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The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty

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THE PRIMACY CLAUSE OF THE CONSTITUTIONAL TREATY AND THE FUTURE OF CONSTITUTIONAL CONFLICT IN THE EUROPEAN UNION

Mattias Kumm and Victor Ferreres Comella

I. INTRODUCTION: CONSTITUTIONAL CONFLICT IN THE EUROPEAN UNION

Forty years after the European Court of Justice (ECJ) declared the law of the European Communities (EU law) to be the supreme law of the land in Europe[1], controversy over the relationship between EU law and national law remains alive. [2]

To be sure, there are important issues that have been settled. National courts in all Member States have accepted that EU law trumps national statutes, even statutes enacted later in time. This may not be surprising for jurisdictions such as the Netherlands, which constitutionally prescribe the primacy of international law over national law.[3] It is more remarkable in jurisdictions such as Italy and Germany, generally committed to the proposition that the status of international treaties in domestic law is the same as that of parliamentary statutes (and that in case of conflict the norm enacted last in time prevails).[4] It is a major constitutional transformation in a jurisdiction

[1] The leading cases are ECJ Case 6/44, Costa v. Enel, [1964] ECR 585; ECJ Case 43/76, Comet BV v. Produktschap voor Siergwassen, [1976] ECR 2043: ECJ Case 106/77. Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629.

[2] For general overviews of note on the issue see A. M. Slaughter, A. Stone and J.H.H. Weiler, *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998), Constance Grewe and Helen Ruiz Fabri, *Droits Constitutionnels Européens* (Paris, PUF 1995), Franz Mayer, *Kompetenzüberschreitung und Letztbegründung* (Muenchen, C.H. Beck 2000). For a collection of the leading cases across jurisdictions see A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases* (Cambridge, 1994 [Vol.1] & 2003 [Vol.2])

[3] For a general overview of the the situation in the Netherlands and Belgium see Bruno de Witte, *Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands*, in: Neil Walker (ed), Sovereignty in Transition (Hart 2003), 351-366.

[4] See the national reports by Juliane Kokott on Germany and Marta Cartabia on Italy in: AM Slaughter and all, *supra* note 1, at 77 and 133 respectively.

such as the UK, where the principle of parliamentary sovereignty presented a formidable barrier.[5]

But even if EU law is deemed to have greater authority than treaties generally, many national courts resist the ECJ´s view that EU law is the supreme law of the land. They have instead held that they can set aside EU law on constitutional grounds under certain circumstances. It should be noted, however, that these courts do not rely on a simple and straightforward rule of national constitutional supremacy. Even if they resist the unconditional supremacy of EU law, they act under a strong presumption that they should apply EU law in case of conflict.[6]

Whether and under what circumstances exactly national courts will set aside EU law varies across jurisdictions. Here it must suffice to offer a very schematic overview of the points of conflict between the ECJ and national courts. This provides the basis for a more informed assessment of how the "Treaty establishing a Constitution for Europe" (hereinafter: Constitutional Treaty) is likely to impact on these conflicts.

There are three lines of national constitutional resistance that define possible arenas of future conflict. The first concerns fundamental rights. This issue dates back to the 1970s and is today probably the least virulent of the three. The story is well rehearsed: Originally the German and Italian constitutional courts asserted that they had jurisdiction to review EU law on the grounds that it violated national constitutional guarantees.[7] As the ECJ further developed its fundamental rights jurisprudence, the issue became less of a concern. The German Court backed off[8] and recently confirmed[9] that it

[5] See Paul Craig, report on the UK, AM Slaughter and all, *supra* note 1 at 195.

[6] Descriptions of the EU and national legal orders as legally independent yet mutually engaged abound. Particularly illuminating recent contributions are Samantha Besson, *From European Integration to European Integrity: Should European Law Speak with Just one Voice?*, 10 European Law Journal, 257-281 (2004), Miguel Maduro, *Contrapuntual Law: Europe's Constitutional Pluralism in Action*, in: N. Walker (ed.), Sovereignty in Transition (Hart 2003). Earlier accounts include Mattias. Kumm, *Who Is the Final Arbiter of Constitutionality in Europe*?, 36 Common Market Law Rev., 356-381 (1999) and Neil MacCormick, Questioning Sovereignty, pp. 97-122 (1999).

[7] See, for example, BVerfGE 37, 337 (Solange I).

[8] BVerfGE, 73, 339 (Solange II).

[9] BVerfG, 2 BvL 1/97 of 7.6.2000, http://www.bverfg.de/

would not exercise its jurisdiction to review EU law on grounds concerning national constitutional rights, for so long as equivalent protection was provided by the institutions of the EU. The Italian Court too has not seriously engaged in reviewing EU law. Though fundamental rights remain a residual ground for some national courts to refuse enforcement of EU law, the probability that an actual conflict between EU law and national constitutional law will arise in this area is very low.

The second concerns the issue of 'Kompetenz-Kompetenz'. This is an issue that is relatively new – it came up as a corollary to the debates concerning subsidiarity and the appropriation by the Treaty of Maastricht of the language of citizenship. If a piece of EU legislation is challenged on the ground that it was enacted *ultra vires* – that it was enacted beyond the competencies conferred on the EU - who gets to ultimately decide the issue? Who gets to ultimately police the jurisdictional boundaries between the national and the European polities? The German[10] and Danish[11] highest Courts in particular have claimed that they have the residual authority (based on national constitutional law) to determine whether EU legislative acts are enacted *ultra vires*. These courts realize that the ECJ has the jurisdiction under the Treaty to review the legality of EU acts, which includes the review of whether the enactments are within the EU's competencies. But the ECJ is itself an EU institution that can act *ultra vires*, by attempting to amend the constitution under the guise of interpreting it. If the ECJ simply rubberstamps the EU's legislative acts as falling within the EU's competencies, then national courts have a constitutional duty to step in and render such laws inapplicable in their respective jurisdictions, so the argument goes.

