 2).

1. Dealing with the question of ultimate jurisdiction

One way to approach the potential for conflict inherent in the question of ultimate jurisdiction is to identify a set of legal tools or instruments which may help shape the legal context or the legal basis of the respective courts, with a view to clarifying the respective positions, in order to rationalise and in that sense resolve the conflict.

a) Modifying competence provisions and the standards applied

Differences of opinion between the European and the national legal orders on the location of the ultimate control competence on European law can be defused by modifying the attribution of competencies (in the broadest sense) or standards applied by a court. The 'Irish solution' bears testimony to this. A primary law protocol annexed to the Maastricht treaty stipulates that nothing in the European treaties shall affect the application in Ireland of Art. 40.3.3 of the Constitution of Ireland (prohibition of abortion).

One has to differentiate between two aspects, though: Resolving an actual or potential conflict on the limits of very specific and concrete areas of European law may be possible by means of the ‘Irish solution’. But as far as the ‘ultimate umpire’ question is concerned, judicial conflict between courts can hardly be excluded by rewriting competence provisions alone, unless one doesn’t simply bar the ECJ from certain areas.¹⁴⁹ The reason for this is the limited problem-solving capacity of written rules: a certain degree of leeway in respect of the interpretation of legal provisions is impossible to exclude.

b) Modifying the institutions with ultimate jurisdiction and their legal environs

The most obvious solution to national courts’ claims of jurisdiction is to take away jurisdiction from these courts (aa) and to shift the responsibility for the type of ultimate decisions that are problematic in the present context to distinct institutions (bb). Structural safeguards of Member States’ interests and specific safeguards of Member State courts may play an indirect role in setting a threshold for national courts’ claims of ultimate jurisdiction in questions of European law (cc). Finally, re-conceptualising supremacy may help (dd).

(1) Jurisdiction

It would be a radical measure, but it could be effective: Why not explicitly forbid national courts to take any kind of decision on European law?¹⁵⁰ Depending on the structures of the various national legal orders, this could be achieved by a simple statute or an amendment to the constitution. Whenever courts such as the *BVerfG* exercise their ultimate jurisdiction on (national) constitutional law or claim to be reviewing national law only (the German act of assent, for example), a prohibition on controlling *European* law would be insufficient, though.

¹⁴⁹ See Art. 35 EU. A different approach was taken by the British government in a Memorandum of 23 July 1996 to the IGC 1996, when suggesting to introduce secondary law correcting the ECJ, see on this P. Perenthaler, see note 5, 697.

¹⁵⁰ See the dissenting opinion in the *Solange I* decision, see note 85.

What would be necessary here, would be an explicit statement inscribed into national law that even incidental questions of European law must be resolved under Art. 234 EC and not answered by national courts. This would amount to a reinforcement of obligations already existing under European law.

(2) Institutional solutions

Institutional solutions are particularly noteworthy in relation to competence conflicts in the strict sense – the overstepping of competence boundaries which delimit specific areas (*ultra vires acts*). They may be conceptualised as judicial (a) or a political (b) mode of control.

(a) Judicial control: Courts of Competence

The establishment of special courts for resolving competence conflicts is something that was suggested early on in the history of the US federal system, but without success.¹⁵¹ Comparable proposals have repeatedly been made for the EU,¹⁵² in recent times even by acting judges of the German *BVerfG* (the proposal of a special Treaty Arbitration Court composed out of 15 representatives of national courts and one ECJ representative,¹⁵³ and of a ‘Common Constitutional Court’ bringing together members of ‘the Member State constitutional courts’¹⁵⁴). Other proposals in this context include suggestions to establish a European Supreme Court (*Europäischer Oberster Gerichtshof*) or a European Constitutional Tribunal (*Europäisches Verfassungsgericht*),¹⁵⁵ a Union Court of Review,¹⁵⁶ a Constitutional Council,¹⁵⁷

¹⁵¹ The most recent suggestion to establish a Court of the Union dates from 1962, for the details Mayer, see note 3, 308.

¹⁵² See the references in A. Schwartze, Kompetenzverteilung und Entscheidungsverfahren in einer Europäischen Verfassung, in: M. E. Streit/S. Voigt (eds.), *Europa reformieren*, 1996, 136 *et seq.*; M. Hilf, Ungeschriebene EG-Kompetenzen im Außenwirtschaftsrecht, *ZfV* 1997, 295.

¹⁵³ Judge Siegfried Bross, Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte, *Verwaltungsarchiv* 2001, 425; see also more recently in Überlegungen zum gegenwärtigen Stand des Europäischen Einigungsprozesses, *EuGRZ* 2002, 574.

¹⁵⁴ Judge Udo Di Fabio, Ist die Staatswerdung Europas unausweichlich?, *FAZ* 2.2.2001, 8.

¹⁵⁵ K. Friedrich, Bundesfinanzhof contra Europäischen Gerichtshof, *RIW* 1985, 794; S. Magiera, in: D. Merten (ed.), *Föderalismus und Europäische Gemeinschaften unter besonderer Berücksichtigung von Umwelt und Gesundheit, Kultur und Bildung*, 1990, 127.

¹⁵⁶ European Constitutional Group, *A Proposal for a European Constitution*, 1993, 13.

or a European Conflicts Tribunal.¹⁵⁸

(b) Political control

The responsibility for the political control of competencies could be assigned to existing institutions such as the Council of Ministers and the European Parliament, or to institutions that would have to be newly created, such as a special parliamentary committee.¹⁵⁹ But one may also develop further the idea of ‘soft’ political solutions, which could offer procedures not focusing so much on actual conflict resolution, but rather emphasising the importance of conflict avoidance by means of procedures and deliberation (reports, Ombudsman-procedures).¹⁶⁰

(c) Political sensitivity in matters of competencies

Without entering into a detailed appraisal of the proposals, it seems fair to say that new institutions would have only a limited problem-solving capacity. First, it cannot be emphasised enough that there is a court of competence already - the ECJ. ECJ judge Colneric has presented a detailed account of the jurisprudence of the court in the field of competencies.¹⁶¹ Introducing an additional court with comprehensive powers would amount to a complete reshuffle of the institutional setting at the European level. As to the suggested *ex ante* control of competencies, they would fail to catch ECJ decisions. Moreover, an institution composed of European members and national members on an equal basis would probably be

¹⁵⁷ J.H.H. Weiler, The European Union Belongs to its Citizens: Three Immodest Proposals, *ELRev.* 22 (1997), 150 (155). See also J.H.H. Weiler/U. R. Haltern/F. C. Mayer, European Democracy and Its Critique, *West-European Politics* 18 (1995), 4 (38); J.H.H. Weiler et al., *Certain Rectangular Problems of European Integration*, 1996, 14; J.H.H. Weiler, In der Unterwelt der Ausschüsse, *Die Zeit* No 44 22.10.1998, 9.

¹⁵⁸ P. Lindseth, Democratic legitimacy and the administrative character of supranationalism: the example of the European Community, *Colum. L. Rev.* 99 (1999), 628 (731 et seq.).

¹⁵⁹ I. Pernice, Kompetenzabgrenzung im europäischen Verfassungsverbund, *JZ* 2000, 866 (874, 876), suggests the establishment of a Subsidiarity Committee (*Subsidiaritätsausschuss*). Similar to this the proposal by J. Schwarze, Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht, *DVBl.* 1995, 1265 (1267) (a *Subsidiaritätsausschuss* as a body that would take binding decisions, though). See in that context also the debates in Working Group I of the Convention and the final report CONV 286/02.

¹⁶⁰ For the details see F. C. Mayer, Die drei Dimensionen der Europäischen Kompetenzdebatte, *ZaöRV* 61 (2001), 577 (606 et seq.) (WHI-Paper 2/02 <<http://www.whi-berlin.de/kompetenzdebatte.htm>>).

unable to solve or prevent conflicts. In sum: So new institutions would not prove effective in resolving all possible conflict scenarios.

It seems to me that the crux of the competence issue in non-unitary systems is to ensure that all actors exercise a consistently high level of sensitivity in matters of competencies. This can be achieved neither by the wording of competence provisions, however detailed they are, nor by institutional arrangements alone.¹⁶² This points again to the importance of ‘soft’ mechanisms (procedures, reports etc.) which aim at a structurally different and cautious approach towards competencies.

Nonetheless a conceivable institution would be an additional forum for judicial dialogue¹⁶³ between courts of the different levels, but without the authority to take binding decisions. It would be composed of ECJ judges and the highest-ranking national judges and could perhaps (also) deal with competence issues, without being an additional court taking binding decisions. In the past, judicial dialogue, the continuous conversation between the courts of the different levels by means of the Art. 234 EC-procedure, has proven to be a fundamental element of the constitutionalisation of the Community legal order driven forward by the ECJ.¹⁶⁴ This is why dialogue, discourse and conversation between the courts seem to bear a substantive problem-solving potential for the future as well. In this sense, establishing a ‘Joint Senate of the highest courts and tribunals of the European Union’ may be a good idea.

(3) Political safeguards of federalism and judicial federalism

There are two approaches that have been developed in the US in order to elucidate the

¹⁶¹ N. Colneric, Der Gerichtshof der Europäischen Gemeinschaften als Kompetenzgericht, *EuZW* 2002, 709.

¹⁶² A different view is taken on the last point at least by A. v. Bogdandy/J. Bast, Die vertikale Kompetenzordnung der Europäischen Union, *EuGRZ* 2001, 441 (458), who emphasise the relevance of the European institutional structure.

¹⁶³ On this notion Pernice, see note 1, 29.

¹⁶⁴ See also J.H.H. Weiler/A. M. Slaughter/A. Stone Sweet, Prologue, in: J.H.H. Weiler/A. M. Slaughter/A. Stone Sweet (eds.), see note 3, v und xii *et seq.*; J.H.H. Weiler, *The Constitution of Europe*, 1999, 287 *et seq.*, 322: “constitutional discourse”.

relationship between federal level and state level, which may aid a better understanding of the EU.

The theory of Political Safeguards of Federalism¹⁶⁵ emphasises the safeguards of state-interests by means of structural characteristics of the overarching (federal) level, which in turn allows courts to exercise self-restraint. It has been noted by Koen Lenaerts that this approach actually suits the EC/EU constellation even better than the US situation.¹⁶⁶ The problem in the present context is, that in order to justify judicial self-restraint of Member State courts, it is the Member State courts themselves that have to be convinced that structural safeguards of Member State interests are adequate at the European level. Decisions such as the German *BVerfG's* Maastricht judgment however, demonstrate that such conviction is by no means forthcoming.

The basic concept behind judicial federalism in the US is the guarantee of autonomous and comprehensive powers for the state courts in a multilevel system. Some of the doctrines and mechanisms developed in the US in that context¹⁶⁷ may be of some interest for the EU. A procedure similar to the Certification procedure (whereby Federal courts submit references to State courts on questions of State law) could, for example, be helpful in all cases where provisions at the European level (e.g. Art. 6(3) EU, see *infra*, dd)) can be interpreted as referring to national law. Such a procedure would also emphasise the autonomy of Member State courts and counteract the impression of there being a hierarchy between the courts of the different levels.

