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EUROPEAN UNION LAW AND NATIONAL CONSTITUTIONS

GENERAL REPORT TO FIDE XX CONGRESS 2002 IN LONDON

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I. Introduction: Foundations of European Constitutionalism

The constitutional process in the European Union has reached a new stage: Following the Nice Declaration on the Future of the Union and the Laeken Summit's call for "a Constitution for European citizens"[1], the European Convention is currently discussing the structure and the contents of a new constitutional settlement[2], first drafts of which are being circulated.[3] In the academic community, a broad doctrinal debate has begun on what is called the "Europeanization" of the national constitutions and which focuses on the implications of European integration on the normative reality of national constitutional law.[4] Our discourse on "European Union Law and National Constitutions", covers both the developments in the academic world and the political arena, which go hand in hand and are two complementary faces of European constitutionalism.

The questionnaire submitted to the national rapporteurs as a guideline concentrated on two aspects: (1) the interrelationship and interdependence of the national concepts of constitution and the provisions of the constitutions of the Member States allowing and conditioning the constitution-making process at the European level, and (2) the repercussions of this process on the constitutional autonomy (or sovereignty) of the Member States, their legal system and the functions of their respective institutions. Ideally, our undertaking results in a better understanding on what European constitutionalism is about among the scientific community as well as the politicians and citizens. On this basis, we may be able to draw some practical conclusions for the ongoing constitutional debate in the European Convention. A comparative constitutional discourse is the more important, the more it becomes apparent that European constitutionalism is not a matter of states only, but involves and concerns directly the peoples and citizens who have defined themselves in the EC Treaty as the citizens of the Union. In the same way as our national constitutions and the concept of constitutionalism are, in each Member State, the expression of a

[1] Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions, Laeken European Council, 15 December 2001 <ue.eu.int/en/info/eurocouncil>, section II.

[2] For a picture of the state of discussion in the Convention see P. Oliver, "European Union Law and National Constitutions: Community Report", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), at p. 6 et seq.

[3] See the "Proposal of a Constitution" of the Swedish Liberal Party of March 2002, referred to in: G. Schäder/M. Melin, "European Union Law and National Constitutions: Sweden", in: Lord Slynn of Hadley/M. Andenas (eds.), FIDE XX. Congress London 2002, Volume 1, National Reports (2002), p. 387 at 395, the recent proposal of R. Badinter, "Une constitution européenne", Fayard, 2002, and the references at <www.whi-berlin.de> (subsection "draft constitutions"), which will be constantly updated.

[4] See the references and in various national reports submitted and more generally I. Pernice, The Impact of European Integration on Member State's Constitutional Systems, lecture given at the International Meeting "The European Political System", Naples, 26-27 September 2002 forthcoming on <www.whi-berlin.de>, subsection WHI Papers 2002.

specific (political) culture[5] and can only be understood and interpreted in the context of its history, religion, philosophy and the economical conditions of the respective country,[6] the constitutional process in Europe must be conceptualised also as a process forming a common political culture and a European identity of the citizens of the Union[7].

Many excellent reports have been submitted[8], while reports from Denmark, France and Belgium did not arrive, at least not in time, and there is also no report from a candidate country of central and eastern Europe. The exercise to produce a "general report" remains, therefore, not only tentative but necessarily also partial and incomplete, even if some important thoughts of French political philosophy are strongly reflected in the actual thinking in other European countries, thereby relativising the absence of a French report. This general report draws from the national reports and generally follows the structure of the questionnaire. But with a view to preparing a sound discussion at the FIDE Conference, specific focus is given, as far as possible, to the five items on the agenda of the workshops envisaged for London:

- Constitutionalism Revisited: What Does "Constitution" Mean for the EU?
- Supremacy and Preemption: Constitutional Principles and National Safeguards
- The European Charter of Fundamental Rights: Legal Status and Judicial Review
- The Reorganisation of the European Executive: Giving the Union a Face ?
- European and National Parliaments: Enhancing Democratic Legitimacy and Control

1. Concept of Constitution in the Member States

"There exists a common theoretical basis of European constitutionalism, viz. the doctrine of social contract and the idea of basic human rights and fundamental freedoms...". This statement in the Austrian Report is qualified by a reference to quite different practical developments in the various European countries[9]. Indeed, the comparison of the national reports shows the existence of very different constitutional traditions and broad conceptual variations (a.) which may explain why a meaningful revision of the EU/EC architecture under the heading of "constitutionalism" will be a difficult undertaking (b.), even if the use of the term "constitution" cannot be regarded as a taboo any more after the Laeken Declaration.

a. What is a Constitution: Theoretical Concepts and Basic Notions

The Dutch report clearly states that "Dutch constitutional law is not based - either in positive law, or in the doctrine - on the idea of popular sovereignty."[10] Talking about a "social contract" will also be difficult for countries like Luxembourg and Cyprus: Luxembourg has been created, as an independent state by an international treaty, the Final Act of the Congress of Vienna of 9 June 1815, and confirmed by the Treaties of London of 1839 and 1867. The function of its first constitution in 1841 was, thus, not to constitute or found the state, but rather to organise the

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[5] For this approach see P. Häberle, *Verfassungslehre als Kulturwissenschaft* (1982), 2nd edition 1998.

[6] P. Häberle, "Die Verfassung im Kontext", in: D. Thürer/J.-F. Aubert/J.P. Müller (eds.), *Verfassungsrecht der Schweiz* (2001), p. 17 et seq.

[7] On the question of a identity-building function of the constitution see M. Nettesheim, "EU-Recht und nationales Verfassungsrecht: Deutscher Bericht", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 81 at 95 et seq.

[8] For a comprehensive overview see <www.FIDE2000.org>.

[9] H.F. Köck, "EU Law and National Constitutions: The Austrian Case", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 5 at 7.

[10] C.A.J.M. Kortmann, "European Union Law and National Constitutions: The Netherlands", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 299 at p. 301.

already existing state and, in particular, its legal system.[11] Even more striking is the example of Cyprus: Its Constitution has been imposed to the people by a Zurich-Treaty of 1959 between Greece and Turkey and the London-Treaty which has been concluded a week later on the initiative of the colonial powers. There was no question of a consent of the people or its representatives, so the Constitution as well as the (partial) independence and integrity is based on international law rather than on a "social contract".[12]

Do these statements and facts, however, exclude the idea or, as the Dutch report says, "ideology"[13] of popular sovereignty and social contract as a principle? In Germany the elaboration and adoption of the German Fundamental Law ("Grundgesetz") after the second world war (1949) was by far not an act of a sovereign German people. Its Fundamental Law was formally adopted by a qualified majority of the German *Länder* which had been established between 1945 and 1949 and it is nevertheless argued that it was legitimised by the subsequent democratic elections, by its recognition in practice[14] and, finally, by its confirmation following the German unification in 1990[15]. The idea of a social contract, therefore, is more a normative *petitum* than a description of the origin of the constitution in Germany.

Moreover, the concept of popular sovereignty is explicitly mentioned as a general principle in Article 20 (2) of the German Constitution and similar explicit references can be found in the Constitutions of Sweden[16], France, Finland (since 1919)[17] and Austria. The latter's Article 1 may be cited as an example: "Austria is a democratic republic. Her legal order originates in the people". And the Austrian report explains that "all legislative acts applicable in Austria would require, as their ultimate basis, the will of the *Austrian* people, and that they would therefore have to be enacted by a legislature elected, not just by a democratically constituted people, but by, and only by, the *Austrian* people"[18].

Is it possible to combine the concept of popular sovereignty as the main source of legitimacy of European public authority with opposite traditions in other Member States, such as the Netherlands referred to earlier, or the United Kingdom[19], where not only the sequence of historical developments, but general constitutional law doctrine does not accept the concept? One aspect, which may be taken into account in this context, is the concept of "political

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[11] G. Wivenes, "Le droit européen et les constitutions nationales: Luxembourg, in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 267 at p. 270 et seq.

[12] C. Josephides, "L'ordre juridique communautaire et les constitutions nationales: la constitution de Chypre face au débat constitutionnel dans l'Union européenne", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 57 at p. 64 et seq. under reference to the Treaty of Guarantee and the Treaty of Alliance.

[13] Kortmann, *supra* note 10, p. 299.

[14] Regarding the (re-)establishment of the German Länder: M. Stolleis, "§ 5 Besatzungsherrschaft und Wiederaufbau deutscher Staatlichkeit 1945-1949", in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Volume I Grundlagen von Staat und Verfassung* (1987), p. 173 at 195 et seq.; regarding the subsequent legitimization of the Constitution see: R. Mußgnug, "§ 6 Zustandekommen des Grundgesetzes und Entstehen der Bundesrepublik Deutschland", in: ibid. p. 219 at 255 et seq.

[15] For details see: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Volume VIII Die Einheit Deutschlands - Entwicklung und Grundlagen* (1995), and in particular the contribution of M. Heckel, "§ 197 Die Legitimation des Grundgesetzes durch das deutsche Volk", ibid. 489 et seq.

[16] Schäder/Melin, *supra* note 3, p. 388.

[17] Z. Sundström/M. Boedeker/K. Kauppi, "EU Law and National Constitutions: Finland", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), at p. 6.

[18] Köck, *supra* note 9, p. 12.

[19] For the United Kingdom, see the general remarks in P. Craig, "European Union Law and National Constitutions: The United Kingdom", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), p. 1 et seq. and, more specifically on the absence of popular sovereignty and perspectives of its adoption for European public authority also from a British perspective, D. Thym, "European Constitutional Theory and the Post-Nice Process", in M. Andenas/J. Usher (eds.): *The Treaty Of Nice, Enlargement and Constitutional Reform* (2003 forthcoming).

sovereignty" of the people in a system of "representative democracy", which underlies the Constitution of the Netherlands[20], the United Kingdom and Luxembourg[21], although they do not refer to the people as the constituent power. At least in this respect, the legitimacy of public authority is based upon the will of the citizens of the country. Moreover, the report from Cyprus stresses that, even if the concept did not apply domestically, it could nonetheless be applied at least to the European Constitution[22], which has insofar a different conceptual basis than the national constitution.

Generally, one may talk about a social contract in cases in which it is "the will of the people represented in the constitution that is regarded as truly sovereign"[23]. Switzerland is another example: It considers itself as a nation of will ("Willensnation"), and the prominent function of its constitutional law, according to the Swiss report, is to keep this nation of will together by means of federalism[24]. The idea of a social contract is common to countries where it is, like in France, the joint will for political association under well determined principles of a constitution - shortly: the constitution - by which the individuals have defined themselves as a "nation"[25]. Accordingly *Abbé Sieyès* said that the nation is „un corps d'associés vivant sous une loi commune et représentés par la même législature"[26]. In the tradition of the French revolution this law cannot be anything else than the expression of the will of the associated individuals. Accordingly it is admitted in France, that the Constitution is the expression of the legitimacy of the political power, based on two principles : (1) national sovereignty belongs to the people which express themselves through their representatives or by referendum ; (2) the Constitution establishes a separation of powers legislative, executive and judiciary. Talking about the will of the people, therefore, seems to refer to the origin of legitimacy of public authority and legislation or to what the Finish report calls "the rule of recognition"[27]: The Constitution is the expression of this will on who has such authority and how the relevant rules may be changed.