The third set of issues concern the possibility of conflict between EU law and certain specific provisions of national Constitutions. Such conflicts have become increasingly frequent ever since the Treaty of Maastricht. Some of these cases concern conflicts between EU primary law and national constitutional law. The Maastricht Treaty, for example, establishing a right of EU citizens to vote and stand for elections in municipal elections anywhere in

[10] BVerfGE 89, 155 (better known as the 'Maastricht' decision)
[11] Carlson and Others v. Rasmussen (Case No I-361/1997) (Supreme Court, 6 April 1998).

the EU collided with a Spanish constitutional provision specifically limiting to Spanish citizens the right to stand for elections. Such conflicts tend to be resolved in the context of the ratification of the Treaty: the issue is brought before the constitutional court and the necessary constitutional amendments are initiated by the respective political actors (or the Treaty is not ratified). (In Spain, for instance, article 13 of the Constitution was amended to make ratification of the Maastricht Treaty possible). More problematic are cases involving secondary EU law conflicting with specific national constitutional provisions. Examples include EU law requiring the opening up of the armed forces to women to a greater extent than the national constitution allows (such a conflict was resolved in Germany by amending the national constitution)[12]; or EU law requiring the recognition of certain degrees issued by private universities, whereas the national constitution prohibits the recognition of any but public institutions in its jurisdiction (this conflict was resolved by Greek courts by simply reading such a requirement out of EU law, ECJ precedent to the contrary notwithstanding)[13].

Note that conflicts involving specific rule-like constitutional commitments tend to have a different structure than conflicts concerning fundamental rights or competencies, both with regard to the frequency and the nature of the conflict. Whereas claims concerning abstract fundamental rights or competencies are standard in litigation – a great deal of legislation raises these issues – specific constitutional rules are only rarely in play. And whereas claims regarding rights and competencies usually involve difficult questions of interpretation and judicial judgment, conflicts concerning specific constitutional commitments do not (as will be further explained below).

The question we will pursue here is whether and how the adoption of the Constitutional Treaty (signed in Rome on October 29, 2004, to be ratified within two years), affects constitutional conflicts. Does it put them to rest, finally? Does the Constitutional Treaty, even if ratified, make any difference at

[12] ECJ Case C-285/98 (Kreil); see M. Trybus, Sister in Arms: EU Law and Sex Equality in the Armed Forces, 9 European Law Journal 631 (2003).

all? The question takes on a particular salience as since May 2004 ten new Member States (each with its own constitutional preconceptions, linked to very different historical experiences and social and economic backgrounds) face the difficult issues that courts in the EU have been arguing and negotiating over for decades.

In the following we will argue that the Constitutional Treaty, if adopted, will make a difference. But the difference will be one of degree. The combination of the new "supremacy clause", the nature of the ratification process, as well as some structural reforms to be introduced in the EU, mutually reinforce one another to reduce the likelihood of conflict (II and III). Yet the Constitutional Treaty does not extinguish all sources of conflict. We will argue that national courts continue to have good reasons to set aside EU law on constitutional grounds in some cases (IV). Constitutional practice in the EU, then, will continue to exhibit a non-monist structure allowing for the possibility of conflict. But the Constitutional Treaty also opens up the door to a revised understanding of what the primacy of EU law actually requires. A plausible interpretation of the Constitutional Treaty suggests that national courts are authorized by EU law to set aside EU secondary law on constitutional grounds in certain cases – cases where the national constitutional identity is at stake (V). The proposal we develop aims to ensure that such conflicts are procedurally transformed into moments of constructive deliberative engagement. The possibility of constitutional conflict can, when channelled by appropriate procedures, create opportunities for the development of a common European constitutional tradition that embraces diversity. Constitutional conflicts need not be thought of as Schmittian moments in which ultimate allegiances are affirmed and the European rule of law is suspended.

II. THE NEW SUPREMACY CLAUSE: A MERE RESTATEMENT OF THE *ACQUIS COMMUNAUTAIRE*?

[13] For further references see Maganaris, The Principle of Supremacy in Community Law – The Greek Challenge, 23 European Law Rev., 179 (1998).

Article I-6 of the Constitutional Treaty[14] establishes a *supremacy (or primacy) clause*: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". No such clause has figured up to now in the Community treaties. But does it make any difference? After all, the ECJ interpreted at a relatively early moment that the foundational treaties effectively presupposed the supremacy of EU law (Costa, 1964). Supremacy is one of the basic principles of EU law that the Court has regularly affirmed. So, if the Member States, acting as constitutional legislators, enact a supremacy clause, won´t that amount to a mere codification of what is already part of the law, the *acquis communautaire* as defined by the ECJ?

1. The primacy clause makes a difference.

We think that even if the new supremacy clause is content-wise a mere codification of the *acquis communautaire*, it makes a difference. To establish the primacy of EU law, the ECJ can now simply cite the text of the Constitutional Treaty, instead of citing its own precedent, which was the result of an interpretative enterprise that involved complex conceptual, empirical and normative questions. Substantive decisions explicitly made by the electorally accountable constitutional legislators have, all other things being equal, greater legitimacy and authority than interpretative decisions made by courts. The explicit constitutional endorsement of the ECJ's supremacy jurisprudence, then, strengthens the case for the supremacy of EU law.

It cannot be objected that Member States, as European constitutional legislators, have already *tacitly* endorsed the supremacy of EU law in the past. It is true that the ECJ's supremacy doctrine is 40 years old, and that Member States have not revoked or qualified it, in spite of the many opportunities they have had to do so, in their periodical revisions of the foundational Treaties. (They could have introduced a clause according to which nothing in the Treaty prejudices the application of national constitutional

[14] This was originally Art I-10 of the Draft Constitutional Treaty.

provisions, for example). But even though Member States have done nothing of the sort with regard to the ECJ's supremacy jurisprudence (while they have corrected the ECJ in other areas), we cannot conclude that they have already tacitly endorsed supremacy. To interpret the collective inaction by the Member States as implicit consent would make sense in the context of simple majoritarian decision-making. But the amendment of the Treaties requires the *unanimous consent* of all Member States. The fact that the States do not reach an agreement to overrule the ECJ is unlikely to reflect a consensus among them that the ECJ was right.