(4) Supremacy

Unconditionally to accept supremacy of European law over any national law has been equated

¹⁶⁵ H. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, *Colum. L. Rev.* 54 (1943), 543; D. Shapiro, *Federalism*, 1995, 116 *et seq.*; see also US Supreme Court, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

to the creation of Federal statehood at the EU level.¹⁶⁸ The term that is used in the Swedish debate for the unconditional acceptance of supremacy, *prostration*,¹⁶⁹ is even more graphic, as it symbolises the utmost kind of humble subordination. The surrender of possibilities of using constitutional law to fend off the supremacy claim of European law is viewed as subordination under a ‘foreign’ power. Note, though, that such subordination is not a merely theoretical idea, but, in the case of the Netherlands for example, part of the constitutional law of the land.

The Irish solution of a protocol at the level of European primary law to preserve the sacrosanctity of national constitutional provisions on abortion could be regarded as simply being peculiar to the specific anti-abortion provision of the Irish constitution (see *supra*). But it may be read more broadly as a revocation of European law’s claim to supremacy in respect of specific Member State interests, which are of particular importance in a given case.

Consideration for Member State matters is not such an unusual concept. Indeed it may be found in the original treaties. Examples include the public service (Art. 39(4) EC) and official authority exceptions (Art. 45 EC) and the exceptions from the fundamental freedoms in Arts. 30, 46 and 55 EC,¹⁷⁰ all of those exceptions being uniform concepts of Community law. It is also conceivable then that a common set of fundamentals of national constitutional law could be established, which could be declared exempt from the supremacy of European law.¹⁷¹

Art. 6(3) EU goes beyond mere Community-wide exceptions to European law. According to

¹⁶⁶ K. Lenaerts, Constitutionalism and the Many Faces of Federalism, *AJCL* 38 (1990), 205 (222).

¹⁶⁷ For a detailed account Mayer, see note 3, 310 et seq.

¹⁶⁸ M. Herdegen, Maastricht and the German Constitutional Court: constitutional restraints for an “ever closer Union”, *CMLRev.* 31 (1991), 235 (240).

¹⁶⁹ O. Ruin, Suède, in: J. Rideau (ed.), *Les Etats membres de l’Union européenne*, 1997, 440.

¹⁷⁰ For an overview, see D. R. Phelan, *Revolt or Revolution*, 1997, 422 et seq.

¹⁷¹ See B. de Witte, Droit communautaire et valeurs constitutionnelles nationales, *Droits* 1991, 87, who, attempting to define such a set of common fundamentals, acknowledges that the crucial problem of the respective Member States’ specific constitutional provisions which shape national constitutional identity remains (“identité constitutionnelle nationale”, *ibid.*, 95).

this provision, the European Union shall respect the national identities of the Member States. Here, a uniform European concept of national identities would be meaningless. This provision clearly refers back to the Member States. As national identity arguably includes constitutional identity, Art. 6(3) EU could be seen as a European level starting point to revoke the claim of supremacy of European law over the Member States' constitutional identity. Art. 6(3) EU is complemented by the principle laid down in Art. 10 EC, which has been considered the basis for the Community's duty to respect national constitutional structures.¹⁷² In the German debate, the principle in Art. 10 EC is typically referred to as Community comity (*Gemeinschaftstreue*), a concept reminiscent of federal comity (*Bundestreue*).

Apart from the fact that, according to Art. 46 EU, the jurisdiction of the ECJ does not include Art. 6(3), one may ask how the concept of national identity can be given meaning from the European level. One answer could be to include the Member States into the process of clarification of that concept: It is hardly surprising that it is an Irish academic contribution that develops the idea of protection of national fundamental (constitutional) choices, inherent to Art. 6(3) EU, further into attributing to national courts of last instance the role of determining the content of national fundamental choices, as recognised and protected by European law.¹⁷³ This is where a European version of the American Certification procedure (see *supra*) could be helpful.

The core idea of European level considerations for constitutional principles of the Member

¹⁷² See v. Bogdandy, Art. 5 EGV, paras. 82 *et seq.*, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union. Kommentar*, looseleaf; on Art. 10 EC (the former Art. 5 EEC) in general see M. Blanquet, *L'article 5 du Traité C.E.E.*, 1993.

¹⁷³ Phelan, see note 170, 416. Phelan discusses different scenarios for the future development of the EU. In order to avoid a revolt or a (legal) revolution and to maintain the legitimacy of the national legal orders, he suggests an amendment to the treaties which would give supremacy (over European law) to basic principles of the Member States' constitutions relating to life, liberty, religion, and the family, which are predicated on visions of personhood (not of the market or the proper distribution of goods) peculiar to each Member State. "The rights through which these principles find expression must be regarded as superior to European Community law within their sphere of application." The exact range of this reservation would be established by the respective national courts or other institutions of last resort, *ibid.*, 416, 417 *et seq.* Critical on Phelan M. P. Maduro, *The Heteronyms of European Law*, *ELJ* 5 (1999), 160 and N. McCormick, *Risking Constitutional Collision in Europe?*, *Oxford Journal of Legal Studies* 18 (1998), 517. See in that context also D. R. Phelan, *The Right to Life of the Unborn v. the Promotion of Trade in Services*, *MLRev.* 55 (1992), 670.

States can also be detached from Art. 6(3) EU: one proposal suggests a duty for the Community, in conjunction with Art. 10 EC, to consider and respect national constitutional structures when exercising European competencies.¹⁷⁴

All in all, it can be said that there are various options of how to find distinct and comprehensive answers to the open question of the ambit of the supremacy principle. The options range from an unconditional acceptance of the supremacy of the law of the overarching level (the European level) by the Member States to more complex solutions, such as European law safeguards of specific fundamental Member State choices.

(5) A variety of legal tools and instruments

There is indeed a set of tools and instruments which could be used in order to minimise the friction between highest national courts and the ECJ. Firstly, a modification of the law is a possibility, with a view to clarifying the scope of the supremacy principle, particularly in relation to the national constitutions. Other, complementary legal options include adopting a type of judicial federalism and relying on the courts' self-restraint on the condition of political-structural safeguards of Member State interests. One may also consider institutional solutions with a view to the creation of juridical or political institutions that bring together the European and the Member State levels, or solving selected conflicts by modifying the allocation of competencies.

2. Adopting a theoretical perspective

a) Existing approaches

One way to approach differences between national courts and the ECJ is to reject either one or

¹⁷⁴ On that proposal Folz, see note 21, 387.

the other position by legal arguments. This approach was adopted, for example, by commentators on the Maastricht decision, in that they repeatedly attempted to prove either the *BVerfG* or the ECJ ‘wrong’ with arguments based in constitutional law,¹⁷⁵ European law,¹⁷⁶ and occasionally in public international law.¹⁷⁷ The efficacy of this kind of approach is rather limited, as the indications are that neither national courts, such as the *BVerfG*, nor the ECJ are willing to surrender ground to the respective counter-position.

A position seemingly inspired by this view touches upon the limits of legal reasoning. It considers this type of conflict unresolvable on a legal level, as both the ECJ and the *BVerfG* argue consistently from their respective positions. In terms of legal theory, this can be conceptualised as a conflict of *Grundnorms* in the Kelsenian sense, for which no further legal solution is available.¹⁷⁸ This position is of particular significance, as it constitutes a fundamental objection to any attempt to go beyond the evaluation of the respective positions of the courts. If there is no ‘legal’ authority in sight that could solve the conflicting positions of the courts, the dispute about who is the final arbiter on European law is probably simply not a legal problem in the conventional sense. Instead, the ECJ and the highest national courts and tribunals could be considered *Grenzorgane*, or borderline institutions in the Verdrossian sense: that is, institutions bound by the law, but not subject to any legal control, so that the

¹⁷⁵ For the position of the *BVerfG* Kirchhof, see note 81, 965. G. Hirsch, *Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?*, *NJW* 1996, 2457, attempts to disprove the position of the *BVerfG* with arguments taken from the German constitution.

¹⁷⁶ See e.g. Tomuschat, see note 107, 494 *et seq.*; for further references Mayer, see note 3, 117.

¹⁷⁷ T. Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, *Harv. Int'l L.J.* 37 (1996), 389; crit. Weiler, see note 164, 286 *et seq.* See also A. Paulus, *Kompetenzüberschreitende Akte von Organen der Europäischen Union - Die Sicht des Völkerrechts*, in: Simma/Schulte (eds.), *Akten des 23. Österreichischen Völkerrechtstages*, 1999, 49 *et seq.* For a conciliatory interpretation of the divergent positions see e.g. I. Pernice, *Einheit und Kooperation*, in: *Gedächtnisschrift für Eberhard Grabitz*, see note 108, 523 (534 *et seq.*).

¹⁷⁸ See M. Heintzen, *Die “Herrschaft” über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?*, *AöR* 119 (1994), 564; N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, *ELJ* 1 (1995), 259; W.-D. Grussmann, *Grundnorm und Supranationalität*, in: v. Danwitz et al. (eds.), see note 15, 47 *et seq.*

resolution of a conflict is a merely political or sociological matter,¹⁷⁹ at the end of the day a ‘question of power’.¹⁸⁰ This is also the core of the argument of those who propose leaving the ‘ultimate umpire’ question open and unresolved.¹⁸¹

The attraction of these latter approaches is without any doubt their level-headed pragmatism. It is likely that these approaches are inspired by some kind of calm confidence that the friction between the courts will not escalate into open conflict. And it cannot be denied that the frictions between the courts are easier to overlook than open conflicts.

What remains a problem, though, is that these approaches - in particular when referring to a conflict of *Grundnorms* - are probably too hastily giving up on finding a slightly less grand legal reasoning, thus not contributing to what law, and constitutional law in particular, is all about: legal certainty and the legal constraining of power. And there is also some evidence that the national courts’ positions have already caused some harm in terms of legal certainty already. In Germany, some judges of lower courts can give a detailed account of how the *BVerfG*’s concept of *ultra vires* acts did induce law-suits against European acts in national courts.

Finally, the German *BVerfG*, in its case law, invents the term *Kooperationsverhältnis* (‘relationship of cooperation’) to describe the relationship between the ECJ and the highest national courts of Member States. One should note, though, that the *BVerfG* refers to the relationship of cooperation in the Maastricht decision only in the context of the protection of fundamental rights.¹⁸² This brings me back to the difference between the two categories ‘*ultra vires* acts’ and ‘acts violating fundamental rights as accorded by the German constitution’

¹⁷⁹ See A. Verdross, *Völkerrecht*, 2nd ed., 1950, 24 *et seq.*, referring to Hans Kelsen.

¹⁸⁰ J. Isensee, Vorrang des Europarechts und deutsche Verfassungsvorbehalte - offener Dissens, in: J. Burmeister (ed.), *Verfassungsstaatlichkeit. Festschrift für Klaus Stern zum 65. Geburtstag*, 1997, 1265.