Like others, French law rests on a formal definition of the constitution. The elements of the constitution: the Preamble including the Declaration of 1789 and the Preamble of 1946, the Constitution itself and the fundamental laws of the Republic recognised as such by the Constitutional Council (freedom of association, independence of the judiciary, rights of defence in criminal court, etc) form the so called "constitutionality block". Thus, the term "constitution" does not necessarily mean a unique legal instrument nor even a written text at all. The latter is the experience of the United Kingdom[28], the former the case of Sweden and Austria. Sweden has "four laws of superior nature, together forming the Constitution", the most important being the "Instrument of Government", which qualifies the other three - the Act of Succession (1810), the

[20] Köck, *supra* note 9, p. 5, see nevertheless p. 6, where "popular sovereignty" is opposed to "representative democracy, although an abrogating consultative referendum is possible since 1 January 2002."
[21] Chapter IV to VI of the Constitution, see Wivenes, *supra* note 11, p. 270.
[22] Josephides, *supra* note 12, p. 60, 65.
[23] With these terms the distinction drawn in " Köck, *supra* note 9 p. 9, to constitutions which are no more than a programmatic guideline for a parliament which is, itself, "regarded the collective representation of people's sovereignty, and thus sovereign itself."
[24] M. Freiermuth Abt/R. Mosters, "EU-Recht und nationale Verfassungen: Schweiz", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 405 at p. 410 et seq.
[25] See also H. Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung", 1999 *Juristenzeitung* 1065 at 1069 et seq.
[26] E. Sieyès, *Qu'est-ce que le Tiers Etat?* (1789), edition R. Zapperi 1970, p. 126 at 204 et suiv.; see also the explanations given by P. Allott, "The Crisis of European Constitutionalism: Reflections on the Revolution in Europe", 34 *CMLRev.* (1997) 452 et seq.
[27] Sundström/Boedeker/Kauppi, *supra* note 17, p. 1, with a reference to N. McCormick, "Questioning Sovereignty", in: ibid., *Law, State and Nation in the European Commonwealth* (1999), p. 80-83.
[28] See Craig, *supra* note 19, p. 3.

Freedom of the Press Act (1949) and the Freedom of Expression Act (1991) as "the fundamental laws of the Realm"[29]. In Austria, the central Federal Constitution ("Bundesverfassungsgesetz") is complemented by numerous federal constitutional laws which have the same authority and protection against revision, but in part of less importance and even "forgotten"[30]. While in other Member States the term "Constitution" seems to be reserved to one formal written legal instrument which ranges at the top of the hierarchy of norms and the revision of which is subject to a specific procedure[31], the term "constitutional law" is broader and used, like in the Netherlands, also to cover the "Charter of the Kingdom", organic regulations, judge-made law, constitutional conventions and, what is important, "parts of international and supranational law, especially Community law and the European Convention on Human Rights"[32].

On the basis of the distinction between the formal and a material meaning of the term constitution[33] the latter areas would certainly be excluded from the body of formal constitutional law, while they are part of and determine the rules on constitutional matters in substance. They would also be outside the term insofar as the concept of "constitution" is related to states only. Many reports contain such a definition: e.g. "Constitution" is defined in the

- Austrian report[34], by: "legal rules which provide for a state's basic organisation by setting up the necessary institutions, endowing them with the necessary powers, and regulating the procedures by which they may fulfil their legislative, administrative, and judicial functions";

- Finish report[35], by: "the legal rules and norms in force within a state that regulate pro primo the competencies, functioning and mutual relations of the highest state organs as well as how they are appointed and elected, and pro secundo the legal status of the citizens in relation to the state power";

- Spanish report[36], calling "constitutional" the provisions which govern the fundamental legal positions of the citizens towards the state, aiming at granting the liberty of the individual in an organised political community, as well as the distribution of the powers between the institutions thereof, provisions which, due to their fundamental and determining character for the legal system, are generally superior in the hierarchy of norms and regarding their obligatory force.

- Luxembourg report[37], in relation to the state, pointing out that the constitutional law in Luxembourg understands the "constitution comme loi organique fondamentale de l'Etat";

- Greek report[38], to be an act, qualified as fundamental law, given supreme legal force and containing the fundamental rules and principles on the organisation and the exercise of the state

[29] Schäder/Melin, *supra* note 3, p. 387, pointing out that the "Instrument of Government" of 1974 is the most important of these fundamental laws and
[30] Köck, *supra* note 9, p. 10.
[31] See also the comparative analysis by I. Pernice, "Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung", in: R. Bieber/P. Widmer (eds.), *L'espace constitutionnel européen. Der Europäische Verfassungsraum. The European Constitutional Area* (1995) p. 225.
[32] Kortmann, *supra* note 10, p. 299.
[33] E.g. in Freiermuth Abt/Mosters, *supra* note 24, p. 409 et seq.; J. Iliopoulos-Strangas/E. Prevedourou, "Le droit de l'Union europénne et les Constitutions nationales. Rapport hellénique", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), at p. 5 et seq.;
[34] Köck, *supra* note 9, p. 8.
[35] Sundström/Boedeker/Kauppi, *supra* note 17, p. 1
[36] J. Martín y Pérez de Nanclares/M. López Castillo, "Droit de l'UE et constitutions nationales: Espagne", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 313 at p. 315.
[37] Wivenes, *supra* note 11, p. 270.
[38] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 7 (my translation).

power as well as the relations of the state to the individuals, the other states and the international community;

- Italian report[39], pointing out that "the very essence of the Constitution relies on the fact that it synthesises in a single legal act the unity of the state as a politically organised entity";

- German report[40], as the fundamental liberal political order of the state, the very essence of the supreme rules of law, normally laid down in a constitutional document, which determine the organisation of the state regarding the institutions, form and structure as well as the fundamental relationship to its citizens and other issues included with a view to give them higher protection against abrogation or revision.

This "traditional" concept has, however, been questioned with regard to the recent developments of the European Union. In this respect, the Italian report develops a "pluralistic conception of Constitution, which rejects the idea of a unitary source of state sovereignty and admits the existence of diverse legal perspectives in which the exercise of political power can be framed"[41]. The German report emphasises that the state-centred view has lost ground and the prevailing view today is an "abstract" or "postnational" concept of the constitution[42]. It points to the central criterion of the constitution which is the principle of democracy, the idea of "self-legislation"[43], and refers to the French Declaration of Human Rights of 1789: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution".[44] Likewise, the Austrian report stresses that to reserve the term "constitution... to the fundamental law of an (albeit federal) state that disposes of unlimited powers, at least in principle..., such terminological purity is neither generally accepted in doctrine nor necessary in practice, and is, as was already shown, alien also to everyday legal terminology"[45]. Interestingly, the definition given for "constitution" in the British report refers the notion basically to "government", not to a "state".[46]

The definitions cited above are quite similar, in substance, and the question may be put whether the definition could be opened so to cover also the primary law of the European Union by replacing the word "state" in each of them by the term "community" or "public authority". Though the relation to the state may be explained by the mere fact that historically there was no other kind of political organisation with a similar interaction between the individual and public authority, there is some reluctance in the debate - and hence the national reports - to use the term "constitution" to describe the primary law of the Union. There is a strong connection, in particular, with the idea of state sovereignty or, as the Italian report stresses, (popular) sovereignty which belongs "only to the citizens, considered as a comprehensive and unitary

[39] E. Cannizzaro, "EU Law and National Constitution: A Pluralist Constitution for a Pluralist Legal Order? National Report Italy", in: Lord Slynn of Hadley/M. Andenas (eds.), *FIDE XX.*, *supra* note 3, p. 243 at p. 243 et seq.
[40] Nettesheim, *supra* note 7, p. 93.
[41] Cannizzaro, *supra* note 39, p. 245 et seq.
[42] Nettesheim, *supra* note 7, p. 90, 91.
[43] Nettesheim, *supra* note 7, p. 94, with reference to W. Kägi, *Die Verfassung als rechtliche Grundordnung des Staates* (1945; new print 1971), p. 49: "Selbstgesetzgebung"
[44] Nettesheim, *supra* note 7, p. 94. For the value of this principle in Greece, see Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 4 et seq.
[45] Köck, *supra* note 9, p. 27; for more detail see: I. Pernice, "Europäisches und nationales Verfassungsrecht", 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2001) 148 at 155 et seq. developing the "postnational" concept of constitution. See also the recent study of A. Peters, *Elemente einer Theorie der europäischen Verfassung* (2001), p. 93-166.
[46] Craig, *supra* note 19, p. 2, with reference to J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries", *Constitutionalism* (L. Alexander ed., Cambridge University Press, 1998), p. 152-154

body"[47]. Its proposed "pluralistic conception of Constitution" assumes the co-existence of "a plurality of legal perspectives, each claiming autonomy and possessing its own source of legitimacy and its own sets of values and principles"[48]. But can the citizens - or people - be considered as a unitary body, if the same citizens legitimise both, the national and European level of government? It is the Swiss report which concludes from the integration clauses of the national constitutions that public authority can be divided and vested with national and European institutions: Divided sovereignty, as can be drawn from the Swiss Constitution of 2000, Article 3 of which declares the Cantons "sovereign", though Switzerland is a sovereign state as well[49]. The American tradition reflected in the Federalist Papers may explain the concept of a democratically divided power system in which powers are entrusted, by the citizens, to the national and federal level of government. James Madison wrote in the Federalist No. 46:

> "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes".

Where, like in France, Portugal or Luxembourg, sovereignty cannot be divided[50] it is the exercise of sovereign rights which is considered to be shared or, as the British debate says, in part pooled at the European level. More clearly than in other Member States, there seems to be little openness in Portugal for a conception of divided sovereignty and a reluctance to see the European power as original or constitutional[51]. Yet, whatever the construction may be, it is essential to see that the instrument by which the European level of government is created and sovereignty is pooled has the same function as a national constitution: It establishes institutions, provides them with limited competencies and powers, organises the political process, including the election of the representatives in the institutions and the decision-making procedures, and defines the status and rights of the individual as a citizen of this community.