It should be noted, moreover, that besides repudiating the ECJ in specific cases, Member States have in the past also explicitly confirmed and restated (in the form of Treaty amendments) the judicial doctrines developed by the ECJ[15]. They have not done so, however, with regard to the supremacy issue. This suggests that if the Member States have collectively acquiesced to anything, they are more likely to have acquiesced to a "legally open" situation in which the ECJ has claimed supremacy for EU law, while some national courts continue to insist on the evaluation of the ECJ's supremacy claim in light of national constitutional commitments.

This is true not only for the original six Member States that signed the Treaty of Rome, but also for those that joined the EU after the ECJ had held in 1964 that EU law is the supreme law of the land. Of course the 'new' Member States were aware that the club they were about to enter included the principle of supremacy as announced by the ECJ as part of the *acquis communautaire*. But if the best interpretation of the political inaction of the original members *vis-à-vis* the ECJ´s jurisprudence on supremacy is that they acquiesced to the legally open situation we have just referred to, it is difficult to see how the new states, being aware of that situation, would be signing on to a more compelling and categorical principle of supremacy.

[15] Notable examples of Member States explicitly constitutionalizing the ECJ's jurisprudence include the recognition of fundamental rights as general principles of EU Law, and the grant of a competence to legislate in the area of environmental law.

So, entrenching the supremacy clause in the Constitutional Treaty makes an important difference, after all. It gives the claim that EU law is the supreme law of the land further weight.

2. The primacy clause still leaves interpretative room for the operation of national constitutional checks.

But the enactment of the supremacy clause still leaves some room for the operation of national constitutional checks on EU law. It leaves enough interpretative space to allow for the continuity of conflicts even if national courts accept the Constitutional Treaty as the appropriate point of reference for adjudicating such conflicts.

To begin with, the clause establishes the primacy of the "Constitution and law adopted by the institutions of the Union *in exercising competences conferred on it*". This means that secondary EU legislation has primacy only to the extent that the Union has acted within its sphere of competences. The supremacy clause does not by itself say who should settle the question whether EU legislation is or is not *ultra vires*. Even though this issue has been the subject of disagreement between the ECJ and some national courts, the new clause does nothing to settle it. (We will later argue that national courts should be hesitant to exercise review of EU law on jurisdictional grounds because of other changes in the Constitutional Treaty. But the point is that the new supremacy clause does not by itself settle the issue).

Secondly, the clause says that EU law shall have primacy "over the law of Member States". Technically, of course, the national Constitution is part of the "law" of a Member State. But since the deepest controversy has never concerned the primacy of EU law over national legislation, but its primacy over national Constitutions, it is striking that the clause does not explicitly say that EU law trumps the Constitutions of the Members States. The supremacy clause of the United States Constitution (Article VI, second paragraph) is instead crystal clear in this respect: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*". In comparison to the United States, there is more ambiguity in the European context as to whether national Constitutions must yield to any piece of EU law.

The ambiguity is further enhanced by Art. I-5.1 of the Constitutional Treaty. This provision does not merely reiterate that the Union shall respect national identities (see the current Art. 6 para. 3 EUT), but specifies that the *fundamental constitutional structures* of Member States are an integral part of the national identity to be respected. The new Art.I-5 could plausibly be read to authorize domestic courts to set aside secondary EU law when it disrespects national constitutional identities *as a matter of EU law.* Since the ultimate authorization for setting aside EU law in such cases would itself be grounded in EU law, the primacy principle would not be formally violated. (This interpretation and its implications will be analyzed more thoroughly in the final part of the article).

Finally, the formal Declaration of Member States annexed to the Constitutional Treaty concerning the supremacy clause does not resolve the ambiguity. It says that "Article I-6 reflects the existing case law of the Court of Justice of the European Communities and of the Court of First Instance"[16]. It is well known that the ECJ has always insisted that EU law takes precedence even when in conflict with national constitutional law.[17] But this Declaration does not settle the issues at stake. *The real issue from the perspective of national courts has always been whether or not to read the ECJ's primacy claim within a monist or a pluralist framework.* The courts of most Member States have given the ECJ's supremacy claim a pluralist, not a monist interpretation. They have insisted that, notwithstanding an ECJ's pronouncement on EU law, fundamental constitutional concerns remain a valid reason to set aside EU law *as a matter of national constitutional law*. As

[16] CIG 87/04 Add2, Declaration re Article I-6.
[17] *See* Internationale Handelsgesellschaft, Case 11/70 [1970] ECR 1125.

a matter of EU law, EU law may be the supreme law of the land, but as a matter of national constitutional law, they believe, national constitutions provide the ultimate criteria for determining what is to be the law of the land. It would seem daring to conclude that a declaration by the Member States making reference to existing case law of the ECJ should be interpreted as radically changing this "pluralist" status quo. If that had really been intended, a clearer statement along the lines of the Supremacy Clause of the United States Constitution would have been the more obvious approach to take[18].

III. THE CONSTITUTIONAL TREATY AS THE EXPRESSION OF "WE THE PEOPLE"?

According to a traditional view, the supremacy of EU law could only be effectively established if the Constitutional Treaty were adopted and ratified through a procedure that could be taken to express the will of a European Demos – a European people acting as a "*pouvoir constituant*" to establish a historically first constitution. Legal authority, it is argued, is either derived from an act of an original constituent power, or is instead derived from the States. In the first case the EU is itself a state, while in the second case it is an international institution (or at best an entity "sui generis"). As a state, the EU would be the ultimate legal authority, and its Constitution would be the supreme law of the land. As an international organisation, in contrast, it would derive its authority from Member States, and EU law would be applied domestically only as determined by national constitutional law.