¹⁸¹ See J. A. Frowein, Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit, *ZaöRV* 54 (1994), 1 (7).

(see *supra*).¹⁸³ Academic writings before the Maastricht decision also suggested cooperation between *BVerfG* and ECJ in the context of fundamental rights only, and not for *ultra vires* acts.¹⁸⁴ The *BVerfG* has used this concept of a relationship of cooperation since the Maastricht decision as well.¹⁸⁵ Nevertheless, the nature and scope of this concept remain ill-defined and require further clarification.¹⁸⁶

b) Embedding the problem into a modern concept of constitutionalism

As was explained earlier, possibilities for dealing with the differences between the courts by shaping the legal environment do exist. Art. 35 EU and 68 EC, for example, suggest the possibility for the Member States to ‘clip the ECJ’s wings’.¹⁸⁷ The fact that the possibilities are not followed through may indicate that the problem simply is not serious enough or not taken seriously enough to change the law. Another explanation is that national governments simply do not understand the problem.¹⁸⁸ Or it may be because the conflict between the courts itself has a special role to play in the relationship between EU and Member States - that of indirectly safeguarding Member State interests. On that reading, the claims of Member State courts of ultimate jurisdiction allow Member States to circumvent European law obligations

¹⁸² BVerfGE 89, 155 (175 and *Leitsatz* 7).

¹⁸³ A different view seems to be adopted by R. Scholz, *Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht*, *DÖV* 1998, 261 (267). He transfers the concept of a ‘relationship of cooperation’ (*Kooperationsverhältnis*) from the realm of fundamental rights to the field of competencies, assuming that a ‘similar relationship of cooperation’ exists there as well. In fact, Scholz establishes a relationship of court-competition in the area of competencies between ECJ and *BVerfG*.

¹⁸⁴ R. Streinz, *Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht*, 1989, 304 *et seq.*

¹⁸⁵ See *supra* notes 99 and 101.

¹⁸⁶ See in that context Zuleeg, Art. 23 GG, paras. 32 *et seq.*, in: *Alternativkommentar zum Grundgesetz*, 3rd ed., 2001 („Verhältnis der Zusammenarbeit“, a relationship of working together) and the recurring wording of the ECJ since the Order concerning the admissibility of third party interventions ECJ, Case 6/64, *Costa/ENEL*, Order of the Court 3 June 1964, [1964] ECR 614 (English special edition), on the “cooperation between the Court of Justice and the national courts” (in the German version “Zusammenarbeit des Gerichtshofes mit den staatlichen Gerichten“, p. 1307 (1309) of the German language edition of the ECR), see also “spirit of cooperation” in ECJ, Case 244/80, *Foglia/Novella*, [1981] ECR 3045 para. 20, or the obligation of also the courts to promote “the principle of sincere cooperation” („Grundsatz der loyalen Zusammenarbeit“) laid down in Art. 10 EC, ECJ, Case C-50/00 P, *UPA/Council*, [2002] ECR I-6677 para. 42.

¹⁸⁷ See Alter, see note 55, 197.

¹⁸⁸ See Alter, see note 55, 182 *et seq.*, who points to the different time horizons and focus of politicians and judges.

that are not in line with their interests. Leaving the question of ultimate jurisdiction open thus appears to be in the interest of Member States: reserving the right of Member State courts to claim ultimate jurisdiction could be considered a kind of compensation for the ever-decreasing influence of Member States on decision-making at the European level. Thus, national court claims of ultimate jurisdiction may even bear some stabilising potential, as they may well lead to minority opinions among Member States, e.g. in a vote, to be taken into consideration at the European level,¹⁸⁹ contributing to maintaining the balance between the two levels.

The challenge for European constitutional legal science is to capture phenomena of European constitutional reality within a modern concept of constitutionalism. Friction between courts and the function of this friction are a part of this European constitutional reality

- (1) Clarification: What constitution? Constitutions, Verfassungsverbund and multilevel constitutionalism
 - (a) Constitutions and the concept of Verfassungsverbund

Whether it is accurate or desirable to speak of the existence of a European Constitution today is subject to debate, to say the least. The critics do not only query the de-coupling of the concept of constitution from the concept of 'state'.¹⁹⁰ They also point to the risk of weakening the national constitution, inherent in the idea of a European Constitution, since the structural security built into national constitutions is called into question. And, the argument continues, a constitution is the enactment of an existing legal culture, which must be developed to some

¹⁸⁹ For the exploitation of national constitutional courts' position see M. Hilf, Solange II: Wie lange noch Solange?, *EuGRZ* 1987, 1 (2): „In den politischen Beratungen vor allem des Rates wurde gelegentlich die Karte der Karlsruher Richter als letztes Mittel ausgespielt.“ [In the political deliberations in particular in the Council, occasionally the reference to the judges in Karlsruhe was used as a last resort]

¹⁹⁰ See e.g. J. Isensee, Staat und Verfassung, in: J. Isensee/P.Kirchhof (eds.), *Handbuch des Staatsrechts* Vol. I, 1987, §13 paras. 1, 3 *et seq.* and the references in C. Grabenwarter, *VVDStRL* 60 (2000), 290 (292).

degree, and this level of development has not yet been achieved as regards in the EU.¹⁹¹ Such an emphatic approach to the concept of constitution may have numerous advantages, not least the familiarity of the interpreters of the constitution with this concept.

In consideration of the developments at the suprastatal level throughout the second half of the 20th century, a different strand of constitutional thought has called for a ‘rethinking of the concept of constitution’.¹⁹² It seems to me that under the changed circumstances of a ‘post-national constellation’ (Jürgen Habermas, Michael Zürn),¹⁹³ a more pragmatic concept of constitutionalism, emphasising that there is no state or public power beyond that established by the constitution,¹⁹⁴ is probably more helpful in explaining the phenomena relating to European integration.

As far as the European Union is concerned, there are two observations that seem to be relevant in the present context: First, there already exists in the EU, European public authority or public power, which affects the individual directly in his or her legal status.¹⁹⁵ Second, at least the German constitution points beyond itself by referring to the objective of a unified Europe (“zur Verwirklichung eines vereinten Europas”) in the preamble and in Art. 23(1). With this in mind, we may answer the question of whether there is a constitutional dimension to European integration in the affirmative. One¹⁹⁶ possible conceptualisation of this

¹⁹¹ P. Kirchhof, Große Entwürfe und kleine Schritte. Die Forderung nach Vereinigten Staaten von Europa verkennt die Eigenart der EU und den Willen ihrer Bürger, *Handelsblatt* 8.8.2001.

¹⁹² P. Badura, Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften, *VVDStRL* 23 (1966), 34 (95).

¹⁹³ J. Habermas, *Die postnationale Konstellation. Politische Essays*, 1998, 91 *et seq.*; M. Zürn, The State in the Post-National Constellation, *ARENA Working Papers* WP 99/35, <<http://www.arena.uio.no>>; see also D. Curtin, *Postnational Democracy*, 1997, 5, 48 *et seq.*, 51 *et seq.*; J. Shaw, Postnational constitutionalism in the European Union, *Journal of European Public Policy* 1999, 579 (586 *et seq.*).

¹⁹⁴ A. Arndt, Umwelt und Recht, *NJW* 1963, 24 (25): „In einer Demokratie gibt es an Staat nicht mehr, als seine Verfassung zum Entstehen bringt“ [In a democracy, there is no more to a ‘state’ than established by the constitution]; see also P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 2nd ed. 1998, 620.

¹⁹⁵ The description of *Gemeinschaftsgewalt* as *Herrschaftsgewalt* is already suggested by Badura, see note 192, 59.

¹⁹⁶ A different concept is, for example, the concept of a ‘double-constitution’, *Doppelverfassung* (T. Öhlinger, Die Verfassung im Schmelztiegel der europäischen Integration: Österreichs neue Doppelverfassung, in: T. Öhlinger, *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union*, 1999, 165 *et seq.*; P. Pernthaler, Die neue Doppelverfassung Österreichs, in: H. Haller et al. (eds.), *Staat und Recht. Festschrift für Günther Winkler*, 1997, 773); see in that context the Austrian VfGH 9.12.1999 *EuZW* 2001, 219 (222) – Reverse discrimination. For more references on the

constitutional dimension is to depict ‘the’ European constitution as a complementary structure of national and European constitutions. This concept is known as *Verfassungsverbund* (multilevel constitutionalism).¹⁹⁷ The closest literal translation of this term is compound of constitutions. According to this concept, a European constitution does exist already, and arises out of both national and European constitutional levels. European and national constitutional law form two levels of a unitary system in terms of substance, function and institutions.¹⁹⁸ On this reading, the principle of supremacy in application (*Anwendungsvorrang*) does not imply a hierarchy of norms in the sense of the hierarchical superiority or inferiority of either European or national (constitutional) law.¹⁹⁹ ‘The hallmark of the *Verfassungsverbund* is its non-hierarchic structure’.²⁰⁰ This distinction between supremacy and hierarchy may not of itself be entirely convincing.²⁰¹ But one can identify a deeper basis of validity for the European compound constitution, which is the individual, to whom the public powers allocated to the national and European component constitutions may

debate see A. Peters, *Elemente einer Theorie der Verfassung Europas*, 2001; P. Craig, Constitutions, Constitutionalism, and the European Union, *ELJ* 7 (2001), 125; D. Blanchard, *La constitutionalisation de l’Union européenne*, 2001.

¹⁹⁷ The term was coined by I. Pernice, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: R. Bieber/P. Widmer (eds.), *L’espace constitutionnel européen*, 1995, 225 (261 *et seq.*), see also by the same author Europäisches und nationales Verfassungsrecht, *VVDStRL* 60 (2001), 163 *et seq.*, with further references. Conceived in 1995 as an alternative concept to the *Staatenverbund* (see note 217), the notion is increasingly used detached from its original context, e.g. in P. M. Huber, *VVDStRL* 60 (2001), 194 *et seq.* On *Verbund* as a concept of order E. Schmidt-Aßmann, Europäische Verwaltung zwischen Kooperation und Hierarchie, in: *Festschrift Steinberger*, see note 100, 1375 (1381 *et seq.*). The term multilevel constitutionalism was introduced in I. Pernice, Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and “Multilevel Constitutionalism”, in: E. Riedel (ed.), *German Reports. XV. International Congress on Comparative Law, Bristol*, 1998, 40 *et seq.*; see also I. Pernice, Multilevel constitutionalism and the treaty of Amsterdam, *CMLRev.* 36 (1998), 703 (WHI-Paper 4/99 <<http://www.whi-berlin.de/pernice-cmlrev.htm>>); I. Pernice/F. C. Mayer/S. Wernicke, Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism, *King’s College Law Journal* 12 (2001), 61 (WHI-Paper 11/01 <<http://www.whi-berlin.de/socialcontract.htm>>); I. Pernice, Multilevel Constitutionalism in the European Union, *ELRev.* 5 (2002), 511; J. Shaw, *Law of the European Union*, 3rd ed. 2000, 179 *et seq.* For a French version of the concept as *constitution composée* I. Pernice/F. C. Mayer, De la constitution composée de l’Europe, *RTDE* 2000, 623 (WHI-Paper 1/01 <<http://www.whi-berlin.de/pernice-mayer.htm>>).