The differences between the concept of a constitution as "self-contained"[52] and building a complete picture of the establishment, distribution and limitation of powers of a state, and the European set of fundamental rules laid down in the European Treaties are nevertheless obvious. While, in accordance with the jurisprudence of the Court of Justice[53], the constitutional character of European primary law is largely recognised, it is complementary to and depends on, the existence of democratic constitutions in the Member States. Many authors therefore prefer to talk about a constitution "de facto" or a "basic order of the Union" (Unionsgrundordnung[54]) with a view to take account of the existing "deficits" and differences[55].

b. The EU/EC Architecture and National Constitutional Traditions

What is the European Union, thus, in terms of the constitutional traditions of the Member States? There is a large consensus, as the Greek report stresses, that at present to qualify the

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[47] Cannizzaro, *supra* note 39, 245 et seq.
[48] Ibid.
[49] Freiermuth Abt/Mosters, *supra* note 24, p. 409, 415, 416.
[50] Wivenes, *supra* note 11, p. 272 et seq.; M. Poiares Maduro, "EU Law and National Constitutions: Portugal. The State of the Portuguese European Constitutional Discourse", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), text following notes 64 and 73, with a reference to Article 3 § 1 of the Constitution. Maduro points out, however, the direct relationship between EC law and the peoples of the Member States, and proposes a "notion of competing sovereignties" (ibid. last four lines). For France, see Article 3 of the Constitution.
[51] Poiares Maduro, *supra* note 50, near footnote 61-62.
[52] This expression used in Köck, *supra* note 9, p. 12.
[53] Case 294/83, *Les Verts*, [1986] ECR 1339 at 1365; see also Oliver, *supra* note 2, p. 10
[54] See D. Tsatsos, "Die europäische Unionsgrundordnung", 22 *Europäische Grundrechte-Zeitschrift* (1995) 287.
[55] See e.g. the conclusions in Nettesheim, *supra* note 7, p. 96.

European Union as a federal state is excluded[56]. Is it a "state in the making" or still an international organisation[57], probably of a special nature?[58] Assuming that its contractual foundation - even in the form of an international treaty - does not necessarily exclude talking of a constitution[59]: would it be a (federal) state just because the basis of its legitimacy is found in the will of the European citizens?[60] The Swedish report seems to see it this way, when it says that "it would not be in conformity with the initial provision of the Constitution to let the co-operation develop into the creation of a federal state, the powers of which derive their legitimacy from a mandate given by an European people in common elections"[61].

Given the specific multilevel structure of the Union[62] and the motivation of its founding fathers to develop a new form of supranational political organisation with a view to overcome the 19th century-system of sovereign nation states, which, in the light of the horrible experience of the two world wars, had failed, as Walter Hallstein pointed out, its test of utility as an instrument to preserve peace in Europe[63], it seems, indeed, to be safe to conceptualise and develop further the European Union and its Member States as a system *sui generis*.[64] The system thus created may be called, as Ingolf Pernice proposed in 1995, a "composed constitutional system" (Verfassungsverbund)[65] or, as the German report suggests in more political terms, a "consociative federation" (konsoziative Föderation), thereby stressing the fact that the members remain sovereign states[66]. Also, in the view of the Finish report "EU law should hence be regarded as an independent legal system, in the sense that it is not derived from any national legal system and not dependent on decisions of the national legal systems. It is a system that is affecting the national legal systems and, therefore, intertwined with national legal systems"[67].

For Member States of the European Union it is not, any more, just the will of the national people who, in the European Union, can be considered as the ultimate basis of all legislative acts applicable to them. The specific nature of the Union implies that where the minister of the country has been outvoted in the Council, such acts are legitimised only by the people of other Member states and by the membership in the Union as such. This implication of the accession to

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[56] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 9.

[57] Clearly in this sense: Wivenes, *supra* note 11, p. 274; this qualification seems to be without any difficulty adequate also to the Dutch (monistic) system, where international law prevails over national law in any event, see Kortmann, *supra* note 10, p. 300, 305; much emphasis is put on the quality as international treaties in Schäder/Melin, *supra* note 3, p. 392 against this qualification: Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 319; see also I. Pernice, "Multilevel Constitutionalism in the European Union", 27 *EL Rev.* (2002) 511, 517 et seq.

[58] See the questions in Nettesheim, *supra* note 7, p. 101 et seq., and p. 103 et seq. with many references. Nettesheim seems to support the thesis of a "state in the making" ibid., p. 25. For a list of arguments for and against each concept see Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 318 et seq.

[59] Peters, *supra* note 45, at p. 220-243, where the "contractual constitution" is considered as a specific form of international law; ibid. 239 et seq..

[60] See Nettesheim, *supra* note 7, p. 104 et seq., where my approach is so qualified.

[61] Schäder/Melin, *supra* note 3, p. 390.

[62] Most recently: Pernice, *supra* note 57, at p. 511 et seq.

[63] W. Hallstein, *Der unvollendete Bundesstaat* (1969), at p. 16; see also H. Steinberger, "Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Okt. 1993", in: *Festschrift Bernhardt* (1995), p. 1313, 1326: "Das System der Nationalstaaten hat den wichtigsten Test des 20. Jahrhunderts nicht bestanden: es hat sich in zwei Weltkriegen als unfähig erwiesen, den Frieden zu bewahren". G. Hirsch, "Nizza: Ende einer Etappe, Beginn einer Epoche?", *Neue Juristische Wochenschrift* (2001) 2677 at 2678.

[64] In this sense: Sundström/Boedeker/Kauppi, *supra* note 17, p. 4; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 319; Wivenes, *supra* note 11, p. 277; Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 9.

[65] Pernice, *supra* note 31, at 261 et seq. One might also translate the term "Verfassungsverbund" as "constitutional federation", thereby deliberately avoiding the term "federal constitution" - so proposed by Thym, *supra* note 19, in section I.C.4.

[66] Nettesheim, *supra* note 7, p. 106 et seq., 109 et seq.

[67] Sundström/Boedeker/Kauppi, *supra* note 17, p. 4.

the Union has been considered in Austria as a "fundamental change of the Austrian Constitution" which required a referendum[68]. The direct impact of the EU membership on the basic concepts and principles of the national constitutions becomes more evident when, with the accession of a new Member State its internal law changes fundamentally from one day to the other. This also appears from the Finish report stating that "the Constitution was actually more profoundly changed when Finland became a member of the European Union than it was with the adoption of the Constitution 2000"[69]. In Greece, the adoption of the Treaty of Maastricht without any express amendment of the Constitution finds its only explanation by the power, given under Article 28(2) and (3), to a "tacit quasi-revision" of the Constitution[70]. The new Article 23((1)) of the German Constitution requires that the procedural conditions of a constitutional revision are respected for the ratification in case the revision of the EU Treaties has the effect of a material revision of the Constitution. The Spanish report, finally, describes this modulation of the public powers in the Member States caused by the European integration clearly[71]:

> "Dans le processus d'intégration communautaire, il se produit en effet un réaménagement du pouvoir public dans un espace politique et dans un cadre juridique différencié, auquel participent les Etats et les citoyens".

It becomes clear that the EU Treaties and their revision have a constitutional character. It is also clear that they are not the same as what we are used to call a constitution of a state: One of the main features which distinguish the Union from a state is, in the view of a number of national reports, its double basis of legitimacy: the citizens and the Member States[72]. It is, as the Cyprus' report puts it, a union of peoples and states, whose constitution is addressed to the Member States as well as to the citizens of the Union or: the future European people[73]. Up to now, the Spanish report stresses - as did the German Constitutional Court in its *Maastricht* decision[74] - that the Member States are the "masters of the Treaties", but, it continues: "from tomorrow on it will be the 'European people'"[75]. This double basis of legitimacy is qualified, in parts of the Greek doctrine, as the specific character of the "postfederal" construction of the Union, incompatible with the federal approach and respectful of national and popular sovereignty as well as of the "institutional equality" of the Member States. Another doctrinal stream, however, sees the process of constitutionalisation of the Union as based upon the Member States which will remain necessary and important, though pointing to the progressive increase of powers at the Union level which is compensated by the enhanced introduction of hitherto state-style constitutional principles such as democracy, the rule of law and the protection of human rights[76].

The question remains whether states are able to provide legitimacy by themselves, in which case the construction of double legitimacy may give the Union a specific character which may differ from a federal structure, or whether they have to be considered, ultimately, as representing their respective peoples or citizens the will of which they are deemed to express. In this latter

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[68] Köck, *supra* note 9, p. 12.
[69] Sundström/Boedeker/Kauppi, *supra* note 17, p. 6.
[70] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 14.
[71] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 316.
[72] See Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 318, 325 et seq.; Wivenes, *supra* note 11, p. 277; Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 10, with reference to Tsatsos.
[73] Josephides, *supra* note 12, p. 60 et seq.; see also: Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 325.
[74] Bundesverfassungsgericht, Cases 2 BvR 2134/92 & 2159/92 *Maastricht*, 89 BVerfGE 155; reported in English as *Manfred Brunner and Others* v. *The European Union Treaty*, [1994] 1 C.M.L.R. 57 at para 49.
[75] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 325/326, see also ibid., p. 14: "En définitive, la 'Constitution de l'Europe' doit donc attendre la naissance du peuple européen, comme conséquence d'une solidarité de fait plus étendue, ou même généralisée, et comme résultat d'un processus qu'il serait insencé de trop accélerer".
[76] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 11, referring to Tsatsos on the one hand and Papadimitriou on the other.

case double legitimacy would in reality have its origin in the same citizens but be provided through two different channels: one is the direct relationship between the individual citizens and the Union, the other is the state through the actors of which the citizens in their respective national identity are represented collectively at the European level. If the will of a democratic state cannot be legitimised other than by the will of its citizens, it is difficult to construe a double legitimacy of the Union and its legislation otherwise.

2. National Provisions for the Adoption of a "Constitution" of the European Union

There is no provision in any constitution of the Member States explicitly providing for the adoption of a Constitution of the European Union. Some national reports, in contrary, point out that the adoption of a Constitution directly by the citizens or through a body of representatives would require substantial changes of the constitution[77] or would even be excluded[78]. Very carefully, the Italian report points out: "Art. 11 and Art. 117 of the Italian Constitution may constitute a sufficient legal basis for the establishment of a constitutional order of a new type, not aimed at embedding the existing national constitutions into a monistic perspective, but based on the respect for the constitutional autonomy of the Member States"[79]. The Luxembourg report goes further: "Giving up the international character of the Union in favour of a constitutional system which would be adopted by the European peoples or their representatives, may not be covered by Article 49bis of the Luxembourg Constitution"[80]. My contention is that this is the situation of the European Community from the beginning, as it was made clear by the Court of Justice in *Van Gend & Loos*: It is a legal order of a new kind, different from international law[81]. However, making a European Constitution, comparable to that of a federal state would, indeed, be an act of revolution and outside the procedures both, of Article 48 TEU and the integration clauses of the national constitutions. The question, instead, focuses on the conditions laid down in the national constitutions, of a substantial revision of the primary law of the Union with a view to, as the Convention is undertaking, simplifying it so to achieve more transparency, democracy and efficiency in a revised and consolidated text which may correspond more than the actual Treaties to what citizens can understand as a constitution.

a. Constitutional Conditions for and Limits to Further Steps of Integration (Substance)

Two national constitutions, the Greek and the German stipulate the aim to complete European integration: A new interpretative declaration (2001) on Article 28 of the Greek Constitution[82], and the new Article 23(1) of the German Grundgesetz (1993). Article 28(3) of the Greek Constitution provides that limiting the exercise of national sovereignty shall "not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity". The Greek report indicates that the principle of equality could limit the power to design a Constitution which provides for a "two speed Europe", and also the provision on reciprocity be a limit in case under the future Constitution of the Union violations of reciprocity would occur generally and

[77] Sundström/Boedeker/Kauppi, *supra* note 17, p. 6, 7 et seq.
[78] More open Köck, *supra* note 9, p. 17 et seq.
[79] Cannizzaro, *supra* note 39, p. 250.
[80] Wivenes, *supra* note 11, p. 275.
[81] Case 26/62, *van Gend and Loos*, (1963) ECR 1 at paras 9 and 10; see also Poiares Maduro, *supra* note 50, near footnote 72 and I. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", 36 *CMLRev*. (1999) 703 at 707 et seq.
[82] The Declaration reads: Article 28 constitutes the foundation for the participation of the Country in the European integration process. See also Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 16.

systematically[83]. It also stresses that, at least in the light of the "clauses of eternity" like for the republican form of the state, common also to Germany (Article 79(3)), France (Article 89(5)) and Italy (Article 139), the national constitution could not be the basis for the construction of a European Union which would question the substance of statehood of its members[84].