Notwithstanding the historical pedigree of this view, we do not believe that this is a helpful conceptual framework for thinking about constitutional

[18] The fact that the Constitutional Treaty explicitly establishes for the first time (in article I-60) that a member State can freely withdraw from the EU can have the collateral effect of strengthening the case for EU Law primacy. One could argue that, to the extent that Member States can exit the Union, they should be loyal to its rules and principles while they remain within it, including the principle that EU Law has primacy over national law. Still, it seems to us that although article I-60 can strengthen the case for the primacy of EU law, it cannot be taken to have the same effects that a more explicit primacy clause (establishing the primacy of EU Law *over national Constitutions*) would have had. If the framers of the Treaty were not ready to say in article I-6 what they should have said in order to guarantee the unconditional primacy of EU law over national Constitutions, the interpreter cannot use article I-60 to generate the same effect, indirectly.

authority generally or constitutional conflicts in the EU specifically. The EU is not an entity that can be accurately described, explained or normatively assessed within such a framework, nor can its future development be guided by it[19].

If we accepted the traditional framework for argument's sake, however, we would conclude that the adoption of the Constitutional Treaty is not best interpreted as an act of a European "pouvoir constituant" (1). However, we believe that the ratification process does have implications for constitutional conflicts (2).

1. "We the People" as "pouvoir constituant"?

It is difficult to view the Constitutional Treaty as an act of a European "pouvoir constituant". To begin with, the whole document reiterates and entrenches rather than transcends the peculiar nature of the EU. Beyond the ostentatious embrace of constitutionalism reflected in the naming of the document (a Treaty establishing a "Constitution"), Art. I-1 makes reference to the will of the citizens and the States of Europe. Nowhere does it recognize a European people, but only European peoples. Furthermore, in giving concrete meaning to the idea of representative democracy in the Union, the Treaty emphasizes the role of national parliaments (Art. I-46.2).

It is not clear, moreover, whether European citizens can act as a people at this moment, in order to be the *subject* that holds the "pouvoir constituant". Doubts arise with regard to the existence of a European public

[19] Yet we profess some sympathy with those who cling on this conceptual framework. The remarkable tenacity of such a framework cannot be explained exclusively in terms of conceptual fetishism or intellectual inertia. In part it results from the absence of a comparatively elegant and simple alternative framework. Neither the rhetoric of "post" and "beyond" (sovereignty, the state) nor the invocations of a jurisprudentially ungrounded pragmatism, let alone the invention of words ('sui generis', Staatenverbund etc.) are likely to convince jurists schooled in the Continental European constitutional tradition to abandon a conceptual world that has historically been of considerable explanatory power. Yet this is not the place to develop an alternative framework. See M. Kumm, *When is a Constitution the Supreme Law of the Land? On the Jurisprudence of Constitutional Conflict*, 11 European Law Journal (2005, forthcoming).

sphere, the necessary structure of civil society, or a sufficient sense of solidarity created by a sufficiently thick collective identity.

It is not surprising that the Constitutional Treaty establishes that it shall be ratified by the states "in accordance with their respective constitutional requirements" (article IV-447). It procedurally reaffirms rather than severs the link between the EU and the national constitutions. The Treaty does not require a Europe-wide plebiscite, nor does it insist on special ratification conventions (as, for example, Art. VII of the U.S. constitution did). At the constitutional Convention, the proposal was made by some of its members to call upon a European referendum for ratification. A dual majority (majority of citizens and majority of states) was suggested as legally necessary to secure ratification (see CONV 658/03). But that was ultimately rejected. So the States are free to choose the manner in which the Treaty will be ratified. They do not have to use a different procedure than the one they generally resort to in order to ratify ordinary international treaties.

An important number of States, however, have committed themselves to involve the people directly[20]. How intensely will the people participate in the political processes of ratification is an open question. Their lack of interest in the work of the Convention makes one skeptical in this regard, but they may become increasingly engaged as the ratification debates unfold. For there to emerge a *European* "pouvoir constituant", however, it is necessary that the debates in the different states are linked to each other in such a way that a truly European conversation takes place. Although some links will be established, the level of interrelationship is not likely to be so high that the final decision to ratify the Treaty can reasonable be attributed to a "European pouvoir constituant".

2. Beyond constitutive acts: How the ratification procedure matters

[20] As of November 18, 2004, nine Member States have committed themselves to do so: Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the United

But even if the adoption of the Constitutional Treaty cannot be taken to be an act of a *European* 'pouvoir constituant', the specific features of the ratification process may strengthen the authority of EU law.

First, in some jurisdictions the ratification of the Treaty may require the amendment of the national Constitution. Given the way in which the Treaty alters the scope and the balance of powers at the domestic level, it may be thought that the national Constitution should include a clause that explicitly covers the decision to ratify such a Treaty. Or, more specifically, the primacy clause of article I-6 of the Treaty may be taken to question the traditional understanding that the national Constitution is the supreme law of the land, and an amendment to the effect that the Constitution explicitly accepts the primacy of EU law may therefore be deemed necessary[21].

Second, in some countries the ratification decision may well qualify as an act of the *national* "pouvoir constituant". In this respect, the trend among Member States to provide citizens with a direct say in the ratification process

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Kingdom. Some other States are still undecided whether to hold a referendum. See http://europa.eu.int/futurum/ratification.

[21] In Spain, for example, the "Consejo de Estado" (a body that advises the government) has published a report (dated October 21, 2004) suggesting that the primacy clause of article I-6 may collide with the principle according to which the Spanish Constitution is the supreme norm of the legal system that is applied in Spain, a principle that is established in the Spanish Constitution itself. Therefore, the Consejo suggests that it may be necessary to amend the Spanish Constitution in order for Spain to be able to validly ratify a Constitutional Treaty that includes such a primacy clause. After the report was made public, the government decided to ask the Constitutional Court whether there is indeed such a contradiction between the Spanish Constitution and the Treaty. For an argument that the primacy clause of article I-6 does not make it necessary for Spain to change its Constitution, see Víctor Ferreres Comella and Alejandro Saiz Arnaiz, "¿Realmente hay que reformar la Constitución española para adecuarla a la cláusula de primacía de la Constitución europea?", *Actualidad Jurídica Aranzadi*, Año XIV, number 645, November 18, 2004.

In Portugal, a similar debate has already led to a constitutional amendment (introduced on July 24, 2004). Article 8 of the Portuguese Constitution now includes a clause (in paragraph 4) that explicitly declares that EU Law is applicable in the domestic legal system in the terms defined by EU law, with due respect to the fundamental principles of a democratic State under the rule of law.