¹⁹⁸ See in that context A. v. Bogdandy/M. Nettesheim, Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung, *EuR* 1996, 1.

¹⁹⁹ See R. Bieber/I. Salomé, Hierarchy of Norms in European Law, *CMLRev.* 33 (1996), 907 (912).

²⁰⁰ Pernice, see note 197, 185, emphasising the difference between *Verbund* [compound] and *Verband* [association].

²⁰¹ Crit. Nettesheim, *German report for the XX. FIDE conference 2002*, <<http://www.fide2002.org>>, 73.

be traced back.²⁰² This is also where a more convincing justification of the concept of supremacy may be found.

(b) Multilevel systems

Josef Isensee's comment that the EU/EC is slipping away from established, traditional typologies of public international and constitutional law²⁰³ illustrates why one may have to try and go beyond the traditional typologies in an even more principled way, and establish new concepts such as 'multilevel systems'.

(i) Objections to the traditional repertoire of terms and concepts

The objections raised against the 'traditional repertoire of terms and concepts'²⁰⁴ may be briefly clarified by means of the example of those terms and concepts typically used to describe non-unitary systems within which there are competing public powers. In a nutshell, *Staat* and *Staatlichkeit* (statehood) have been coined the "central complex of German constitutional psychology" from an outside observer's perspective.²⁰⁵ Federal state (*Bundesstaat*) and federal statehood (*Bundesstaatlichkeit*) are established terms used since the

²⁰² In that sense I. Pernice, Die Europäische Verfassung, in: *Festschrift Steinberger*, see note 100, 1319 (1324); see also I. Pernice/F. C. Mayer/S. Wernicke, Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism, *King's College Law Journal* 12 (2001), 61 (64 *et seq.*, 68 *et seq.*). The problematic nature of this approach's emphasis on the individual is highlighted *inter alia* by U.K. Preuss, Contribution to the discussion, *VVDStRL* 60 (2000), 384 *et seq.*

²⁰³ J. Isensee, Integrationsziel Europastaat?, in: O. Due/M. Lutter/J. Schwarze (eds.), *Festschrift für Ulrich Everling zum 70. Geburtstag*, 1995, 567. See also Gunnar-Folke Schupperts comment that the Community may only be understood with a way of thinking and a terminology which pays tribute to the specifics and the process-oriented nature of the EC, Zur Staatswerdung Europas, *StWStP* 1994, 35 (60).

²⁰⁴ Schuppert, see note 203, 53. See also E.-W. Böckenförde, *Staat, Nation, Europa*, 1999, 8, according to whom we are in a state of transition, where traditional dogmatic categories and structures capture the changing realities only in part or not at all [...wir in einer Situation des Übergangs stehen, in der überkommene dogmatische Kategorien und Strukturen die sich verändernde Wirklichkeit nur noch zum Teil oder gar nicht mehr normativ übergreifen"].

²⁰⁵ P. Allott, The Crisis of European Constitutionalism, *CMLRev.* 34 (1997), 439 (444); see also J.H.H. Weiler, The State "über alles", in: O. Due et al., see note 203) (eds.), *Festschrift Everling*, 1651; see on that C. Möllers, *Staat als Argument*, 2000, 407.

call for a European federal state in the early days of European integration.²⁰⁶ *Hugo Preuss* considered the elimination of the term ‘sovereignty’ from constitutional theory to be a precondition of any kind of development of a modern constitutional theory at the end of the 19th century - already more than 100 years ago.²⁰⁷ Concepts such as ‘autonomous legal order’ or ‘independent legal system’ will always lead back to equally unclear concepts such as ‘independent source of effectiveness’ of a legal order.²⁰⁸ ‘Federalism’ encounters the difficulty of finding some common understanding of this term and concept from the outset.²⁰⁹ Then there is the term ‘constitution’. Any attempt to establish a substantive understanding of this term for non-statal entities meets with resistance²¹⁰ and brings about a debate not only on the link between statehood and constitution (see *supra*), but also on the basis of a legal order, the exact location of sovereignty, the core of federalism etc. Accordingly, even the concept of *Verfassungsverbund* (multilevel constitutionalism), which seeks to avoid the trappings of traditional terms and concepts, encounters objections that point to the danger of blurring

²⁰⁶ On the European Federal State in the early days of European integration Ernst B. Haas 1958 (*The uniting of Europe*) or Walter Hallstein 1969 (*Der unvollendete Bundesstaat*); see also the references in Pernice, Art. 23, para. 35, in: H. Dreier (ed.), *Grundgesetz. Kommentar*, Vol. 2, 1998.

²⁰⁷ H. Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889, 92, 135; see S. Oeter, Souveränität und Demokratie als Probleme in der “Verfassungsentwicklung” der Europäischen Union, *ZaöRV* 55 (1995), 659 (704); on sovereignty in public international law also S. Oeter, Souveränität – ein überholtes Konzept?, in: *Festschrift Steinberger*, see note 100, 259 (283 *et seq.*). For the French debate F. Chaltiel, *La souveraineté de l’Etat et l’Union européenne, l’exemple français*, 2000.

²⁰⁸ „eigenständiger Geltungsgrund”, see e.g. A. v. Bogdandy, Supranationale Union als neuer Herrschaftstypus, *Integration* 1993, 210 (213) and Grussmann, see note 178).

²⁰⁹ The difficulties in discussing the concept of federalism are illustrated by the discussion on P. Lerche, Föderalismus als nationales Ordnungsprinzip, *VVDStRL* 21 (1964), 66 (105 *et seq.*, in particular 109, 120 *et seq.*, 124, 125, 136). See also T. Koopmans, Federalism: The wrong debate, *CMLRev.* 29 (1992), 1047 (1051); O. Beaud, Föderalismus und Souveränität, *Der Staat* 1996, 45; or Armin von Bogdandy’s attempt to develop the concept of a ‘supranational Union’ – at least on a terminological level - into the concept of a ‘supranational Federation’: A. v. Bogdandy, Die Europäische Union als supranationale Föderation, *Integration* 1999, 95; A. v. Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999, 63 note 280. See also the contributions to K. Nicolaidis/R. Howse (eds.), *The Federal Vision*, 2001.

²¹⁰ See already Carl Schmitt’s critique of Alfred Verdross’ attempt to establish a constitution of the international community based on a *Grundnorm* ‘*pacta sunt servanda*’ (Die Verfassung der Völkerrechtsgemeinschaft), C. Schmitt, *Verfassungslehre*, 1928, 69 and 363 *et seq.* For the concept of a constitution of the international community see also A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd ed. 1984, § 75 *et seq.*, with further references. On the UN-Charter as a constitution of the international community also B. Simma, From Bilateralism to Community Interest in International Law, *RdC* 250 (1994-VI), 217 (258 *et seq.*). For tendencies of constitutionalisation at the WTO level see M. Nettesheim, Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung, in: C. D. Claasen et al. (eds.), *In einem vereinten Europa dem Frieden der Welt zu dienen...*, Liber amicorum Thomas Oppermann, 2001, 381 *et seq.*; R. Howse/K. Nicolaidis, Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far, in: P. Sauve et al. (eds.), *Equity, Efficiency and Legitimacy: The Multilateral Trading System at the Millenium*, 2001.

responsibilities, of falling into joint-decision traps,²¹¹ of the ‘federal-state-kind-of-thought dependency of compound constructions’, and of potential ‘blueprint traps’.²¹²

What is interesting is that the quest for neutral analytical concepts to elucidate new and recent phenomena is also taking place in the realm of social science, with – in part – the same motivation as in law, namely to overcome the fixation with the state as the dominant form of political organisation.²¹³ Under the label of ‘New Institutionalism’,²¹⁴ there have been attempts to overcome the state-orientation of social science in general and of International Relations theory in particular, starting out from a broad concept of institutions, which includes formal and informal institutions as well as procedures.

Moreover, what speaks in favour of trying to develop a more neutral concept such as that of a ‘multilevel system’ is the very nature of the subject of scrutiny already: the particular conceptual form and shape of the EC/EU, which is open and must remain so.²¹⁵ There are indications that the ‘traditional repertoire of terms and concepts’ will be incapable of adequately explaining the specifics of this original ‘organisational reality’ of the EC/EU,²¹⁶ if, as is arguably the case for the EC/EU, this reality is a dynamic, ongoing process. This is because traditional and less traditional (*Staatenverbund*²¹⁷) terms and concepts tend to be

²¹¹ See *infra*, notes 234 and 235, the references to Fritz Scharpf’s work.

²¹² „föderalstaatliche Pfadabhängigkeit der Verbundkonstruktion“, „Blaupausenfalle“, G. F. Schuppert, Anforderungen an eine Europäische Verfassung, in: H.-D. Klingemann/F. Neidhardt (eds.), *Zur Zukunft der Demokratie*, 2000, 207 (216, 226); see also G. F. Schuppert, Contribution to the discussion, *VVDStRL* 60 (2000), 352.

²¹³ See M. Jachtenfuchs/B. Kohler-Koch (eds.), *Europäische Integration*, 1996, 11 *et seq.*, M. Jachtenfuchs, Theoretical Perspectives on European Governance, *ELJ* 1 (1995), 115 (119 *et seq.*), pointing to the parallel legal debate; M. Jachtenfuchs/B. Kohler-Koch, *Regieren im dynamischen Mehrebenensystem*, a.a.O., 30. See also T. König/E. Rieger/H. Schmitt (eds.), *Das europäische Mehrebenensystem*, 1996, 15. Donald Puchalla warned in 1971 already, in his influential article ‘Of Blind Men, Elephants and International Integration’, against destroying essentially new phenomena in international relations with blunt and inappropriate analytical instruments, *JCMS* 10 (1971/72), 267 (269). Similar Ipsen, see note 69, 183 *et seq.*, in 1972 on the dangers of thinking in categories of federal theory or public international law theory.

²¹⁴ S. Bulmer, The Governance of the EU: A New Institutional Approach, *Journal of Public Policy* 13 (1994), 351. On that approach see also P. Craig, The Nature of the Community, in: P. Craig/G. de Búrca (eds.), *The evolution of EU law*, 1999, 19 *et seq.*

²¹⁵ Ipsen, see note 69, 1050 *et seq.*

²¹⁶ Schuppert, see note 203, 53.