This may be meant also by the reference to "federal principles" in the German Constitution. It even goes a step further in qualifying which principles shall be governing the European Union, when it says in Article 23(1): "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law...". It is clear that the European integration process will bring about a specific European translation of these requirements, the vagueness of which leaves enough room for solutions which are no copy of the respective German model[85]. A real limit to the possible extent and form of European integration, however, is laid down in Article 23(3) referring to the "eternity clause" of Article 79(3) of the German Constitution. It is the constitutional identity of Germany which is protected in that provision. Yet, taking account of the preamble and the ongoing "mutation" even of this "identity", - contrary to some doctrinal submission - even this clause cannot be interpreted as a substantial guaranty of the sovereign statehood of the country[86]. This may be different in the case of Luxembourg, where, under Article 49bis of the Constitution, "the exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily (!) vested by treaty in institutions governed by international law". Thus, the Luxembourg report states that the devolution is considered temporary and non-definitive[87], while in fact, Luxembourg has consented to Article 51 TEU and Article 312 TEC which provide that the Treaties are concluded "for an unlimited period".

The protection of human rights is an important condition also for Sweden: According to Chapter 10, Article 5 of the Instrument of Government, the Swedish report says, "the Riksdag may transfer decision-making rights to the European Communities 'as long as' the Communities have a system of protection of fundamental rights and freedoms 'corresponding to' that provided for by the Instrument of Government and by the European Convention on Human Rights"[88]. Though the Spanish Constitution, in Article 93, is silent in this regard, the Spanish report refers to similar conditions discussed in the doctrine, adding the respect for the principles of the democratic and the regional state[89]. Accordingly, Section 94 of the Finish Constitution states that an international obligation must not endanger the democratic foundations of the Constitution[90]. The Swiss report stresses, though the Constitution does not provide for express limitations of its revision, that in case of the accession of Switzerland the essential characteristics of the Swiss Constitution, its federal structure and neutrality as elements of the national identity, would have to be respected[91].

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[83] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 18.
[84] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 20. See also Sundström/Boedeker/Kauppi, *supra* note 17, p. 7, where a similar limit is drawn from Section 1 of the Constitution, stating that Finland is a sovereign republic.
[85] For more details see Nettesheim, *supra* note 7, p. 111 et seq.
[86] Nettesheim, *supra* note 7, p. 112 et seq.
[87] Wivenes, *supra* note 11, p. 273
[88] Schäder/Melin, *supra* note 3, p. 390.
[89] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 321.
[90] Sundström/Boedeker/Kauppi, *supra* note 17, p. 7 et seq.
[91] Freiermuth Abt/Mosters, *supra* note 24, p. 419 with examples in footnote 77, 420-422.

In contrast to this, the Austrian report qualifies the Austrian constitutional order as a "strictly positive one" which "does not know any principles which could not be abrogated, or at least changed in its scope, by a decision of the sovereign, i.e. the people". Talking about "a substantive core, and if so, whether it is therefore, to that extent, inalienable and resistant to integration", would be not more than an "academic question"[92]. Whatever the contents of the revised Treaty would be, even if it were to be called "Constitution of the European Union", Austrian constitutional law could not, legally, be opposed to its ratification[93].

b. Procedural Requirements under National Constitutional Provisions

Given the constitutional character and impact on national constitutions of the attribution of sovereign rights to the European Union, it is important to see how the constitutions organise the conclusion of the European Treaties or the accession to the Union. While in most Member States, this question is regarded a case of international action[94], it is the subject of a specific constitutional provision in others[95]. Accession was made possible in Austria under Article 50(3) of the Federal Constitutional Law by qualified majority of the National Council, and was treated as a fundamental change of the Constitution requiring a referendum, while the Austrian report suggests that according to some authors in Austria further integration is already covered by the Accession Enabling Act of 1994 and "with regard to future enlargement and consolidation Treaties... the alleviated conditions of article 50(1) B-VG" would be sufficient. Yet, the Austrian practice followed and would continue to follow the procedures applied to the accession including a referendum in case a fundamental constitutional change should be involved[96]. The Finnish Constitution requires in Section 95 at least the "simplified procedure for adopting constitutional amendments", but the adoption of "a state-dependent constitution of the EU" would - because of its impact on the democratic foundations of the national constitution - be subject to the very complicated procedure of Section 73 for the adoption of constitutional amendments[97]. According to the Finnish report "the accession act was on several points in conflict with the Constitution. Therefore it had to be adopted by the same procedure as an international treaty amending the Constitution"[98]. Also in Luxembourg, the devolution of the exercise of attributions reserved by the Constitution to the legislative, executive and judiciary to an international institution needs the qualified majority required for constitutional amendments[99]. In Germany, the procedure provided for constitutional amendments is applicable, under Article 23(1) of the Constitution, whenever the accession to the Union or the revision of the Treaties, as regularly, implies a material modification of the Fundamental Law[100]. This was the case at least with the Treaties of Maastricht, Amsterdam and Nice. The Greek Constitution is not clear on the applicable procedures, but according to the Greek report the combination of Article 28(2) and (3) of the Constitution is the appropriate solution. This would mean that the authorisation is given by a majority of three fifths of the total number of deputies of the Parliament, and in case a European Constitution were to be adopted, a referendum under Article 44(2) would be appropriate[101]. Even

[92] Köck, *supra* note 9, p. 14 et seq.
[93] Köck, *supra* note 9, p. 15-18.
[94] Wivenes, *supra* note 11, p. 271 et seq.; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 322 et seq.; Kortmann, *supra* note 10, p. 300.
[95] See Articles 23 § 1 of the German Constitution, Article 28 of the Greek Constitution, Chapter 10 Article 5 of the Swedish Instrument of Government; I. Pernice, "Fondements de droit constitutionnel européen", WHI Paper 5/00, <www.whi-berlin.de/pernice-fondements.htm>, § 3.
[96] Köck, *supra* note 9, p. 12 et seq., 15 et seq.
[97] Sundström/Boedeker/Kauppi, *supra* note 17, p. 7 et sequ.
[98] Sundström/Boedeker/Kauppi, *supra* note 17, p. 7.
[99] Wivenes, *supra* note 11, p. 272.
[100] Nettesheim, *supra* note 7, p. 114 et seq.
[101] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 24 et seq.

higher requirements exist in Sweden, where, under Chapter 10 Article 5 of the Instrument of Government a majority of three fourths of the Riksdag is necessary if the heavy procedure for the constitutional amendment is not followed[102].

The Spanish Constitution is less demanding, when it requires, in Article 93, a simple organic law adopted by the *Cortes Generales* with an absolute majority at the Congress (Article 81 § 2). Though the ratification of an international agreement which would be contrary to the Constitution is subject to a prior constitutional amendment, according to the Spanish report all the steps of European integration have been authorised, so far, by organic law not the heavy procedure of Article 95 was not used[103]. The Constitution of the Netherlands even allows for the authorisation of the ratification of treaties by an ordinary majority, even in case - to be established by an ordinary majority as well - of deviation from the Constitution, where in principle a two thirds majority is necessary[104]. The lowest requirements are found in Italy, where a simple majority of the Parliament is necessary to authorise the consent, to be given by the Government, to any revision of the treaties including a European Constitution[105].

The Irish Constitution is a special case. Following the "Crotty" jurisprudence of the Irish Supreme Court, the Irish report explains why the accession to the European Union, but also each of the subsequent revision Treaties required an amendment of the Constitution with a majority of the two Houses of the Oireachtas, and a majority of the voters at a referendum: The exclusive law-making powers of the Oireachtas under Article 15(2)(1) of the Irish Constitution was "plainly inconsistent with the provisions of the Treaty conferring law-making powers on the Community". But also the inclusion of the Charter of Fundamental Rights into the primary law of the Union would be subject to this procedure. The new provisions of the Constitution gave, and will give, on the other hand, full supremacy to European law and empower the state to ratify the Treaties and exercise the options or discretions they provide for.

c. The Role of the Citizens: International Treaty or European Social Contract?

Is there room, on the basis of these provisions, for considering the revised (constitutional) Treaty as a renewed European social contract between the citizens of the Union? Most of the national reports are reluctant, some expressly opposed to such a perspective. They stress that the Union is based on international treaties[106], that the question of a constituant power or of a real European Constitution adopted by representatives of the peoples is not put[107], that the Member States are the masters of the Treaties and that the Constitution of Europe needs to wait for the birthday of the European people[108], that the idea of a social contract is even outside the scope of the national constitution[109] or contrary to the constitutional tradition of the country, according to which the nation has been constituted by the revolution, an act of collective entity[110]. There "has not been any exercise of original constitutional power (*pouvoir constituant*) at the EU level", the Portuguese report says and continues that "European constitutionalism may not even have the necessary conditions (a *demos* for example) to promote such exercise of *pouvoir constituant* at

[102] Schäder/Melin, *supra* note 3, p. 392.
[103] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 322-325, though the majorities required for a constitutional amendment under Article 168 have been achieved (ibid. p. 12).
[104] Kortmann, *supra* note 10, p. 301.
[105] Cannizzaro, *supra* note 39, p. 250. Note that up to 1993 also the German Constitution did require not more than a simple law of ratification under Articles 24 § 1 and 59(2).
[106] Schäder/Melin, *supra* note 3, p. 392.
[107] Wivenes, *supra* note 11, p. 277.
[108] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 325, 326.
[109] Kortmann, *supra* note 10, p. 301.
[110] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 25.

the EU level"[111]. A European social contract, the Italian report states, "to be concluded among European citizens considered by themselves as autonomous political subjects, and not regrouped in social and political communities such as the Member States, is inconsistent with the positive grant of the Italian Constitution"[112]. The assimilation of an original constitutional power to an assembly, "which will derive from a revolutionary act by which the people, or its representatives, or those who have the power to effectively claim that they speak for the people, create a new fundamental legal order that has no direct connection with the former one", leads also the Austrian report to reject the idea[113].