In France, the Constitutional Council was asked by the President of the Republic to render an opinion on the constitutionality of the Treaty. In its decision (decision number 2004-505 DC, November 19, 2004), the Council established that, although the Constitution needs to be amended before France can ratify the Constitutional Treaty for other reasons, the primacy clause presents no specific constitutional problem. The Council emphasizes that the Treaty establishing a Constitution for Europe is still a Treaty, and that article I-5 entails that the Treaty respects the existence of the French Constitution and its place as the highest norm of the internal legal order. The Council notes that in earlier decisions (numbers 2004-496, 2004-497, 2004-498, 2004-499) it had already accepted that EU law has primacy, except when it contradicts specific provisions of the French Constitution, and it finds no reason to think that the primacy clause should now alter that conclusion.

– either by binding referendum or by way of advisory polls that are likely to have the same binding effect politically – is of significance.

Third, the authority of EU law could also be strengthened by the quality of the ratification procedure seen as a whole in Europe. That would depend on the degree of public participation in each state, and on the extent to which the debates in the different states were linked to each other[22]. As we suggested, these criteria are not likely to be satisfied to such an extent that one could speak of a "European pouvoir constituant", but they may be satisfied to a significant extent nevertheless.

If any of these factors were present in the ratification process, the authority of the Constitutional Treaty would be strengthened, and national courts would be less willing in the future to interpret the national Constitution as an impediment to the enforcement of EU law.

IV. EUROPEAN SUPREMACY AND STRUCTURAL DEFICIENCIES

So far we have argued that both the text of the Constitutional Treaty, and some features of the ratification process, may strengthen the authority of EU law. We have also argued that the Constitutional Treaty does not provide conclusive reasons for domestic courts to unconditionally accept the primacy of EU law over national constitutions. With this background, we now suggest this: *It is legitimate for national courts to continue to assert jurisdiction to review EU law on constitutional grounds, but only if and to the extent that such review is targeted towards remedying persistent structural deficiencies on the EU level. National constitutions should be read in light of a strong interpretative principle according to which nothing in the national constitution prevents the enforcement of EU law, unless national constitutional provisions address or compensate for structural deficiencies on the level of the EU.*

[22] The European Parliament has passed a resolution (October 14, 2004) calling on the Council to devise a coordinated approach to the timetabling of national ratification procedures, and suggesting

There are three potential deficiencies that have traditionally motivated national courts to resist recognizing the unqualified supremacy of EU law. They relate to jurisdiction, procedure and outcome respectively. Each of these concerns has given rise to different judicial doctrines, and each can be addressed by different kinds of institutional reforms on the EU level. Obviously, the case for national-constitutional review of EU law becomes weaker the more successful are the efforts undertaken by the Constitutional Treaty to overcome such structural deficiencies. The following can be no more than a tentative and very schematic appraisal.

1. Policing jurisdictional boundaries

As far as jurisdiction is concerned, the problem is how to keep EU legislation within the boundaries established by the Treaty. The specific problem is that European institutions, including the ECJ, have been widely perceived as not taking jurisdictional boundaries seriously. Some national courts have asserted that they have a subsidiary role to play in making sure that those boundaries are respected by the EU institutions[23].

There are at least some indications that the ECJ has begun to take jurisdictional concerns more seriously, though recent developments are not unambiguous. (The "Tobacco directive" decision, C-376/98 is believed by many to have given the ECJ at least some credibility as the institution in charge of policing the boundaries).

But more importantly, the Constitutional Treaty provides a number of changes that, seen on the whole, may well provide the kind of structural guarantees that national courts have reasons to deem sufficient. If so, they should refuse to address questions of competence when asked to do so by litigants.

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that the period from 5 to 8 May 2005 might be chosen as a suitable period for holding the planned referenda on the Constitution or the parliamentary ratification in the Member States.

[23] *Supra* note 7 and 8.

One of the mandates of the Convention was to clarify the jurisdictional limits of the European polity. The Convention found it difficult to define jurisdictional limits that are at the same time sufficiently specific and clear and yet allow the flexibility that a European Constitution requires.[24] Not surprisingly for students of comparative constitutionalism, the main innovation of the Constitutional Treaty is focused on enhancing the 'political safeguards' for the protection of Member States. The constitutional Treaty includes a protocol on the application of the principle of subsidiarity and proportionality that establishes an "early warning system". National Parliaments are to be informed of EU legislative proposals, so that they can express their informed opinion that a particular proposal does not comply with the principle of subsidiarity. If a qualified minority of the Parliaments have submitted negative reports, the Commission must study the legislative proposal again. A central focus of the procedure involves the duty of various actors to give reasons for the conclusions reached. If taken seriously by the Commission and the national Parliaments, the assembled documents are likely to provide a substantial record. Such a record could form the basis for the ECJ to engage in a meaningful assessment whether concerns relating to subsidiarity were given an appropriate weight at the legislative stage. (It could give rise to the kind of aggressive review that in the United States has characterized the review of administrative regulations by federal courts).[25] Whether this system is a sufficient political safeguard remains to be seen, but it has the potential to significantly reinforce the protection of jurisdictional boundaries.[26]

The enlargement of the Union to 25 Member States, moreover, has shifted the balance of reasons in favour of national courts accepting jurisdictional decisions made by EU institutions. There is an increasing risk that, as the EU increasingly abandons unanimity voting and moves towards

[24] For a general assessment see Juliane Kokott and Alexandra Rueth, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 Common Market Law Review, 1315-1345 (2003).

[25] See Martin Shapiro, Who Guards the Guardians: Judicial Control of Administration (1988).

[26] Another institutional solution that was suggested, but ultimately rejected, was the establishment of a separate Court focusing explicitly on jurisdictional issues. Such a Court could have been staffed by judges from national courts and judges from the ECJ. For a proposal along these lines, see Joseph Weiler, "To be a European Citizen: Eros and Civilization", included in The Constitution of Europe (1999), p. 353.

qualified majority voting in an ever expansive number of areas, the defeated States will play the jurisdictional "constitutional card" at home: they will choose to protect their interests, against the enforcement of EU norms they have voted against, through an appeal to their Constitutions and their courts. Moreover, since the claim that an EC norm is *ultra vires*, if true for one Member State, must be true for the rest of States, and the number of Member States has gone up to 25, there is a special risk if the national courts subject EU law to this kind of review.