²¹⁷ Thus the characterization by the *BVerfG* in the Maastricht decision, *BVerfGE* 89, 155 (181, 190) and *Leitsatz* 8 – *Maastricht*. The term *Staatenverbund* was initially coined by P. Kirchhof, Contribution to the discussion, *EuR* 1991 (Beiheft 1), 47; Der deutsche Staat im Prozeß der europäischen Integration, *HdbStR* Vol. VII, § 183, para. 69. B. Kahl, Europäische Union: Bundesstaat - Staatenbund - Staatenverbund?, *Der Staat* 1994, 241, tells us that in terms of content, of system and of

geared to static phenomena,²¹⁸ already presupposing a political unit and unity.²¹⁹ The EU/EC as a ‘fluid system’ may ‘hardly be described and circumscribed with rigid terms and notions’.²²⁰ This also applies to another concept, developed out of a perceived inadequacy of existing concepts²²¹ in the early days of European integration. It was first used by social scientists,²²² and was later taken on and developed further by lawyers:²²³ the concept of supranationalism²²⁴ or of a supranational Union.²²⁵ Even if this term does manage to grasp the nature of the EU/EC,²²⁶ it still tends to be oriented towards a concept of a static, already established entity.

The fact that there is ‘still no convincing concept’ for the Community as a ‘*novum*’ and, arguably, an ‘interim form’,²²⁷ may be another argument related to European integration in favour of a concept more neutral than the traditional, established terms and concepts of existing constitutional thought.²²⁸

It seems to me that, very similar to the approach followed in social sciences, it is advisable to search for concepts, which are as neutral as possible, decoupled from the traditional terms and

telos, the *Staatenverbund* corresponds to the *Staatenbund* (confederation), *ibid.*, 245. U. Di Fabio, *Das Recht offener Staaten*, 1998, 140 *et seq.*, describes the *Staatenverbund* as a transitory model in times of change. Kirchhof himself initially also used the term ‘*Staatenverband*’, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *EuR* 1991 (Beiheft 1), 11 (16). The latter concedes at least an original form of its own to the European construct; the *Verbund* leaves this autonomy in the dark and deliberately emphasizes that the States are the principal entities in European integration. Crit. H. Schneider, *Die Europäische Union als Staatenverbund oder als multinationale “Civitas Europea”?*, in: *Gedächtnisschrift für Eberhard Grabitz*, see note 108, 677; uncrit. M. Kaufmann, *Europäische Integration und Demokratieprinzip*, 1997, 214 *et seq.*

²¹⁸ Schuppert, see note 203, 53. For the process-driven nature of European integration see also R. Pitschas, *Europäische Integration als Netzwerkkoordination komplexer Staatsaufgaben*, *StWSiP* 1994, 503 (504).

²¹⁹ See I. Pernice, Carl Schmitt, Rudolf Smend und die europäische Integration, *AöR* 120 (1995), 100 (118).

²²⁰ Isensee, see note 203, 567; for the problem of using constitution in that context Pernthaler, see note 5, 696.

²²¹ J.H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, *YEL* 1 (1981), 267 (268).

²²² See E. B. Haas, *The Uniting of Europe*, 1958, 59.

²²³ In Germany e.g. by Badura, see note 192, 57 *et seq.*; s. auch Ipsen, see note 69, 67 *et seq.*

²²⁴ According to Ipsen, see note 69, 67 with further references, the term itself goes back to Nietzsche (*Der Wille zur Macht*, 1885). See in general also J.H.H. Weiler, *Il sistema comunitario europeo*, 1985, *passim*.

²²⁵ v. Bogdandy, see note 208, see also note 209.

²²⁶ K. Stern, *Staatsrecht* Vol. I, 1984, 540 *et seq.*; Isensee, see note 180, 1239 *et seq.*

²²⁷ D. Grimm, *Europäischer Gerichtshof und nationale Arbeitsgerichte aus verfassungsrechtlicher Sicht*, *RdA* 1996, 66 (English version: *The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision*, *Colum. J. Eur. L.* 3 (1997), 229). Grimm categorises the Community somewhere between State and International Organisation, not being a state because of the lacking self-determination on form and content of its political existence; not being an International Organisation because of a surplus of public authority, *ibid.*, 66 *et seq.*

²²⁸ In the context of European integration, Pernice, see note 219, 120, considers an adaptation of the fundamental terms and concepts of constitutional theory to be possible though.

concepts, and which make it possible to leave aside concepts and terms that are not relevant for a given question.

Finally, the comparative law context which is inherent in European integration also speaks in favour of referring to an analytical concept such as that of a ‘multilevel system’, which is as neutral as can be. The variety of legal and constitutional concepts in Europe arising out of differences in language and legal culture (as may easily be illustrated by the different understandings of state, federalism, sovereignty and constitution), necessitates an enormous amount of conceptual and terminological clarification, before one uses these terms and notions in the EU context.

The mere translation of new terms and concepts such as *Staatenverbund* or *Verfassungsverbund* for example into English already proves highly problematic: Whereas *multilevel constitutionalism*²²⁹ transports at least the idea behind the concept; the English translation of *Staatenverbund* (compound of states)²³⁰ remains clumsy. Nuances between *Verbund* (compound) and *Verband* (association) pale into obscurity.

(ii) The level metaphor

Irrespective of the question of what exactly defines a multilevel system, one may already have doubts about whether the particular metaphor of distinct levels depicts the reality of non-unitary systems better than others. Beyond the specific use in the context of the social science-multilevel system, the metaphor of ‘levels’ can typically be found in theories of federalism and in social science descriptions of European integration.²³¹ In the field of law in

²²⁹ See *supra*, note 197.

²³⁰ This is the term used in the ILM-translation of the Maastricht decision, *ILM* 22 (1994), 388. Note in that context L. Siedentop, *Democracy in Europe*, 2000, 27, though, pointing to Madison in the Federalist papers, speaking of the ‘compound republic’.

²³¹ See *supra* note 213, in particular T. König/E. Rieger/H. Schmitt, 16.; see also R. Mayntz, *Föderalismus und die Gesellschaft der Gegenwart*, *AöR* 115 (1990), 232; F. W. Scharpf, *Optionen des Föderalismus in Germany und Europa*,

Germany, *Gunnar Folke Schuppert, Rainer Wahl* and *Udo Di Fabio* have adopted the multilevel metaphor.²³² There may be a problem with the image of different levels, used to describe non-unitary systems, though, as the term ‘level’ suggests a super-/subordination and an impermeable separation of the levels.²³³ The latter at least does not really correspond to the decision-making structure of the EU/EC, where, for example, the Council of Ministers is made up of members of the ‘other level’ and where joint-decision trap-phenomena²³⁴ have reached a European dimension.²³⁵

Other common attempts to describe non-unitary systems include the centre-periphery model,²³⁶ the pyramid model and the matrix model,²³⁷ or the attempt to overcome the whole/components distinction by terming the Union and the Member States ‘centres’ in the sense of a ‘polycentric system’.²³⁸ In the context of federal theory, the orthodox ‘layer model’ has been complemented by a ‘marble cake model’, where ingredients – meaning component entities - are less easy to distinguish.²³⁹

Compared to all these other models, the advantage of the ‘level’ metaphor seems to be that it captures the horizontal juxtaposition of constituent entities better than, for example, the polycentric structure. Horizontal coupling is typical of complex social systems: *Renate*

1994, 13; G. Marks/L. Hooghe/K. Blank, *European Integration and the State (Manuscript)*, 1994, 7, with further references. See also F. Scharpf, Community and Autonomy. Multilevel Policy-Making in the European Union, *EUI Working Paper RSC* No. 94/1.

²³² Schuppert, see note 212; R. Wahl, Der Einzelne in der Welt jenseits des Staates, *Der Staat* 2001, 45 (46 *et seq.*); U. Di Fabio, Mehrebenendemokratie in Europa. Auf dem Weg in die komplementäre Ordnung, Lecture given in the context of the FCE-series at Humboldt-University on 15. November 2001, <<http://www.whi-berlin.de/difabio.htm>>. See also R. Nickel, Zur Zukunft des Bundesverfassungsgerichts im Zeitalter der Europäisierung, *JZ* 2001, 625 (631). Crit. P. Badura, Contribution to the discussion, *VVDStRL* 60 (2000), 353.

²³³ Schuppert reminds us that we are not the masters of the connotations of terms and concepts that we create, see note 212, 222.

²³⁴ For more details on this concept F. W. Scharpf et al., *Politikverflechtung*, 1976, 13-66; F. W. Scharpf, The joint-decision trap: lessons from German federalism and European integration, 66 *Public Administration* 239 (1988); F. W. Scharpf, La trapolla della decisione congiunta: federalismo tedesco e integrazione europea, 17 *Stato e Mercato* 175 (1986).

²³⁵ F. W. Scharpf, Die Politikverflechtungsfälle: Europäische Integration und deutscher Föderalismus im Vergleich, *Politische Vierteljahresschrift* 26 (1985), 323.

²³⁶ See e.g. J.H.H. Weiler, The Transformation of Europe, *Yale L.J.* 100 (1991), 2403 (2408 *et seq.*); see also D. Elazar, *Exploring Federalism*, 1987, 27 *et seq.*

²³⁷ Elazar, see note 236, 27 *et seq.*

²³⁸ v. Bogdandy, see note 208, 217.

²³⁹ M. Grodzins, The Federal System, in: A. Wildavsky (ed.), *American Federalism in Perspective*, 1967, 257.

Mayntz refers to the work of American organisational theory scholar and Nobel-prize winner *Herbert A. Simon* in that field,²⁴⁰ who showed that this kind of structure to a structure principle typical of organic life forms that has been successful in evolution because of its effectiveness.

The objection of joint-decision trap phenomena can be rebutted in that even joint-decision traps and respective theories presuppose distinct and determinable units, that develop into situations of joint-decision traps later on. It is in the sense of describing distinct and determinable units that ‘levels’ are to be understood in the present context.

Furthermore, the image of distinct levels is not necessary linked to super- and subordination. Levels may also be understood as platforms that may be at equal height in one case, at different heights in another, or even circling freely around each other.

(iii) Multilevel systems - attempting a definition

Disregarding the traditional terms and concepts when examining a specific problem only makes sense, though, if a conceptual alternative succeeds.

There are two empirical observations independent of concepts of constitution, state or federalism that appear to be beyond contestment: Existing political entities are typically subdivided into component units for reasons of practicability.²⁴¹ Or existing political units unite to form a new political entity, without giving up their own quality as – now constituent – distinct, individual units. A sharing out of tasks between constituted or original overarching entities and their component sub-entities is agreed upon, which finds its legal expression in an allocation of powers or competencies between the overarching unit and the sub-units.

²⁴⁰ The Architecture of Complexity, in: *Kommunikation* III/2, 1967, 55-83, quoted by Mayntz, see note 231, 232 (241).

²⁴¹ On the aspect of size as a relevant factor for public authorities R. Dahl, *Federalism and the Democratic Process*, in: R. Pennock/J. W. Chapman (eds.), *Liberal Democracy*, 1983, 95 *et seq.*; R. Dahl/E. Tufte, *Size and Democracy*, 1973, 137 *et*

Typically, there will be an overarching entity with a certain range of competencies on one level and a multitude of entities each with an equally large range of competencies - not, however, necessarily the same competencies - on another level. The term 'overarching' is simply used to denote the relation of levels and entities towards each other. It is by no means used to suggest hierarchical superiority. A (decision-making) level is characterised by one or more (decision-making) entities with equal or similar competencies. An entity may well be an overarching one, that covers several entities in the way described *supra*, and itself be a component entity of another overarching entity.²⁴² Thus, in principle, multilevel systems may cover a multitude of levels. The entities in that context are political units with an original or attributed decision-making power and a certain degree of legal-organisational distinctiveness that makes them distinguishable in the first place.