Some reports, however, hesitantly concede that a referendum on the European Constitution could support the argument for the concept of a social contract[114]. But this is not the point. The idea is to see the process of European integration from another perspective, the perspective of the citizen for whom the political organisation, be it at the regional, national or European level, is not more than an instrument for meeting specific needs and challenges: safety, peace, freedom, welfare etc. On the European level of government, the citizens should be considered as acting through the respective bodies of representation of their Member State in order to find an agreement with the citizens of other Member States on the "constitution" of European institutions. There is no contradiction, ultimately, to conceive the European Treaties thus established as international treaties from a legal perspective and to regard the Member States as the masters of these Treaties, if "Member States" means the peoples or citizens of each country organised in and represented by the state[115]. But it may lead to more awareness among the citizens that the European construction is their own matter.

3. The Constitution-Making Process: Preparing the IGC 2004 in Practice

Both, the Nice Declaration and the Declaration of Laeken on the Future of the European Union state the need of a broad European-wide debate, involving all citizens, to feed and guide the work of the Convention, and the success of this work will depend on the extent to which the citizens and civil society, finally, will have had the opportunity to actively participate. Without repeating the national and European reports in detail, it seems to be appropriate, nevertheless, to summarise and evaluate briefly the way this debate is organised and what are the main issues raised.

a. How Is the Internal Debate on the Future of the European Union Organised?

In a number of Member States the debate has been actively organised by the government or the European affairs committees of the parliaments[116]. Speeches[117] and articles in newspapers by political leaders and public hearings at the parliamentary committees[118] are on the agenda in

[111] Poiares Maduro, *supra* note 50, near footnote 61.
[112] Cannizzaro, *supra* note 39, p. 250.
[113] Köck, *supra* note 9, p. 17.
[114] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 26; Nettesheim, *supra* note 7, p. 120 et seq.; Cannizzaro, *supra* note 39, p. 250.
[115] For more details see: I. Pernice/F. Mayer/S. Wernicke, "Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism",, 12 *Kings College Law Journal* (2001) 60 et seq.
[116] Josephides, *supra* note 12, p. 65.
[117] See the series of the "Forum Constitutionis Europae", in the frame of which the German minister for foreign affairs, Joschka Fischer gave his "Humboldt-speech" in May 2000, "From Confederacy to Federation - Thoughts on the Finality of European Integration", FCE Special 2/00, <www.whi-berlin.de>, subsection speeches.
[118] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 328; for Germany see references in Nettesheim,

order to open and promote the public discourse. Austria has already organised a high level "Round Table on Europe" twice with representatives of all politically relevant institutions as well as experts on European affairs[119]. Finland has established an active "Civil Forum on the Future of the European Union", which has organised meetings with around 90 organisations under the chairmanship of the prime minister or other ministers since September 2001. A special web-site "Mr. Europe" hosts three discussion groups and contains a database with relevant materials on the Laeken process[120]. In Spain, a Royal Decree (779/2001) has established a specific institution, the "Council for the Debate on the Future of the European Union" which leads a general and simplified two-tier discussion for all citizens on the basis of internet and for specialised representatives of civil society on the basis of a questionnaire which comprises 59 questions the answers to which are evaluated by the University of Oviedo[121]. Similarly, a special committee has been created in Sweden to organise public seminars and hearings, to initiate and sponsor scientific reports and to develop a special web-site[122]. Moreover, chambers of commerce and trade unions participate in broadcasted debates[123] and we should also mention that universities and academic institutions - like FIDE - are very active in the field as well[124].

Other reports, however, are silent on this question or state that the interest among the citizens is low and the information incomplete[125]. But it is fair to add that the European institutions contribute to the organisation of a public debate, such as was the Brussels Congress "Europe 2004: Le grand debat: Setting the Agenda and Outlining the Options", organised by the Commission in October 2001[126] or the public hearing by the Convention itself in June 2002[127]. In July 2002, a Youth Convention was successfully organised giving young people from all Member States an opportunity to develop their ideas on the future of Europe[128]. An internet chat with the President of the Convention, Valéry Giscard d'Estaing, is being organised on October 28th 2002[129] following the example of individual members of the Convention. All these initiatives, however, do not seem to reach the public sufficiently, let alone originate a broad European discourse as it would be appropriate for a "constitutional moment" in Europe. As in Greece and Sweden, there seems to be only a weak interest in constitutional and institutional issues as in almost all Member States and candidate countries[130].

b. What Are the Key Issues and Proposals of the Leading Political Groups?

The governments of the Member States and the leading political groups have quite diverse ideas about how the future European primary law should look like. The work of the Convention and its working groups, summarised in the EU report, reflects many points reported from the

supra note 7, p. 122 et seq., as well as Deutscher Bundestag, Ausschuß für die Angelegenheiten der Europäischen Union, "Der Europäische Verfassungskonvent. Gemeinsame öffentliche Anhörung der Europaausschüsse von Bundestag und Bundesrat am 26. Juni 2002", Texte und Materialien, Volume 26 (2002), including the protocol of the 101th meeting of this committee.

[119] Köck, *supra* note 9, 21 et seq.

[120] Sundström/Boedeker/Kauppi, *supra* note 17, p. 8.

[121] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 328.

[122] Schäder/Melin, *supra* note 3, p. 393, stating that a budget of 15 million SEK has been allocated to this Committee.

[123] Josephides, *supra* note 12, p. 65.

[124] Josephides, *supra* note 12, p. 65, Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 27 et seq.

[125] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 27.

[126] European Commission, "Europe 2004: le grand débat" (2002).

[127] Plenary meeting of the Convention of June 24 and 25th, 2002, Summary in CONV 167/02.

[128] <http://european-convention.eu.int/youth.asp?lang=EN&content=intro>.

[129] Announcement on: <www.europa.eu.int/comm/chat/vge/index_en.htm>.

[130] Schäder/Melin, *supra* note 3, p. 395; Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 27.

debate in the Member States[131]. Nevertheless, it seems possible to group the European and national debates on the reform of the Treaties under the following items:

aa. European Constitution or a Mere Simplification of the Constitutional Treaties?

The (former) Dutch government opted for a "European Constitution for an effective and democratic Union"[132]. Also in Germany, the need of a simple and clarified constitutional Treaty seems to be accepted quasi unanimously. The German chancellor has underlined in September 2000 already the right of European citizens to a Constitution which is precise and comprehensible for everybody. The Christian democrats also opt for a constitutional Treaty which contains rules on the distribution of competencies, financial provisions, the institutions and decision-making procedures as well as the Charter of Fundamental Rights. The German report says, however, that there is no great expectation that the Convention actually submits a draft Treaty and that a Constitution will be adopted[133]. But the more recent reports on the work of the Convention support a less sceptic view[134]. Also, the Austrian government is reported to "favour a Constitution as compared to a mere simplification of the constitutional Treaties"[135]. Luxembourg is not opposed to a future Constitution, but the discussion rather concentrates on specific issues like a better delimitation of competencies, the incorporation of the Charter of Fundamental Rights or the role of national parliaments. There seems also to be a claim for a better anchorage of the European construction in the national constitutions[136]. According to the Austrian Social Democrat Party and the Green Party, a Constitution would, in particular, mean strengthening or "re-establish" democracy at the transnational level[137].

A rather "minimalist" approach seems prevail in Italy and consists " in simplifying the decision-making process, merging the three pillars, preserving the competence of the MS from a too invasive activity of the Union, specifying and embodying in the constitutional text the bill of rights of the Union"[138]. The Finish Foreign Affairs Committee supports the simplification of the Treaties, but there is no discourse on a Constitution[139]. The Greek socialist party as well as the Prime Minister would accept a Constitution but do not see a need for abstract discussions. They rather support an enhanced social and humanist profile of the Union by strengthening the provisions on employment, labour relations and the combat of poverty as well as also stronger cohesion policies and integrated economic policies[140]. Also, the Swedish Prime Minister Göran Persson said that the question of a Constitution is less important; the existing Treaties may well be "seen as a constitution" with the important question being “what kind of constitution we want”[141]. He stressed, however, that he "would not be prepared to accept any transfer of competence from the national to the European level... without ratification by national parliaments"[142]. This will be important for the question whether a splitting of the Treaties with a view to allowing a simplified revision procedure for the "less important" technical part is a realistic option.

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[131] Oliver, *supra* note 2, p. 6 et seq., 15 et seq.
[132] Kortmann, *supra* note 10, p. 303.
[133] Nettesheim, *supra* note 7, p. 123 et seq.
[134] Oliver, *supra* note 2, p. 10,
[135] Köck, *supra* note 9, p. 24.
[136] Wivenes, *supra* note 11, p. 277 et seq.
[137] Köck, *supra* note 9, p. 23 et seq.
[138] Cannizzaro, *supra* note 39, p. 251.
[139] Sundström/Boedeker/Kauppi, *supra* note 17, p. 9.
[140] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 28 et seq.
[141] Schäder/Melin, *supra* note 3, p. 394.
[142] Schäder/Melin, *supra* note 3, p. 394.

bb. A Clearer Division and Delimitation of Competencies

The need for clearer definitions of the European competencies was originally emphasised by the German *Länder*, and this claim was the historic origin of the entire Post-Nice process. While the idea of a "Kompetenzkatalog" (catalogue of competencies) is not really supported any more, a more systematic and better defined attribution of limited competencies continues to feature strongly in the discussion[143]. Indeed, the Commission and most of the members of the Convention seem to be opposed to the idea of a positive or a negative catalogue of the Union's powers[144]. A clarification of the distribution of competencies is supported also by the Dutch Labour Party and Christian Democrats[145], as well as by the Austrian Freedom Party[146], the Swedish Prime Minister[147] and all political actors in Finland. The latter stick with the existing attribution of competencies, which should always be specified in the Treaties, while the "competence-competence" should remain with the Member States[148]. There is no voice reported opting for a change in this regard anyway. Also, the Austrian political debate supports a better delimitation of the competencies of the European Union and stresses the importance of the principle of subsidiarity[149]. This seems to be the position in Cyprus as well[150], while in Luxembourg there seems to be some hesitation regarding the rigid delimitation of competencies despite the general acceptance of the importance of the principle. Instead, there is a preference for a "progressive and gradual determination" of the Union's competencies, which would continue to include the present Article 308 TEC.

cc. Integration of the Charter of Fundamental Rights as Binding Law

The integration of the European Charter of Fundamental Rights into the constituent texts of the Union is strongly supported by the Greek government and the Socialist Party[151] - a view shared by the (former) Dutch government and all political actors in Germany[152]. How the Charter could be incorporated has yet to be seen[153]. Although the Finish Foreign Affairs Committee emphasises the need for protection of human rights, it opts for an adhesion of the European Union to the European Convention on Human Rights[154]. This seems also to be the view of the Swedish Prime Minister Göran Persson who regards the Charter as being insufficiently precise[155].