Under these circumstances, national courts should be hesitant to review EU law on jurisdictional grounds, though much will depend on whether constitutional practice will in fact develop along the lines suggested above.

2. Fundamental rights

The second concern relates to the protection of citizens against violations of their fundamental rights by EU institutions. This is an old concern, originally articulated in a context where the ECJ gave fundamental rights no judicial protection against EU legislation. But since the eighties the ECJ is widely believed to have developed a level of fundamental rights protection against EU legislation that is essentially equivalent to that afforded by national courts under their respective Constitutions. The Constitutional Treaty reaffirms that jurisprudence in Art. I-9.3. Furthermore, the inclusion of the Charter of Fundamental Rights is likely to have a positive impact on the level of protection. Rights are more visible now; they will be invoked more often, probably, and the ECJ cannot be indifferent to their gravitational pull. The guarantees provided against acts of the EU are unlikely to fall below the guarantees provided by the European Court of Human Rights (given Art.II-112.3). Moreover, if the Union ratifies the European Convention on Human Rights[27], another institution specifically charged with safeguarding rights will provide an additional institutional layer of protection. If the experience with the

[27] See Article I-9.2 of the Constitutional Treaty. This provision "responds" to the ECJ Opinion 2/94, of March 28,1996, where the Court held that the EU does not have the competence to accede to the ECHR.

European Court of Human Rights teaches anything, it is that national courts are more ready to internalise the duty to guard fundamental rights when an external institution can indirectly check their decisions. To prevent international embarrassment, both the national courts and the political branches feel that it's better to protect rights "at home". The same is likely to be true if the European Union signs the European Convention on Human Rights. The ECJ and the rest of EU institutions will be encouraged to respect rights so that the other Court, which is specialized in human rights, does not find them at fault.

So we think that following the adoption of the Constitutional Treaty it can no longer be said that there are structural deficiencies with regard to the *level of protection* of rights in the context of EU law. Of course, this does not mean that there is going to be agreement about the meaning of those rights in all cases. National courts will sometimes strongly disagree with the particular interpretation rendered by the ECJ. But such disagreements on the meaning in specific contexts of the abstract guarantees (concerning property, the right to freely pursue a profession, equality, freedom of expression, association, etc..) are inevitable. The existence of such disagreements does not entail that the general level of protection offered by the ECJ is lower than that offered by national courts. And it does not justify national courts asserting jurisdiction to review EU law on the grounds that it violates national constitutional rights.

3. Procedure: The democratic deficit

There is a third concern related to what is generically referred to as the democratic deficit in the European Union. Sometimes the argument is fleshed out as a communitarian argument concerning identity; mostly it is couched in procedural terms. Both are connected. Legislative procedures at the EU level are believed to be democratically lacking in important respects. A widely held view is that the core of the problem is the weakness of directly representative institutions that can be held accountable for the decisions made at the heart of the European legislative process. There are no participatory mechanisms that ensure that citizens in the Union can vote those responsible for a legislative

program out of office. Instead, the result of legislation appears as the complex interaction of the Commission, the Council and Parliament, with the core of the political choices being made by the Commission and the Council. The consociational element in European decision-making remains strong. Of course the European Parliament is a directly representative institution whose consent is required for most EU legislation to become effective. But with the monopoly to introduce legislation for the most part still with the Commission and the political centrality of the Council deciding issues with a supermajority, the institutional importance of Parliament is limited. Its role as an independent political force shaping the agenda of the EU is underdeveloped. Public interest in elections to the European Parliament is correspondingly low.[28]

In this respect, the Constitutional Treaty brings about little change. It does little to strengthen directly representative institutions. The accountability of the President and the Commission to the European Parliament has not been meaningfully enhanced. The Council will continue to be the central player in the legislative process. It will not function as a second legislative Chamber comparable to, say, the Bundesrat in Germany, the Senate in France, or the House of Lords in the U.K.

Recalibrating the numbers with regard to the weight of votes in the Council, the necessary majority or even the number of representatives in Parliament, amounts to little more than fiddling at the margins if the issue is the democratic deficit. The fact that these have turned out to be the most sensitive issues from a political point of view has more to do with deeply entrenched national sensibilities and conventional intergovernmental power-play. None of the choices seriously contemplated by the Convention in this regard are meaningfully connected to the goal of establishing an effective system of representative democracy on the European level [29].

[28] Participation in elections for European Parliament in June 2004 dropped to a record low of 45,3% across the 25 Member States.

[29] For a positive assessment of the Constitutional Treaty, notwithstanding the remaining strong consociational elements in European decision-making, see A. Peters, *European Democracy after the 2003 Convention*, 41 Common Market Law Review, 37-85 (2004).

Critics point out that it would not be enough for a procedure to be formally representative. The pre-institutional conditions for directly representative institutions to be meaningful, they argue, are missing on the European level. On the one hand, there is no well-developed party system anchored in a European civil society, no European media and no European public sphere. On the other hand, there is no European identity assuring the kind of relative homogeneity of interest and solidarity that would make directly representative decision-making legitimate.[30] This is how the procedural argument concerning democratic legitimacy is connected with the argument from identity.

Others have claimed that the issue is one of appropriate sequencing. The development of a European civil society and a European identity would be fostered by directly representative forms of decision-making. Whatever prerequisites are missing at the present time would develop once the appropriate institutional reforms had been put in place.[31] But without the necessary institutional reforms there are few incentives and possibilities to engage in the kind of political practices that create the prerequisites that make directly representative decision-making democratically meaningful.

This is not the place to seriously engage these issues. It must suffice to point out that, whether or not supported by sound reasons, the Constitutional Treaty does not in fact strengthen directly representative institutions on the EU level, and that even if it had done so, it is clear that the development of a practice that would be democratically meaningful would take time.