Public power is thus not defined by the monopoly of power, the traditional concept used *inter alia* to define elements of sovereignty,²⁴³ rather by the mere decision-making power (leaving aside the question of enforcement capacity), typically expressed in the concrete form of norm- or law-making capacities. The decision-making power represents a subset of the elements that characterise the traditional concept of state and public power: the monopoly of force plus exclusive law-making powers.²⁴⁴ The legal powers defined as competencies take on a concrete form through a decision.²⁴⁵ Levels in the context of a legal multilevel system are decision-making levels.²⁴⁶

seq. From the perspective of organisational theories see Mayntz in that context, see note 231, 232 (241 *et seq.*, with further references).

²⁴² A German *Land* (region) is an overarching entity for municipalities and districts. The *Land*, in turn, is part of the Federal Republic, which is a Member State of the EU. For the emergence of new decision-making levels due to internationalisation Mayntz, see note 231, 232 (243).

²⁴³ The monopoly on the (legitimate) use of force as the basis for state and public authority structures is emphasised *inter alia* by Max Weber, *Wirtschaft und Gesellschaft*, 5th ed. 1985, 835 *et seq.* See also v. Bogdandy, see note 208, 211 *et seq.*

²⁴⁴ v. Bogdandy, see note 208, 215.

²⁴⁵ A similar approach is taken by R. Stettner, *Grundfragen einer Kompetenzlehre*, 1983, 73 *et seq.*

²⁴⁶ For a similar concept Scharpf, see note 231, 25, 29 and Mayntz, see note 231, 232. See also Schuppert's description of the EC as a political entity with several decision-making levels, see note 203, 39, or as *Mehrebenenentscheidungssystem* [system

Decision in this context is a cipher for decision-making operating under the rule of law, i.e. determined by and organised according to law.²⁴⁷ The emphasis on the element of decision instead of that of enforcement when defining public power may also be found elsewhere: The element of decision is the object and central paradigm of regime theory in social sciences, though under the distinct label of “governance”.²⁴⁸ Whether one categorises entities with a relatively small norm- or law-making capacity, such as municipalities in Germany or French regions, as levels depends on how strictly one wishes the criteria of decision-making powers to be.

A series of levels representing a multilevel system is distinguishable from the many other existing levels and entities by virtue of the factual and legal relationship between them. First, there is a specific factual relationship between the different levels of a multilevel system: Typically, a multilevel system will have one overarching unit on one side and a multitude of smaller entities on another level, the latter entities being a subset of the overarching unit in terms of territory and individuals. In addition to this factual relationship, there will typically be a specific legal bond among the entities and levels, which rests upon the factual link: The law of the distinct levels claims to be effective within the same territory – in principle, the individual may be granted rights and receive obligations from each of the levels.

Legal acts of the different levels can thus cover identical or similar situations.

(2) The role of courts in a multilevel system

of multilevel decision-making] by M. Zürn, *Über den Staat und die Demokratie in der Europäischen Union*, *ZERP-Diskussionspapier* 3/95, 19 *et seq.*

²⁴⁷ See in this context the concept of the state suggested by Hermann Heller, *Staatslehre*, 1934, 228 *et seq.*, according to whom the state is an organised entity of effective decision-making (*organisierte Entscheidungs- und Wirkungseinheit*); see also v. Bogdandy, see note 208, 217.

²⁴⁸ See S. Krasner (ed.), *International Regimes*, 1983, *passim*; F. Kratochvil/ J. G. Ruggie, International organization: a state of the art on an art of the state, *International Organization* 40 (1986), 753. A differentiated approach to the concept of decision is suggested by M. Reisman/M. McDougal, *International Law Essays*, 1981, 4.

(a) From constitutional court to complementary constitutional adjudication?

If the European constitution can be conceptualised as a complementary structure in the sense of multilevel constitutionalism (*Verfassungsverbund*), European constitutional adjudication may have to be conceptualised in a similar way.²⁴⁹ On a positive reading,²⁵⁰ ‘the’ European constitutional court would consist of both the highest national courts and tribunals and the ECJ. Since, from the theoretical perspective of multilevel constitutionalism, the national courts’ and the ECJ’s authority both stem from the individual, there is no presupposed hierarchy between the courts, rather a duty of cooperation. The task of this composite European constitutional court would be that of a guardian and interpreter of the (composite) European constitution. This concept of ‘the European constitutional court’ clearly differs from the ideal that *Walter Hallstein* and others seemed to have in mind when they modelled the ECJ on the US Supreme Court.²⁵¹

(b) Courts in a multilevel system

Having chosen a neutral analytical concept, the multilevel system, and having merely observed that there is friction between the highest national courts and the ECJ, the fundamental consideration must be how to minimise the potential for conflict in the event of diverging claims of ultimate jurisdiction in multilevel systems.

Empirical analysis indicates that at the end of the day, the subject of conflict in the relationship between the levels are the issue of supremacy and the question of the source of European law, its basis of validity. The latter question is controversial in the context of the

²⁴⁹ The German *BVerfG* stated already in BVerfGE 73, 339 (367 *et seq.*) - *Solange II (Wünsche)* that there is a ‘functional intertwining of the European and Member State judiciaries’, including a ‘partial functional incorporation of the ECJ into the domestic court system’ [„funktionelle Verschränkung der Gerichtsbarkeit der Europäischen Gemeinschaften mit der Gerichtsbarkeit der Mitgliedstaaten“ mit einer „teilweisen funktionalen Eingliederung des Europäischen Gerichtshofs in die mitgliedstaatliche Gerichtsbarkeit“].

²⁵⁰ A pessimistic view would be the view that courts compete with each other.

²⁵¹ W. Hallstein, *Die Europäische Gemeinschaft*, 5th ed., 1979, 110. Pernthaler, see note 5, 693, also quotes J.

concept of compound or multilevel constitutionalism (the *Verfassungsverbund*), since the mere concept of constitutionalism implies a statement on the source of European law.²⁵² This question can be left open in the multilevel context.

As far as the supremacy issue is concerned, the multilevel description exposes the basic requirements for a conditional principle of supremacy between distinct levels of public powers to function: The supremacy question, at the end of the day, can be answered unambiguously only according to the content accorded to it at the overarching level. In the EU, this content is the principle of precedence in application (*Anwendungsvorrang*), though not in validity (*Geltungsvorrang*), of the law of the overarching level. In order to avoid conflicts, though, any claims for elements of national law, in particular constitutions, to be exempt from the supremacy of European law have to be recognised by both levels in principle, and determined consensually from both levels, in concrete cases.

This brings me to the core question of where to locate ultimate jurisdiction claims of the highest *national* courts and tribunals at the *European* level. The answer points to Art. 234 EC in a procedural perspective and to Art. 6(3) EU in a substantive perspective. The interpretation of the latter norm has to be accomplished by both the highest national courts *and* the ECJ. The fundamental rights saga from *Solange I* up to the *Banana* decisions in front of the ECJ and the *BVerfG* seem to indicate that the respective courts of ultimate decision, guardians of the interests of the respective levels, are already working towards establishing a core of (constitutional) law exempt from the supremacy of European law, and accepted as such from both levels.

Monnet, *Les Etats Unis d'Europe Ont Commencé*, 1955, 53.

²⁵² See in that context H. Hofmann, *Von der Staatssoziologie zu einer Soziologie der Verfassung?*, *JZ* 1999, 1065.

c) Objections to complementary European constitutional adjudication²⁵³

Whether one starts out from multilevel constitutionalism or merely from a multilevel description of legal systems, the idea of a complementary structure of European constitutional adjudication raises numerous objections.

(1) Asymmetry

The heterogeneity of the highest national courts and tribunals was described earlier. This heterogeneity is not limited to the role of the judge, the language of the decisions and the acceptance of judge-made law in the different Member States. There are also differences in the range of powers and jurisdiction of the highest national courts. Hence the concept of a complementary European constitutional judiciary leads to a very different shape of European constitutional law adjudication from Member State to Member State.

In Germany, for example, the strong constitutional court may claim exemption from European supremacy for certain national constitutional law principles, whereas in the Netherlands, for lack of a constitutional court, this possibility does not exist.

On the one hand, this kind of asymmetry is intrinsic to the heterogeneity of the EU Member States, which is one of the crucial constitutional hallmarks of the Union.²⁵⁴ On the other hand, proposals in some of the Member States for court reforms, going as far as the introduction of genuine constitutional courts may be part of some trend towards convergence,²⁵⁵ promoted to some extent by the ultimate jurisdiction issue. This is indicated by the Swedish example, at

²⁵³ More fundamentally, general objections against the concept of (constitutional) judicial review as such and theories dealing with judicial review will not be addressed here. See for this debate U. Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Mißtrauen*, 1998, in particular 169 *et seq.*, with further references; for the American debate on judicial review A. Bickel, *The Least Dangerous Branch*, 1962; M. Tushnet, *Taking the Constitution Away from the Courts*, 1999.

²⁵⁴ See in that context J. Tully, *Strange multiplicity*, 1995, 183 *et seq.* (constitutions as “chains of continual intercultural negotiation”).

²⁵⁵ Considering the number of states where judicial review of parliamentary decisions is still considered an anomaly, one can not yet speak of a general convergence in Europe towards judicial review exercised by constitutional courts, but see Tomuschat, see note 3, 245 *et seq.*

least.²⁵⁶ In any case, the new Member States and the candidates for accession to the EU have almost all established a constitutional court (see *supra*). This may lead to an overall strengthening of influence of the courts in the EU.

Generally speaking, this is the point where the merits of a multilevel description become apparent: The relevant borderline between public powers in the EU is the line between the European and the Member State levels. The way the fundamental rights issue developed is a good illustration that it may well be enough to have one single court of one level – in that case the German *BVerfG* - determining the interests of that level. This is not to say that the German *BVerfG* may be some kind of role model for other courts in other Member States. It is simply to say that the reservations expressed by the *BVerfG* in the field of fundamental rights have contributed to making the case law of the ECJ clearer in this area. All Member States have benefitted from this, whether or not they have a constitutional court who voiced similar national concerns to the *BVerfG*. In that sense, the *BVerfG* could be seen as not only the guardian of the German constitution, but also a guardian of the interests of the Member State level generally. The same applies, of course, for the other highest national courts and tribunals in their respective positioning towards the ECJ.

The objection that the ECJ and the highest national courts are not really comparable - in spite of occasional descriptions of the ECJ as a constitutional court²⁵⁷ - carries particular weight. It possibly points to an asymmetry between the courts in question, which excludes any concept

²⁵⁶ In the context of the constitutional reform required by accession to the EU, the Swedish government wanted to make sure that Swedish courts would have the same powers as far as European law is concerned as the German *BVerfG*, Justitiedepartementet, *Våra Grundlagar och EG - förslag till alternativ, Ds 1993:36*.