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[143] Nettesheim, *supra* note 7, p. 124 et seq.: this is reported as the view of Wolfgang Clement (Social Democrat), as well as of Joschka Fischer (Greens) and Schäuble/Bocklet (Christian Democrats).
[144] Oliver, *supra* note 2, p. 22.
[145] Kortmann, *supra* note 10, p. 303, while the Volkspartij is "clearly opposed to fixing a distribution of competences between the EU and the Member States".
[146] Köck, *supra* note 9, p. 23.
[147] Schäder/Melin, *supra* note 3, p. 394, but he emphasises that this shall not lead to a "dismantling of what the EU has achieved over the years".
[148] Sundström/Boedeker/Kauppi, *supra* note 17, p. 9.
[149] Köck, *supra* note 9, p. 23, referring to the hope of the Austrian Freedom Party, that "a Constitution would stop the ongoing discussion about the correct division of powers and what it considers the inherent threat of curtailing Member States competencies at each Council meeting".
[150] Josephides, *supra* note 12, p. 65 et seq.
[151] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 28
[152] Kortmann, *supra* note 10, p. 303; Nettesheim, *supra* note 7, p. 123 et seq.
[153] For the problems and options see Oliver, *supra* note 2, p. 32 et seq.
[154] Sundström/Boedeker/Kauppi, *supra* note 17, p. 9.
[155] Schäder/Melin, *supra* note 3, p. 394.

dd. Democracy: Strengthening the Role of the European and the National Parliaments

In the view of the German Social Democrats as well as the (former) Dutch government and the Labour Party, the Commission should be strengthened and its President be elected by the European Parliament[156]; the European Parliament should be one of the legislative chambers, the other being the Council[157]. This is also the view of the chairman of the European Affairs Committee of the Bundestag (Christian Democrat)[158]. The (former) chairman of the Christian Democrat fraction of the Bundestag, Friedrich Merz, adds the need for a general co-decision power of the European Parliament[159], which finds the support of the Dutch Christian Democrats[160] and the Luxembourg government[161]. In the view of the Dutch Labour Party, the European Parliament should also have the right to dismiss individual Commissioners, while the Commission should be enabled to dissolve the European Parliament[162]. Clearly, more powers for the Parliament was already the claim made by Joschka Fischer in his Humboldt speech of May 2000[163].

The Austrian People's Party, however, does not see strengthening the national parliaments as a matter for the European Constitution, but rather as one lying within the competence of each national constitution. Instead, it favours a transformation of the European Parliament into a Parliament with full competencies, in particular in the legislative (initiative) and budgetary fields[164].

ee. The European Union at the International Scene: Securing Efficient Action in the CFSP

The extension of the attributions to the Union in the area of CFSP as well as in home affairs - and even their communitarisation - is favoured by the political leaders in Luxembourg, including the external representation in EMU matters[165]. Also, the report from Cyprus underlines the need for a strong Common Foreign and Security Policy and a strong Europe on the international scene in order to contribute efficiently to the problems of Palestine, Cyprus and other parts of the world[166]. This seems also to be one of the issues strongly supported by the Greek New Democracy Party which emphasises this with a view to the lack of security at the Greek borders[167].

ff. A European Government and a President of the European Union ?

For Göran Persson the European Council and the Council of Minister will continue "to play the central role in the governing of Europe", no fundamental change would be the wish of the Member States[168]. The other reports do not take position on this question.

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[156] Nettesheim, *supra* note 7, p. 124 et seq. Kortmann, *supra* note 10, p. 303.
[157] Nettesheim, *supra* note 7, p. 124 et seq.
[158] Nettesheim, *supra* note 7, p. 126 et seq.
[159] Nettesheim, *supra* note 7, p. 126/127.
[160] Kortmann, *supra* note 10, p. 303.
[161] Wivenes, *supra* note 11, p. 276.
[162] Kortmann, *supra* note 10, p. 303.
[163] Nettesheim, *supra* note 7, p. 125.
[164] Köck, *supra* note 9, p. 23.
[165] Wivenes, *supra* note 11, p. 276.
[166] Josephides, *supra* note 12, p. 65 et seq.
[167] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 29.
[168] Schäder/Melin, *supra* note 3, p. 394.

gg. How Should the European Union Look Like after 2004 ?

There seems to be a broad consensus that the Laeken process should lead to a revision of the existing Treaties with a view to consolidate, simplify and clarify the primary law of the Union in a text which may be called Constitution or constitutional Treaty. Valéry Giscard d'Estaing also seems to favour one of these titles[169]. The name, however, is less important than a contents and structure the citizens can understand and accept as the legal foundation of the Union. Nobody in the political arena seems to call for a European federal state and it was Tony Blair who expressed this in his speech in Warsaw: "A superpower, not a superstate".

The question is, however, how this "superpower" should look like. While Joschka Fischer talked about a "federation" - thereby excluding, at least implicitly, the option of a "federal state" - the Finish Foreign Affairs Committee seems to opt for developing the European Union as a close co-operation of independent states and the peoples of Europe[170]. There is not much reported on the views in other Member States concerning the "finality" of the process. A quite original position was taken in 2001 by the (former) Prime Minister of Saxonia Kurt Biedenkopf who opted for a "Europe of Regions" instead of a Europe of nation states, but he did not get much support for this vision[171]. Like also in Germany, the position and rights of the regions seem to be an important issue in the debate in Spain[172]. But this does not concern, so much, the *sui generis* character of the European Union in the future.

On open question will be how to react, if one or some Member States do not ratify a possible constitutional Treaty of the European Union. Joschka Fischer's vision for this case was a centre of gravity, being built by some Member States ready to agree upon a Constitution as a nucleus of the Federation[173]. This seems to parallel the avant-garde-concept defended by Jacques Delors. But do the existing Treaties give room to such a solution?

II. Relationship and Interaction of EC/EU Law and National Constitutions

One key issue, not only in legal terms, will be the relationship of the future Treaty to national constitutions and the interaction between these two levels of law in the European system. What ever may be the general qualification (be it regarded as two autonomous and separate bodies of law[174] or be it qualified as two elements in a multilevel constitutional system): there is no doubt that European and national law are distinct[175] and have each its own source of legitimacy. But they are closely interwoven, related and complementary to each other and the same citizens are, ultimately, the basis for their legitimacy and the people to which they are addressed; the system is meant to produce one single legal answer in each case, be it developed from provisions of European or from national law. This is, in my view, the very consequence of

[169] Oliver, *supra* note 2, p. 10, referring to Giscard d'Estaing,, "Les dernières nouvelles de la Convention européenne", *Le Monde* of 23 July 2002 <www.lemonde.fr >.
[170] Sundström/Boedeker/Kauppi, *supra* note 17, p. 9.
[171] Nettesheim, *supra* note 7, p. 127 et seq.
[172] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 328 et seq.
[173] Nettesheim, *supra* note 7, p. 126.
[174] This is the approach of the Court of Justice in Case 26/62, *Van Gend & Loos*, [1963] ECR 1; this is also the position of all those who qualify European law as international law, see Peters, *supra* note 45, at p. 248 et seq.
[175] Insofar, the critical remarks in Nettesheim, *supra* note 7, p. 106 with footnotes 63 and 64, are easily accepted, but Ingolf Pernice did not intend to say that no distinction may be drawn between the European Constitution and national Constitutions.

the divided sovereignty in Europe referred to in the Swedish report[176] and it is important to examine what that means in practice. There may be implications for the Member States' constitutional autonomy (infra 1.), for the question whether there are and, eventually, which are the common values of the Union (infra 2.), for the ongoing discussion on the supremacy of European law (infra 3.) and for the new functions of national institutions (infra 4.).

1. Member States' Constitutional Autonomy under European Constraints

There seems to be a safeguard in the EU Treaty, for the identity of the Member States, but the question, recently debated at the annual meeting of the Association of the German Professors of Public Law[177], was to know what is meant with national as well as European identity. It could well be a limit to the extension of the EC/EU competencies and thereby protect the constitutional autonomy of the Member States (infra 1.), while, on the other hand, the provisions of Article 6(1) and Article 7 TEU may impose limits on the liberty of the Member States to determine independently their internal structure and political system, thereby putting constraints on the constitutional autonomy of the Member States (infra 2.).

a. National Identities of the Member States and the Extension of the EC/EU Competencies

The views of the national reports on the meaning of Article 6(3) TEU are divergent: It is seen, by the Austrian report, as an "accessory principle" - national identity cannot be regarded as a limit to the full exercise of the powers given to the EC including under Article 308 ECT, and it is "no impediment for changes in the area of primary law and does not prevent any revision of the constitutional Treaties that the Member states should see fit"[178]. The prevalence in the institutions of certain languages, it says, "and the emergence, or perhaps, even ordainment, of a kind of *lingua franca* for the EU/EC, is a much more serious threat to the national identities of Member States than some minor issue of competence"[179]. Other reports regard the language as an important element of identity too[180], whereas in the view of the Luxembourg report, shared by a number of reports[181], Article 6(3) TEU is rather a programmatic principle than a legal rule limiting the extension of competencies[182] and giving guidance to the interpretation of the rules governing European competencies[183]

A limit is, however, drawn from Article 6(3) TEU by the Swedish report: "It would not be in conformity with the initial provision of the Constitution to let the co-operation develop into the creation of a federal state, the powers of which derive their legitimacy from a mandate given by an European people in common elections". Hence, the creation of a European federal state would not be in conformity with Article 6(3) TEU[184]. This reflects a broad, though not unanimous[185],

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[176] Schäder/Melin, *supra* note 3, p. 390, 397, 399; see also supra, at the end of point I.1.a.
[177] See for the meeting of 3-5 October 2002 in St. Gallen and the reports of Armin von Bogdandy and, "Europäische und nationale Identität", 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2003, forthcoming); see also E. Pache, "Europäische und nationale Identität: Integration durch Verfassungsrecht", *Deutsche Verwaltungsblätter* (2002), 1157.
[178] Köck, *supra* note 9, p. 26, 27.
[179] Köck, *supra* note 9, p. 27.
[180] Nettesheim, *supra* note 7, p. 130, Iliopoulos-Strangas/Prevedourou, *supra* note 33, 32.
[181] See Craig, *supra* note 19, p. 6; Kortmann, *supra* note 10, p. 304; Josephides, *supra* note 12, p. 67: "...la disposition de l'article 6.3 n'apparait pas nécessaire".
[182] Wivenes, *supra* note 11, p. 279. Et seq., referring to case C- 473/93, Commission/Luxembourg, 1996 ECR I-3207.
[183] Nettesheim, *supra* note 7, p. 130, which, however, is going a step further in saying that, consequently, it must be understood as limiting the exercise and use of existing competencies.
[184] Schäder/Melin, *supra* note 3, p. 390, 395.

feeling expressed by other reports as well[186]. Nonetheless, the Swedish report stresses that the position of the Swedish Parliament "as the principle organ of the state must not be substantially undermined through the transfer of legislative powers" and already at the time of accession it was understood in Sweden that the free formation of opinion, public access to documents and the right of local self determination are values of great importance which could not be affected by the EU competencies[187]. In defining what is meant by national identity, the reports often refers to the constitutional provisions which have already been quoted as limits to further integration[188].