What follows from all of this? Given the – perhaps inevitable – comparative democratic weakness of the European legislative process, we suggest that *Member States should have the possibility to override EU legislation by national constitutional legislation, when they deem that questions of fundamental importance for the national community are at stake. When a national community, following the procedure set out in its respective*

[30] See D. Grimm, Does Europe need a Constitution?, 1 European Law Journal, 282-302 (1995)

[31] See Jürgen Habermas, Does Europe need a Constitution? Response to Dieter Grimm, 1 European Law Journal 303-308 (1995).

Constitution, decides to entrench a specific rule, the implications of which in a particular case are clear (that is, the constitutional provision does not allow for reasonable interpretative disagreement as applied to a particular case), then national courts should respect that choice. They ought to apply the national Constitution and set aside EU law, if necessary.[32]

The requirement (in our proposal) that the constitutional rules be *specific* dramatically reduces the risks for the uniform enforcement of EU law, which is an important value. EU legislation should not be tested by national courts against, for example, abstract rights announced in their Constitutions (such as the right to property, or the right to freely pursue a profession, or the freedom of speech) or against abstract clauses that are relevant to define the extent to which Member States have transferred (or are authorized to transfer) competences to the EU. This kind of test would affect all sorts of EU legislation, and the uniform application of EU law would then be in serious danger. Instead, limiting the scope of national constitutional override to specific rules has a considerably more limited impact on the application of EU law.

In order to defend and apply the specificity requirement, it is not necessary to engage in a deep philosophical discussion about the indeterminacy of language. For the purpose of our proposal, the key point is institutional, not linguistic. A constitutional rule is specific in a particular context if it can be plausibly said that its application does not require an independent value-informed interpretative judgment by the court. The relevant normative judgment in the particular case has to be fairly attributable to the constitutional legislator. Of course, the idea of specificity thus understood is not itself clear and simple. Cases are likely to arise where its application may raise difficulties. But in the vast majority of cases, this distinction, once it is

[32] The French Constitutional Council has taken a similar position, although it has not linked it to the "democratic deficit" argument. In its decisions 2004-496 DC, June 10, 2004; 2004-497, July 1, 2004; 2004-498, July 29, 2004; and 2004-499, July 29, 2004, the Council held that the duty of the State to implement a Directive can only be removed when the Directive is incompatible with an "express provision" of the French Constitution. If there is no such clear contradiction, it is for the ECJ, and not for the French Constitutional Council, to review the Directive under the competences or the fundamental rights that are established in the Treaties.

understood in institutional terms, is stable and workable enough. If it is clear in a particular case that a specific substantive decision has been made by the constitutional legislator, national courts would have to honor that decision. (Possible examples are the Irish Constitution´s protection of the fetus, or the Greek Constitution´s commitment to a public monopoly on higher education)[33]. If, in contrast, the constitutional legislator in effect authorizes courts to engage in open-ended inquiries about the concrete implications of abstract principles, national courts may *not* disapply EU law on the grounds of their understanding of those principles.

Note that it is not enough for the government of a Member State to claim that some specific interest is fundamental. Our proposed test is not one that reinstitutes De Gaulle's position of a general national political veto through the back door. Only those legal rules that are *explicitly incorporated in the national Constitution* justify non-compliance with EU law. The political community must believe that such a rule is important enough to justify its being enshrined there. Member States should be discouraged from invoking national peculiarities too frivolously. It is true that the Union must respect the "national identity" of the Member States (article I-5.1 of the Constitutional Treaty), but the States should not be encouraged to exaggerate the extent to which they have a national identity that requires their being exempt from a piece of EU legislation. Requiring them to overcome the obstacles of the national constitutional amendment process seems therefore justified.

Of course, each Member State has selected a different procedure of constitutional amendment. Some States have chosen more rigid procedures than others. They should nevertheless be allowed to respond to EU law through the procedure they have established to alter their Constitution. Respecting that institutional choice is part of what respecting their constitutional identities is about[34].

[33] See CJ C-159/90, SPUC/Grogan and the Irish Supreme Court's ruling in SC Society for the Protection of Unborn Children (Ireland) Ltd. V. Grogan [1989} IR 753.

[34] The United Kingdom is a special case, since it is the only country in the EU that has not established a formal distinction between the Constitution and ordinary legislation. But the super-strong "clear statement rule" adopted by the House of Lords, that requires Parliament

Similarly, if a Member State strongly disagrees with the specific way the ECJ has interpreted an abstract fundamental right or principle, it could "respond" to the ECJ through an amendment of the national Constitution: It could spell out in the form of a specific rule what it believes a particular abstract guarantee amounts to with regard to a particular issue. Again, because this response should not be made unless the national community is strongly committed to it, the Constitution is the place to register the disagreement. Given the rigidity of the procedure of constitutional amendment and the political salience of an open act of opposition to the requirements of EU law, these instances are likely to be very rare.

At the domestic level, it is already a rare event for a court to be "corrected" through a constitutional amendment. The well-known cases are well-known precisely because they are few in number. The practice of national political actors overruling EU institutions is likely to be even rarer. At the purely domestic level (that is, when national political actors 'overrule' national courts by constitutional amendment), there is no need to be concerned with the value of uniform enforcement of the law. If, in contrast, the amendment takes place to set aside EU law as interpreted by the ECJ, there is a counter-value to take into account: the need to preserve the uniform enforcement of EU law, a counter-value that the Member States have traditionally been aware of. (This is one of the reasons why the primacy of EU law over national ordinary legislation is generally accepted). Moreover, if a State defies EU law as interpreted by the ECJ, it may have to pay political costs at the European level. So, overall, the national political branches will be reluctant to enact a constitutional amendment in order to set aside, not the interpretation of the national Court when it reads the national Constitution, but the interpretation of the ECJ when it interprets a provision of EU law that must be uniformly applied.

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to explicitly state that a provision should apply even when it violates EU Law, if it is to trump EU Law, can be deemed to be a functional equivalent to a constitutional amendment.