²⁵⁷ J. Schwarze (ed.), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz*, 1983; O. Due, A Constitutional Court for the European Communities, in: D. Curtin/D. O'Keefe (eds.) *Constitutional Adjudication in European Community and National Law*, 1992, 3; K. Alter, *Establishing the Supremacy of European Law*, 2001, 225.

of a system of complementary jurisdiction in respect of European constitutional law.²⁵⁸ On that reading, the ECJ and the highest national courts and tribunals are just too different.

One fundamental difference, addressed earlier,²⁵⁹ is the absence of a ‘real’ constitution. If constitutional adjudication can indeed be said to be characterised by a particularly large margin of interpretation, constitutional adjudication without a constitution could admittedly prove to be rather problematic.²⁶⁰ I will not undertake a more detailed analysis of this problem at this juncture.

Another difference is, for example, that it is the exception that individuals appear in front of the ECJ. In European procedural law, the Member States, the Commission and national courts (by way of references) are privileged parties. These are the ECJ’s preferred interlocutors.²⁶¹ The ECJ has confirmed this in its recent case law, against the Court of First Instance and against the advice of the Advocate General.²⁶² This seems to point to a conception of the ECJ’s function as relating specifically to maintaining and strengthening European integration, rather than being concerned with the individual’s legal protection.²⁶³ The debate about the introduction of some form of fundamental rights complaint,²⁶⁴ modelled more or less on the German *Verfassungsbeschwerde*, may indicate a change of perceptions if not a shift of paradigms, though. This may well further raise the perception or even the role of the ECJ as the court of the Union citizen, with all the consequences that such a shift of paradigms would

²⁵⁸ A similar objection is made by P. Badura, Contribution to the discussion, *VVDStRL* 60 (2000), 353, against the multilevel concept, when pointing to the lack of comparability of the levels.

²⁵⁹ See on that debate *supra*.

²⁶⁰ Pernthaler, see note 5, 695, who does not want the concept of constitution to be used in the European context.

²⁶¹ See on this H. Schepel/E. Blankenburg, Mobilizing the European Court of Justice, in: G. de Búrca/J.H.H. Weiler (eds.), *The European Court of Justice*, 2001, 9 (18 *et seq.*). See also in that context the rather strict approach of the ECJ concerning the admissibility of third party interventions ECJ, Case 6/64, *Costa/ENEL*, Order of the Court 3 June 1964, [1964] ECR 614 (English special edition).

²⁶² ECJ, Case C-50/00 P, *UPA/Rat*, Urteil vom 25.7.2002, *EuZW* 2002, 529; against AG Jacobs Concl. 21.3.2002, paras. 59 *et seq.* and the Court of First Instance CFI, Case T-177/01, *Jégo-Quéré/Commission*, Urteil vom 3.5.2002, *EuZW* 2002, 412, paras. 41 *et seq.*, 50.

²⁶³ H. Rasmussen, *The European Court of Justice*, 1998, 198 *et seq.* See also L. Hooghe/G. Marks, *Multi-Level Governance and European Integration*, 2001, 26 *et seq.*

²⁶⁴ Suggested by N. Reich, Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde, *ZRP* 2000, 375; see

bring about.

Other differences between national courts and the ECJ may be related to the fact that traditional concepts of separation of powers cannot simply be transferred to the European construct: On that reading, the European judiciary may have a totally different role, compared to that of a supreme national court.

The most serious objection in the present context is probably the one that points to the differences in democratic legitimacy between the ECJ on the one hand and the highest national courts and tribunals on the other. Unlike the courts of many Member States, who take their decisions ‘in the name of the people’,²⁶⁵ the ECJ does not even reveal in whose name or on whose behalf it is speaking. This raises the question of who or what legitimises the ECJ. According to Art. 223 EC, the European judges are appointed by the governments of the Member States without any parliamentary participation - neither of the European, nor of national parliaments.²⁶⁶ In contrast, the judges of the German *BVerfG*, for example, are elected by parliament (Art. 94 of the German constitution). It is nevertheless true that the selection of ECJ judges can be democratically justified by chains of legitimacy, some of which are longer than others. However, it should be noted that European law does not prevent parliamentary participation at the Member State level, as the Austrian example of parliamentary participation proves.²⁶⁷ Generally speaking, one will find numerous unanswered fundamental

also Convention document CONV 72/02, point I.3; CONV 354/02.

²⁶⁵ This aspect is highlighted by O. Dubos in his comprehensive study *Les juridictions nationales, juge communautaire*, 2001, 855.

²⁶⁶ The history of the recent appointments of the German judges Everling, Zuleeg and Hirsch is not exactly a success story, as all of them were one-term judges. This showed some deficiencies in the current procedure. Alter, see note 55, 200, reports that U. Everling was initially seen as having a greater appreciation of the borders of EC authority, and that M. Zuleeg, rather than being reappointed, was replaced by G. Hirsch from Bavaria in part because of the perception that he was too willing to interpret European law expansively.

²⁶⁷ Art. 23 lit. c of the Austrian Constitution, the *B-VG*.

questions on the legitimacy of judges at the Member State level as well,²⁶⁸ and the German procedure of selecting the highest judges by parliament could itself be criticised for not being as transparent as, say, the US solution of public hearings of the prospective judges

At the end of the day, the utterly different understandings of and approaches to the nature and the range of democratic legitimacy of courts is probably simply the corollary of the heterogeneity of the Member States.

(2) The evaporation of responsibilities - Who is to define the common good?

There are more fundamental objections than asymmetry to a concept of complementary jurisdiction in European constitutional law. They concern the issue of accountability and the question of how to establish a concept of 'common good' in such a complex system.

Just as a certain fuzziness or lack of clarity has developed over time in the realm of the executive, between Council, national governments and administrative structures,²⁶⁹ a composite structure of jurisdiction might be vulnerable to an unclear and ill-defined division of responsibilities and jurisdiction. There is a danger that this could lead to a vacuum of responsibility for fundamental rights protection *in concreto*, as the Banana cases indicated. There, the principles were upheld, but the Banana importers went bankrupt. It would be a serious problem indeed if a forum for the definition of the common good,²⁷⁰ the place where a concept of solidarity could also be developed, became less and less discernible. In this instance, solidarity-free individualisation would then have also reached the realm of constitutional law.

(3) Is there any value in theories of composite structures of adjudication?

²⁶⁸ For a German perspective A. Voßkuhle/G. Sydow, Die demokratische Legitimation des Richters, *JZ* 2002, 673. Pernice, see note 1, 36, emphasizes the functional legitimacy of the European judiciary.

²⁶⁹ See F. C. Mayer, Nationale Regierungsstrukturen und europäische Integration, *EuGRZ* 2002, 111 *et seq.*

²⁷⁰ On the question of a 'multilevel common good', *Mehrebenen-Gemeinwohl* G. F. Schuppert, Die Zukunft der Daseinsvorsorge in Europa: Zwischen Gemeinwohlbindung und Wettbewerb, manuscript, 12 *et seq.*; see also P. Häberle,

The value of conceptualising what the courts in the EU do or should do by means of a non-hierarchical, composite multilevel structure may be summarised as follows: Starting out from a concept that covers the national and the European levels, and thus establishing responsibilities of adjudication on European constitutional law for both of them, the non-hierarchical relationship of the courts begins to take on a clearer form, constitutional clarity is enhanced and a reciprocal strengthening of constitutional bonds and limits is achieved.

The multilevel approach can serve as a starting point to develop criteria for determining the limits of responsibilities and as a conceptual basis for the constitutional dialogue between the courts, which are allotted functions according to a specific concept of constitutionalism. That means rejecting the conflict paradigm and more readily accepting the cooperation paradigm. To some extent, the non-subordination of national courts could be explained and legitimised in terms of European constitutional law. It would no longer automatically be seen as an infringement of European law. In any case, there would be clear limits on how national courts may act, which would remove the foundations of misleading legal reasoning (particularly in respect of *ultra vires* acts²⁷¹).

3. Interim summary

The ‘frictional phenomena’ that exist between the highest national courts and tribunals of the Member States and the ECJ can be legally analysed and their specific manifestations affected by law. They have a function in the relationship between EU and Member States. There are theoretical tools which can help constructively to explain and conceptualise this function and the empirical findings of differences between the courts. By means of concepts such as the *Verfassungsverbund* or the multilevel system, the cooperation paradigm can be emphasised.

Gibt es ein europäisches Gemeinwohl?, in: *Festschrift Steinberger*, see note 100, 1153 (1166 *et seq.*); R. Uerpmann, *Das öffentliche Interesse*, 1999, 266 *et seq.*

²⁷¹ See note 118 for examples of alleged *ausbrechende Rechtsakte*.

IV. PROSPECTIVE DEVELOPMENTS IN THE RELATIONSHIP BETWEEN EUROPEAN AND NATIONAL COURTS

The Declaration on the future of the Union annexed to the Treaty of Nice,²⁷² the Laeken declaration,²⁷³ the summoning of a Convention for 2002/2003 in order to prepare an Intergovernmental Conference in 2003/2004 and the accession of ten and more states from Central and Eastern Europe concern fundamental questions of European law that do not leave the courts unaffected.

1. Topics of the constitutional debate until 2004

a) Fundamental rights

One of the questions with which the Convention is supposed to deal is the question of the binding character of the Fundamental Rights Charter.²⁷⁴ Especially if coupled with some new kind of procedural device such as a ‘constitutional complaint’ for individuals to the ECJ or a substantial modification of Art. 230 para. 4 EC,²⁷⁵ the consequence could be a fundamental shift of paradigms, away from the market-driven economic community towards a fundamental rights community.²⁷⁶ This raises the question of the ECJ’s future role in that context, and thus, indirectly the question of the role of national courts. Problems may arise out of the fact that a genuine codification of European fundamental rights may make more apparent the divergence in control, scrutiny and standards of protection between the European level and at least some of the Member States.²⁷⁷ Some observers expect to see a shift in the responsibility for

²⁷² Declaration No 23, Document CONFER 4820/00 and OJ 2001 No C 80, 1.

²⁷³ Conclusions of the Presidency, Laeken European Council, Annex I, 15.12.2001, Document SN 300/01, <<http://ue.eu.int>>

²⁷⁴ In December 2000, the Charter was only announced as a solemn political proclamation, see OJ 2000 No C 364, 1.

²⁷⁵ See note 264; see also the final report of WG II, CONV 354/02 point C, and the discussion within the Discussion circle on the Court of Justice, CIRCLE I WD 08, para. 17 *et seq.*

²⁷⁶ See A. v. Bogdandy, Grundrechtsgemeinschaft als Integrationsziel, *JZ* 2001, 157.