The Greek report adds that the culture - language, cultural heritage, relation between the state and the church - is an element of national identity and could be an implicit limit to the extension of European competencies as well.[189] It stresses that, indeed, Article 6(3) TEU also obliges the Union to take affirmative action in view of preserving the national identity of the Member States[190]. On the other hand, the principles laid down in Article 6(1) TEU are seen as an implicit limit to the autonomy of the Member States to determine their own national identity, and the values which determine the national identity are subject to the evolution of the multinational and polycentric frame constituted by the Union[191]. The German report follows the same line in emphasising that the normative construction of Article 6(3) TEU should realise that European and national identities are not conflicting, antagonistic or even competing, but complementary, multi-referential and multi-layerd[192]. Only such elements of a national identity would benefit from the protection under this provision which are not contrary to the concept of the multilevel structure of complementary national and European identities[193].

b. Articles 6(1) and 7 TEU as Limits to the Constitutional Autonomy of the Member States

There is a close relationship between Article 6(1) and (3) TEU with the latter conditioning the former. The Union - including the respect for the identity of the Member States - is based upon the common values and principles referred to in Article 6(1) TEU. This provision together with Article 7 TEU, as is stated by the Swedish report, "quite naturally puts limits to the constitutional autonomy of the Member States. That is their purpose"[194]. They express, in the view of the German report, the very core of the common constitutional heritage in Europe[195] and establish, together with the corresponding conditions in the national integration clauses[196], a collective system of reciprocal constitutional stabilisation[197]. The Italian report emphasises the importance of Article 6(1) "in the process of emerging of shared principles and values through reciprocal influence by the MS and the EU Institutions... Given the fact that the institutional

[185] For the opposite view, saying that even a federal state would not be contrary to this provision: Kortmann, *supra* note 10, p. 304.
[186] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 330: "...tout autant que le principe de l'Etat de Droit que le principe démocratique, ainsi que la protection des droits fondamentaux et la survivance de l'Espagne comme un Etat souverain et indépendant, sont des éléments minimums et indispensables de l'identité nationale espagnole". See also Cannizzaro, *supra* note 39, p. 252.
[187] Schäder/Melin, *supra* note 3, p. 396.
[188] Supra, point I.2.a.; see in particular Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 32; Nettesheim, *supra* note 7, p. 130.
[189] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 31, 32 et seq.
[190] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 31
[191] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 31 et seq.
[192] Nettesheim, *supra* note 7, p. 131.
[193] Nettesheim, *supra* note 7, p. 132. See also Pache, *supra* note 177.
[194] Schäder/Melin, *supra* note 3, p. 397.
[195] Nettesheim, *supra* note 7, p. 134: “Kerngehalt "gemeineuropäischen Verfassungsrechts"”.
[196] See point I.2.a.
[197] Nettesheim, *supra* note 7, p. 133.

dimension of the EU is also based on procedures of decision-making that take place within the legal orders of the MS, the conclusion can be drawn that the full realisation of democracy in the EU context requires that democracy is full realised within each MS legal order"[198]. Indeed, the same seems to be true for the rule of law and the respect of fundamental rights as well as for the decision-making processes at the European level.

It is, consequently, the predominant view in the national reports that through these provisions the basic principles of Article 6(1) TEU have the character of limits on the autonomy of the Member States, though - as the Austrian report points out - "in only a very formal way"[199]. The Dutch report points at the existing internal system which makes sure that such limits are only theoretical ones[200] - a "hypothèse d'école" as the Luxembourg report says[201]. Be it as it may, it is worth quoting from the Austrian report the practical insight that "it is detrimental for the development of the European Union, with or without a 'constitution', if articles 6 and 7, or even the idea behind them, are abused for political reason in order to illegitimately intervene in the internal affairs of a Member State"[202]. Appropriate sanctions under Article 7, the Greek report points out, are on the other hand welcomed under Greek constitutional law as an assurance of the constitutional requirement of reciprocity of rights and obligations of the Member States having joined the Union[203].

2. Common Values: the Charter of Fundamental Rights of the European Union

It is clear that talking about common values and the principles of Article 6(1) TEU immediately leads to the Charter of Fundamental Rights of the European Union (hereafter: CFR), which has been proclaimed at the Nice Summit and which is on the agenda of the Laeken Convention for determining its legal status[204]. The questions on the Charter have provoked diverse answers in length and in substance, developments which in part go far beyond the reach of the questions put and which are recommended, as such, for intense study and discussion. The first question to be dealt with hereafter relates to the contents of the Charter as compared to the human rights standards guaranteed in the Member States and aims to know whether or not it will provide sufficient protection of fundamental rights at the European level (infra a.). The second is of a more practical nature and focuses on the possible use of the Charter in national courts, which are - as partners in the judicial dialogue with the Court of Justice - the basic element of the existing European system for the judicial protection of fundamental rights (infra b.). The third question leads us back to Article 6(1) TEU and aims at establishing to what extent the Charter can contribute to clarifying what are the common principles referred to in this provision (infra c.). Some other aspects of importance have been raised by the national reports, one of which is the question of the scope of the Charter and its relation to the European Convention on Human Rights (ECHR; infra d.).

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[198] Cannizzaro, *supra* note 39, p. 253.
[199] Köck, *supra* note 9, p. 28.
[200] Kortmann, *supra* note 10, p. 304. See also Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 34.
[201] Wivenes, *supra* note 11, p. 281.
[202] Köck, *supra* note 9, p. 28. See, on the other hand, Cannizzaro, *supra* note 39, p. 253, where the right of the other Member States is seen, even "to adopt, outside the institutionalised frame set out by Art. 7 TUE, some means of constraints in order to induce the breaching State to revert its course and to assure full respect of these principles".
[203] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 34.
[204] See J. Dutheil de la Rochère, "L'avenir de la Charte des droits fondamentaux de l'Union européenne", Jean Monnet Paper, 2001; see also the contributions of J. Dutheil de la Rochère, The EU Charter of Fundamental Rights, in: D. Melissas/I. Pernice (eds.), Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004 (2001), p. 41, Stephan Griller,Primacy of Community Law: A Hidden Agenda of the Charter of Fundamental Rights, ibid., p. 47, and: G. Papadimitriou, The Charter of Fundamental Rights. A Landmark in the Institutional Maturity of the European Union, ibid., p. 62, (to be found also under EU Constitutional Discourse on: www.ecln.net).

a. The CFR and the Basic Human Rights Standards of National Law?

There is an important reference in the Swiss report to a famous saying by Rudolf Smend, which should be born in mind by everybody who is engaged in comparative constitutional law, which the report relates to the many similarities between the Charter and the provisions of the Swiss Federal Constitution of 2000: "If two constitutions say the same, this may not (necessarily) mean the same"[205]. Most of the national reports state a broad concordance between their national guarantees and the rights laid down in the Charter[206], though, in particular, the vagueness of the provision on possible limitations in Article 52(1) CFR raises uncertainties regarding the level of protection guaranteed under the specific provisions of the Charter[207]. The Luxembourg report states that it goes by far beyond the rights recognised by the national constitution[208].

Accordingly, the German report, first, points out the similarity of the protection established by the Charter to the German Constitution in general terms. With a view to the German initiative for the process, it states: "Without this concordance, there would be no Charter"[209]. A number of "deficits", however, show that the actual text of the Charter is the result of compromises: Many of the rights it criticises, e.g.. under reference to the freedom to conduct a business or the right of collective bargaining and action (Articles 16 and 28), are recognised only "in accordance with Community law and national laws and practices". Even if legally binding, this would not provide the individual with any right which could be enforced against such "laws and practices"[210]. The general provision on limitations would not give more assurance and legal certainty and the lack of differentiation between rights like the prohibition of reproductive cloning, on the one hand, and the right to paid maternity leave, on the other hand, signalled that almost everything is left to the Court of Justice[211]. The Italian report finds a regrettable gap regarding Article 52 CFR, which does "not enumerate the public interests that can legitimately restrict the individual rights"[212]. Given these uncertainties raised by the Charter, the Swedish report concludes that it is "difficult to assess the importance of it"[213].

Serious doubts on the practical use of some rights of the Charter follow for the Irish report from the definition of its scope in Article 51 CFR. While the rights are "guaranteed in accordance with the national laws governing the exercise of these rights" or "under the conditions established by national laws and practices", the areas concerned are those where the Union has no competence to act and, thus, even national implementing measures for European acts would not be conceivable. The report finds all these guarantees meaningless and legally paradox[214]. It may not be very satisfactory to say that at least the values are expressed in such provisions of fundamental rights and the legal impact for the European Union is rather to stop it

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[205] Freiermuth Abt/Mosters, *supra* note 24, p. 422, quoted from Häberle, *supra* note 6, at p. 17.
[206] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 36, with a detailed comparison of the Charter with several national constitutions, ibid., p. 37 et seq.; see also Sundström/Boedeker/Kauppi, *supra* note 17, p. 9; Köck, *supra* note 9, p. 29; see also the following footnote.
[207] Kortmann, *supra* note 10, p. 305: "significant correlation"; Craig, *supra* note 19, p. 7, with questions, however, regarding the social rights; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 332: "correspondance... relative"; see also the comparison with Article 36 of the Swiss constitution in Freiermuth Abt/Mosters, *supra* note 24, p. 425 et seq.
[208] Wivenes, *supra* note 11, p. 281.
[209] Nettesheim, *supra* note 7, p. 136.
[210] Nettesheim, *supra* note 7, p. 137 et seq.; criticism to this effect also in Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 334.
[211] Nettesheim, *supra* note 7, p. 139 et seq.
[212] Cannizzaro, *supra* note 39, pp. 254 et seq.; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 334.
[213] Schäder/Melin, *supra* note 3, p. 398.
[214] G. Hogan, "European Union Law and National Constitutions: Ireland", FIDE XX. Congress London 2002 (published on <www.fide2002.org>), p. 15 to 18.

from any action which would affect the standards of protection achieved within the Member States.