Under our proposal, the capacity of national courts to affect the uniform enforcement of EU law is limited. A national court may disagree with the way the ECJ has interpreted an abstract right or principle, but it cannot impose its own interpretation in the name of national constitutional law. The decision of the court should be merely declaratory. Its effect would be to signal to the political branches that a constitutional value is negatively affected. The burden is then on those branches (if they agree with the national court) to amend the Constitution to support that interpretation, against the ECJ. Only after that successful amendment would the national interpretation override that of the ECJ. There would thus be an internal dialogue in the Member State, triggered by the domestic court´s decision, about the extent to which there is truly an aspect of the national identity at stake that requires the introduction of a constitutional exception to the application of EU law (as interpreted by the ECJ). [35]

Of course, the effective and uniform enforcement of EU law is at stake in these situations, but we should not exaggerate this concern. Apart from the fact that these situations are exceptional, we should bear in mind that the uniform and effective application of EU law is not the only principle to be taken into account. Trade-offs between the ideal of effectively establishing a supranational rule of law and principles of democratic governance may be necessary. Any potential loss along the dimension of effective and uniform enforcement of EU law is likely to be insignificant when seen in the context of European constitutional practice as a whole. The EU Treaties contain a whole range of opt-out clauses that allow national actors under narrowly circumscribed substantive and/or procedural conditions to deviate from EU law. As a matter of EU law the uniform application of the same standard is not

[35] For these purposes, it is helpful for Member States to have a Constitutional Court (or at least a specific constitutional chamber within the highest national court). Such a Court helps focus the debate and is more likely to create the degree of public awareness that is appropriate given the nature of these cases. Furthermore, a Constitutional Court is typically "close" to the political branches, which makes it sensitive to the political problems that the Member State may encounter if the Court rules against EU Law on constitutional grounds. For purposes of deciding whether or not the state has a national constitutional identity that requires an exception to the application of EU Law, these are good features for a court to have. In general, on the visibility of Constitutional Courts, see Víctor Ferreres Comella, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", 82 *Texas Law Review*, 1705 (2004), especially pp. 1726-1727.

paramount and is easily overridden in many core areas of the Common Market.[36]

V. INTERPRETING THE CONSTITUTIONAL TREATY: EUROPEAN AUTHORIZATION FOR SETTING ASIDE EU LAW ON CERTAIN NATIONAL CONSTITUTIONAL GROUNDS?

We have argued that the cumulative effect of the introduction of the supremacy clause (article I-6), the ratification procedure, as well as structural reforms reflected in the Constitutional Treaty, make a significant contribution to strengthen the authority of EU law over national law. At the same time we have emphasized that the Constitutional Treaty does not provide grounds for the abolition of constitutional conflicts in the EU. The future of European constitutionalism is a future in which the constructive negotiation over constitutional conflicts will remain an integral part.

With regard to the three lines of potential conflict described in the introduction, we have suggested: First, there is no more space for national courts to insist on jurisdiction with regard to subjecting EU law to fundamental rights review. The level of protection of rights at the EU level is equivalent to that granted to them at the domestic level. Second, there are grounds to believe that the Constitutional Treaty is likely to provide sufficient protection against EU acts that are *ultra vires*. If future practice turns out to support that assessment, national courts should refrain from asserting a subsidiary role in policing the jurisdictional boundaries between the EU and Member States. Third, with the democratic deficit remaining – perhaps inevitably - intact, national courts may have legitimate reasons to set aside EU law when it collides with *specific* national constitutional rules that form an essential part of a Member State´s constitutional identity. The constitutional legislator (but not national courts as interpreters of abstract principles) should in the present state of European constitutionalism continue to be able to override EU law.

[36] For a helpful overview and analysis of the current law and practice in the context of the common market see Nicolas de Sadeleer, *Procedures for derogations from the principle of approximation of laws under Art. 95 ECT* , 40 Common Market Law review 889-915 (2003).

But beyond providing what we hope is a coherent and normatively attractive approach to constitutional conflicts generally, this proposal also finds an interpretative basis in the Constitutional Treaty itself. It is possible to read the primacy clause of the Constitutional Treaty *in conjunction with the guarantee of the constitutional identities of Member States (article I-5.1*) to authorize national courts to set aside EU law on certain limited grounds (along the lines we have suggested). That is, EU law itself would make such moves possible[37]. Such authorization could cabin in possible conflicts by prescribing substantive and procedural conditions. The ECJ could insist that national courts are required, for example, to make a *reference to the ECJ* explaining the issue as it arises under national constitutional law. In this way the ECJ would have an opportunity to examine how best to interpret the EU provision in light of the possibility of conflict. It would also act as an external check, providing an incentive for national courts to invoke national constitutional provisions only if the national constitutional provision really is clear and specific. If it is not, the ECJ would have an opportunity to point this out and suggest alternative readings of the national constitutional provision. Another procedural barrier that could be established would be for the national Court to *notify the Commission* of its decision. In this way, the Commission would know about the issue and be aware of the constitutional concerns as described by the national court. As the political guardian of the European legal order, the Commission could then assess whether it is necessary and helpful to address the issue on the political level in order to resolve it.

Something of symbolic significance would be gained if it were generally recognized that, ultimately, EU law frames the terms on which European citizens relate to one another. The proposal we have offered grants national courts a residual and subsidiary role as ultimate arbiters of fundamental constitutional commitments. But it does so in a way that clarifies that national courts are acting not on their own national authority, but as agents of a joint

[37] It is interesting to note that while article 10 of the current Treaty of the European Community requires Member States to take any appropriate measures to ensure fulfillment of the

common European constitutional tradition that requires them to involve European institutions in the process. National courts are not cast as agents defending an idiosyncratic national tradition against the EU. They are instead trying to give meaning to the principles of their national Constitutions in light of a common European constitutional practice, and they do so in cooperation with EU institutions. The possibility of constitutional conflict can, when channelled by appropriate procedures, create opportunities for the development of a richer, more integrative common European tradition that embraces constitutional diversity. Conflicts should not be thought of as Schmittian moments in which ultimate allegiances are affirmed and the European rule of law is suspended.

obligations arising out of EU Law, article I-5.2 of the Constitutional Treaty imposes a similar duty, but first establishes the principle that the EU and the Member States owe each other "full mutual respect".