²⁷⁷ On this point M. Nettesheim, Grundrechtliche Prüflichten durch den EuGH, *EuZW* 1995, 106; P. Selmer, *Die Gewährleistung der unabdingbaren Grundrechtsstandards durch den EuGH*, 1998, 133 *et seq.*

protecting fundamental rights from the political sphere to the judiciary despite the merely political nature of the Fundamental Rights Charter. In this event, the judiciary would again ‘be forced to be the driving force behind European integration’ (Paul Kirchhof).²⁷⁸ It may be that if this happened, the ECJ would be somewhat overtaxed.

b) The delimitation of powers and competencies

According to the ‘Declaration on the future of the Union’ annexed to the Treaty of Nice, one point for discussion before a 2004 Intergovernmental Conference is “inter alia” the question of “how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity”.

In fact, the competence issue is not that much a question of the wording of general competence provisions, rather of who decides in cases of concrete conflict.²⁷⁹ A genuine additional Court of competence court was among the proposals.²⁸⁰ There is no urgent need to establish such an additional court, though,²⁸¹ and experience indicates that the inertia of a *status quo* would be a significant obstacle to establishing such a new institution. But the entire debate about competencies and the recurring accusation that the ECJ is not fulfilling its functions, threatens to weaken the position of the ECJ, with destabilising side-effects for the entire system of European constitutional law adjudication.

c) The debate on the shape of the European executive power

The effects of the debate on European governance and on the European executive power on the ECJ remain unclear. The debate initiated by the Commission in order to improve

²⁷⁸ Kirchhof, see note 191.

²⁷⁹ Weiler, see note 164, 287 *et seq.*

²⁸⁰ See notes 153 and 154 for proposals made by two German *BVerfG* judges. See also U. Everling, *Quis custodiet custodes ipsos?*, *EuZW* 2002, 357, rejecting this kind of proposal; for the debate in the Convention see document CONV 286/02.

²⁸¹ Just see ECJ, Case C-376/98, *Germany/Commission (Tobacco directive)*, [2000] ECR I-8419. See also Mayer, see note 160, 594 *et seq.* and German ECJ judge Colneric, see note 161.

governance in Europe²⁸² fails to take into account the role and functions of the ECJ. The entire approach has an executive-driven tendency (reliance on experts, independent agencies), but it is hard to tell how this may affect the role of the courts. There is a possibility that expansion of executive leeway outside of judicial review at the European level may weaken the position of courts in the EU in general. This point is illustrated by the European Council, an institution acting completely outside the scope of judicial review (Art. 46 EU).

More generally, the debate on the future shape of the European executive and particularly the choice between an elected President of the Commission and an elected President of the EU attached to the Council,²⁸³ may also affect the courts. Although the courts are not the primary subject of this debate as they hardly play a role in the institutional debate at all, the fact that in the future a more politicised Commission or, worse, a Commission more or less deprived of power, may no longer act as guardian of the treaties, could have an indirect effect on the Court, increasing its burden of responsibility to defend the supranational originality and independence of the entire integration project. The dichotomy of legislature and executive might be taken to imply that the separation of powers concept of the nation state can simply be applied to the EU. This is not necessarily the case.

The judiciary may be the last remaining institution to be implementing the driving idea behind European integration of the last 50 years which was to mediate political conflict by means of law, and its an (assumed) rationality.²⁸⁴

d) Extending majority voting

²⁸² See the Commission White Paper on European Governance, COM (2001) 428 final.

²⁸³ See the proposals debated in the Convention in January 2002, see also the Giscard draft of 28.10.2002, CONV 369/02.

²⁸⁴ The *Carpenter* decision of July 2002 (Case C-159/90, *EuZW* 2002, 603, see Pernice/Mayer, Grundrechtsschutz und rechtsstaatliche Grundsätze (nach Art. 6 EUV), paras. 32 *et seq.*, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union. Kommentar*, looseleaf) where the ECJ clearly disregards any limits that Art. 51 of the Fundamental Rights Charter might impose on the ERT-case law, seems to indicate that it is not that easy to circumnavigate the ECJ.

The extension of (qualified) majority voting (QMV) in the Council of Ministers is often considered to be the key to securing the functioning of an enlarged Union. In the development of European integration from the Single European Act 1986, to the Treaty of Maastricht 1992, the Treaty of Amsterdam 1997 and most recently the Treaty of Nice 2000, very little substantial progress has been made in this subject

Extending majority voting could have an effect on the role of national courts. This is well illustrated by the Banana-regulation.²⁸⁵ Germany actually voted against the regulation in the Council but was nonetheless bound by it, and had then to solve the massive fundamental rights problems that arose at home as a result. More generally speaking: Extending QMV also means that governments may no longer be able to act as guardians of certain interests in the Council. To the extent that these interests are well enough established to be covered by constitutional law (as fundamental rights are, for example), the national courts may be forced into a more activist role as defenders of these interests against the EU, in particular when these interests can be designated integration-proof elements of national constitutional law.

2. Open questions

Neither national nor European judiciary are at the centre of the constitutional debate. The judiciary is hardly mentioned on the Conventions agenda for 2002/2003 at all. It is only at a very late stage that a forum for debating ECJ-related questions was introduced, albeit with a rather limited mandate.²⁸⁶ There are, however, numerous questions about the future of the courts which need answering.²⁸⁷ There is not only the question already touched upon *supra* of

²⁸⁵ See on this decision F. C. Mayer, Grundrechtsschutz gegen europäische Rechtsakte: Zur Verfassungsmäßigkeit der Bananenmarktordnung, *EuZW* 2000, 685.

²⁸⁶ For the mandate of this 'Discussion circle on the Court of Justice' (Circle I), see CONV 543/03. For the draft final report, see CIRCLE I WD 08.

²⁸⁷ For the debate on the reform of the European court system, which strangely has been decoupled from the general constitutional debate see *inter alia* J.H.H. Weiler, Epilogue: The Judicial Après Nice, in: G. de Búrca/J.H.H. Weiler (eds.), *The European Court of Justice*, 2001, 215 *et seq.*; U. Everling, Zur Fortbildung der Gerichtsbarkeit der Europäischen Gemeinschaften durch den Vertrag von Nizza, in: *Festschrift Steinberger*, see

how to establish a concept of the common good in a European Union in which a complementary structure of the constitution (in the sense of multilevel constitutionalism) obtains. There are also foreseeable logistical and infrastructural obstacles to a functioning ECJ in an EU of 25 or more Member States, with possible side effects for European constitutional law adjudication in the entire EU. These obstacles include the language problem²⁸⁸ and the question of how to ensure a balanced composition of the Court and its component parts based on equal representation of Member States.

More generally, one may question whether the Laeken-declaration agenda, which includes such topics as the legal status of the Charter of Fundamental Rights or the delimitation of competencies, does not perhaps deflect attention from more urgent, fundamental questions of European law. A political decision on the range and limits of the (common) market, for example, might be considered more pressing. This issue does not only concern social and cultural specifics of the Member States, but also fundamental choices of a society on the market-state relationship, taking into consideration social and other preferences. The ECJ's *Preussen-Elektra* judgment illustrates in the area of the relationship between free movement of goods and environmental protection that, in spite of the *Keck*-jurisprudence, the ECJ is finding it increasingly difficult to remain consistent in its case law on the limits of the market.²⁸⁹

The codification of the ECJ's case law on fundamental principles of European law such as direct effect, indirect effect of directives, state-liability under the *Francovich*-principles etc. would certainly be a rewarding task for the Convention and the ensuing IGC. Of primary importance as regards Treaty reform, is on the one hand the establishment of a comprehensive

note 100, 1103 *et seq.*, with further references.

²⁸⁸ The increasing number of languages may not be just a logistical problem, it may also adversely affect the clarity of Court decisions and contribute to the fuzziness of European law, see on that aspect Pernice/Mayer, Art. 220 EGV, paras. 86 *et seq.*, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union. Kommentar*, looseleaf.

competence of the ECJ to adjudicate in the so-called intergovernmental areas, extending to acts of the European Council, and on the other hand the clarification of the extent to which European law enjoys supremacy over national law.

An analysis of European constitutional law adjudication is closely linked to the more general question, which reaches beyond the EU, of how to conceptualise public power in an era in times of globalisation and internationalisation. Similar frictional phenomena as detected between the Member States and the EU may occur there, with similar lines of conflict. The ECJ may find itself in a position vis-à-vis courts or other adjudicating bodies outside the EU, which resembles the position national courts have adopted towards the ECJ.²⁹⁰ Moreover, there are numerous new fundamental questions, ranging from the question of how to tame new, previously unknown threats to individual freedom relating to economic power, to the question of how to legitimise new forms of governance.²⁹¹ The answers to these questions will also affect the role and the function of national and supranational courts.

V. SUMMARY AND CONCLUSION

The analysis of the conflicts between the highest courts and tribunals at the European and Member State levels goes far beyond the mere relationship between these courts. Looking at this relationship offers more general insights about how Member States deal with the tension between their national legal orders and European legal order and where the crucial points for potential conflict are located within the European construct. Beyond the law, national courts also reflect changes in mood or opinion, regarding European integration, within the respective

²⁸⁹ ECJ, Case C-379/98, *Preussen Elektra*, [2001] ECR I-2099. See also the contribution by Th. Kingreen in this volume.

²⁹⁰ See e.g. ECHR, *Matthews/Great Britain*, *EuGRZ* 1999, 200; see also ECJ, Case C-17/98, *Emesa Sugar*, [2000] ECR I-665; see also the case ECHR, *Senator Lines GmbH/ 15 EU Member States*, pending (56672/00), *EuGRZ* 2000, 334; following Case T-191/98 R, *DSR-Senator Lines GmbH/Com.*, [1999] ECR II-2531 and Case C-364/99 P(R), *DSR-Senator Lines GmbH/Com.*, [1999] ECR I-8733.

²⁹¹ See on this point J. Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, *MLRev.* 65 (2002), 204 (209), with further references; N. Walker, *The Idea of Constitutional Pluralism*, *MLRev.* 65 (2002), 317. On the resolution of the boundaries between Public and Private see S.

Member States.²⁹² The differences and conflicts between the courts can be considered representative of more general trends and differences of opinion.

In all, it is probably a little premature to regard the relationship between the ECJ and the highest national courts and tribunals to be a consolidated relationship, but it is on the right path, heading towards a complementary structure of European constitutional law adjudication. This path is characterised by embracing cooperation instead of collision and by elements of a constitutional conversation between the courts, sometimes quite indirect, and variant in its characteristics, depending on the Member State in question. However, it remains to be seen, whether the constitutional debate in the aftermath of the Nice Treaty and next round of enlargement in 2004, will somehow serve to hinder this positive development.

Thus, in these times of change in Europe, what is true for European integration in general applies likewise to the relationship between the courts: when facing crucial decisions, all-important is to preserve and secure what has already been achieved. Offering concepts and ideas to this end is not the only, but a particularly befitting task for the science of European constitutional law.

Wernicke, *Die Privatwirkung im Europäischen Gemeinschaftsrecht*, 2002, 265 *et seq.*

²⁹² J.H.H Weiler, *The Reformation of European Constitutionalism*, *JCMS* 35 (1997), 97 (107).