In general terms, the comparative analysis given in the Greek report, between the Charter and several national constitutions, however, leads to its conclusion, that in spite of differences as to the subject matter of guarantees and their concrete scope and binding force, there is a right balance in the Charter regarding the social rights; it reflects the standards of protection contained in the national constitutions[215].

b. The Charter as a Reference for Fundamental Rights Protection in National Courts

The Charter has been referred to in a number of cases already by the Court of First Instance and by advocates general of the Court of Justice[216]. For the Commission "compliance with the rights contained in the Charter" are to become a "touchstone for its action"[217] and the EU report says that "the two branches of the legislature - the European Parliament and the Council - may thus be said to have given their blessing to the Commission's approach[218]. It will be, as the Swiss report states, an important source of inspiration for national courts and will contribute to the evolution of European *ius commune* in that it promotes the Europeanization and approximation of the national law and its interpretation[219].

The Finish report rightly states that, as long as the Charter has no binding effect, reference to it can only made as a "politically agreed indication of existing rights"[220] making them more "visible". Yet, it follows from the national reports that the Charter may be[221] and has already been quoted by national judges a few times. The first example is the Spanish Constitutional Court, which has referred to Article 8 of the Charter even before it was proclaimed in Nice[222], and also after that event the Constitutional Court referred to it (Article 18) with a view to make an argument relating to a national measure[223]. The Corte d'Appello di Roma has also given consideration to the Charter (Article 47) in a case regarding labour law[224]. Similarly, the Charter is accepted in France as a text of reference, possibly used by national courts to confirm existing solutions. An example appears with a case decided by the Conseil d'Etat[225] where the commissaire du gouvernement, M. Fombeur, in his opinion made an express reference to the European Charter of Fundamental Rights, namely to the right to engage in work (Article 15.1), which he distinguished from the right to an employment, recognised neither by the European Charter nor by the French constitutional principles. The Luxembourg report, however, states that as long as the Charter is not binding, there is no room for references to it by national courts[226].

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[215] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 42 et seq.
[216] References in: Oliver, *supra* note 2, p. 30 at footnotes 129-132; Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 46 at footnote 173.
[217] Oliver, *supra* note 2, p. 29, with reference to the Communication of the Commission on the application of the Charter, SEC (2001) 380/3.
[218] Oliver, *supra* note 2, p. 29 et seq.
[219] Freiermuth Abt/Mosters, *supra* note 24, p. 426.
[220] Sundström/Boedeker/Kauppi, *supra* note 17, p. 11.
[221] See also Köck, *supra* note 9, p. 29 et seq.; Craig, *supra* note 19, p. 7; Kortmann, *supra* note 10, p. 305; Cannizzaro, *supra* note 39, p. 255; Nettesheim, *supra* note 7, p. 141 et seq.
[222] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 335.
[223] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 335 et seq.
[224] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 43.
[225] CE sect. 28 February 2001, Casanovas, 2001 RFDA, p. 402.
[226] Wivenes, *supra* note 11, p. 282.

Though the Charter may give national courts like to the Court of Justice an orientation on what are the fundamental rights *in concreto*, there is one case from Austria only, in which a national court has requested from the Court of Justice a preliminary ruling on the compatibility of a measure with the fundamental rights contained in the Charter[227]. The ruling of the Court has yet to be given, and it will be interesting to see whether it takes a position on the Charter or continues to avoid referring to it with respect to the decision of the Nice Summit not yet to give it a legally binding effect.

c. The Impact of the Charter on the Standards Referred to in Article 6.1 TEU

There is a clear statement in several national reports that the Charter will influence the standards which are set in Article 6(1) TEU[228]. It will serve, as the Austrian report says, "as a source of reference for the better understanding of, and substantial consequences deriving from, these principles"[229] and in view of others like the Luxembourg, Greek, Swedish and the United Kingdom's reports it could help to understand more precisely what is meant by Article 6(1) TEU[230]. The German report, finally, emphasises that there is no doubt that the Charter will have effects both on the principle of democracy and the protection of fundamental rights as provided for in Article 6(1) and (2) TEU[231].

d. The Scope of the Charter and Its Relation to the ECHR

It is the Italian report which stresses that Article 53 CFR should be understood to give an assurance to the effect that in each case the highest standard of protection should be achieved: "In case that the Charter does not reproduce exactly the balance between individual liberties and public interests established in the ECHR, the Courts must apply the standard of protection that grants greater consideration for the former"[232]. The United Kingdom's report draws the attention to the conflicts which may arise due to the fact that national constitutional courts like the German and the Italian, do not accept, as a principle, that the "respective sphere of application", as is said in Article 53 CFR, of the national fundamental rights is limited to national measures only. Moreover, a Charter right may be applied so as to comply with the fundamental rights standards of one Member State, but would not satisfy the requirements of another fundamental right guarantee of another Member State[233]. The Swedish report, finally, states that there is "a risk that the importance of the Convention would be deteriorated", if the Charter should become a binding instrument[234].

The EU-report finds many reasons for the Union to accede to the ECHR, and reports that "the climate of informed opinion ha shifted markedly in fovour of accession"[235]. The adoption of the Charter as legally binding would not challenge, but underline the value of the human rights, for the protection of which the ECHR and the complaint to Strasbourg would be a "last remedy"

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[227] Nettesheim, *supra* note 7, p. 142, with reference to case C-248/01, *Pfanner Getränke* (pending).
[228] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 336.
[229] Köck, *supra* note 9, p. 30.
[230] Wivenes, *supra* note 11, p. 283; Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 45. See also Schäder/Melin, *supra* note 3, p. 398: The Charter will... certainly set the standards for the references in article 6.1"; Craig, *supra* note 19, p. 10: "The answer is surely that the Charter would be regarded as 'fleshing out' the meaning of the 'human rights and fundamental freedoms' mentioned in that Article".
[231] Nettesheim, *supra* note 7, p. 142 et seq.
[232] Cannizzaro, *supra* note 39, p. 255.
[233] Craig, *supra* note 19, p. 7 et seq.
[234] Schäder/Melin, *supra* note 3, p. 398.
[235] Oliver, *supra* note 2, p. 34 et seq.

for the citizen against the EU - as it is against the Member States today. By the way, is it conceivable that the interpretation of the Charter, indeed, "affects" human rights as recognised in other instruments, national constitutions or the ECHR? What may affect or violate such human rights is always the European or national measure under review. In case the protection of fundamental rights provided by the Charter should prove insufficient, as compared to the protection which would be given under national or ECHR standards, the real question seems to be whether or not the measure may be challenged before national courts or the Strasbourg Court. The answer to this question is not given in Article 53 CFR nor in the Charter at all[236]. As long as the EU is not, itself, party to the ECHR, it comes to the question of supremacy of European law which shall be dealt with now.

3. The Question of the Supremacy of EC/EU law and Its Constitutional Effects

Although the established jurisprudence of the Court of Justice since 1964 leaves no doubt on the supremacy of European law over national law[237], the position in the Member States and of their supreme courts is much less clear, if not opposed[238]. It is the key question regarding the relation between European Union law and national constitutions and the functioning of the European construction. The approach chosen seems to depend very much on the various concepts of constitution, discussed above, and how the foundations of European law are conceptualised: Where they are found in the national constitutions and regarded as international law, supremacy of European law will be conditioned by the provisions of the national constitution and their interpretation by national (constitutional) courts - yet, the supremacy may be recognised as a consequence of the monistic approach of the respective Member State. Where the Union and its law is conceptualised, ultimately, as a social contract of the peoples or citizens of the Member States, acting through their respective national institutions, the supremacy would follow from their common will to establish a functioning system the law of which is equally applicable throughout the Union.

Except for Portugal, the national reports do not draw a meaningful distinction between the primary and the secondary law of the Union, so that the question of supremacy is dealt with in general (infra a.) before the impact of it for implicit modifications of the national constitutions are discussed in brief (infra b.).

a. Supremacy of Community Law and National Constitutions

In some "monistic" Member States the supremacy of European law is recognised without any reservation: This seems to be the case for the Austrian legal order, which unconditionally recognises the autonomous force of the EU/EC law as elaborated in the case law of the Court of Justice: "Any norm of Community law", the Austrian report says, "whether contained in the constitutional Treaties or in the legislative acts of Community institutions, has primacy over any norm of national law, whether contained in the Constitution or in 'simple' law"[239]. The same is true, according to the Dutch report, in the Netherlands: According to Article 94 of the Dutch

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[236] For the relationship to the European Convention of Human Rights see: Ingolf Pernice, The European Constitution, in: Sinclair House Debates 16, Europe's Constitution - a framework for the future of the Union (2001), p. 18, at 30 et seq. and D. Thym, "Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe?", XI *Finnish Yearbook of International Law* (2002/3 forthcoming).

[237] See: Case 6/64, *Costa* v. *ENEL*, [1964] ECR 1251; Case C-213/89, *Factortame (No. 2)*, [1990] ECR I-2243; Case 106/77, *Simmenthal*, [1978] ECR 629.

[238] See for an exhaustive analysis of the attitudes of national courts: F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000), at p. 87-273.

[239] Köck, *supra* note 9, p. 32.

constitution and without distinction between primary and secondary law, "all Community law is superior to national (constitutional) law[240]. Also the Spanish situation is clear. According to Article 93 of the Spanish Constitution, the direct effect and supremacy even over constitutional law is recognised, though the Constitution provides for a previous control of the constitutionality of international treaties and, in case of a variance, the amendment of the Constitution[241]. Similar rules seem to apply also to France[242], which is a "monist" country where the primacy of international law and international conventions is stated by the Constitution. The case law has progressively and, now, definitely admitted this regarding national legislation, while the question of the respective ranking of EC secondary legislation and constitutional law is more tricky. The French Constitution is silent on that point and the Constitutional Council and for long the national supreme courts had carefully avoided any direct confrontation with the ECJ case law on that question. Recent decisions, however, seem to give an indication of stiffening of the attitude of the supreme courts. The Conseil d'Etat (Ass. 30 octobre 1998, Sarran, Levacher et autres) and the Cour de Cassation (Ass. Plén. 2 juin 2000, Delle Fraisse) have both refused to include the Constitution among the corpus juris to which article 55 of the Constitution refers; they consider that the principle established by Article 55 of the French Constitution, according to which international convention and treaties prevail upon national law, does not mean that such treaties and convention prevail upon the Constitution, at least in domestic law. The Conseil d'Etat repeated such statement in an obiter dictum (CE 3 décembre 2001, Syndicat National de l'Industrie Pharmaceutique et autres). There are serious doubts, thus, on the recognition of the primacy of European law over French constitutional law.

Yet, the case of Luxembourg seems to be more in conformity with the ECJ case law. Though the Constitutional Court of Luxembourg did not yet have the opportunity to pronounce itself on the matter, the Luxembourg report finds that, due to the clear monistic approach of his country, international law including Community law always prevails national law. This was recognised, recently, by the Constitutional Court for the European Convention on Human Rights and would be valid, *a fortiori* for Community law[243].

The situation is less clear in countries where the "dualistic" approach has been chosen. The *Maastricht* judgement of the German Constitutional Court[244], based on the "international" approach has confirmed its right to exercise an ultimate control on the applicability of European acts in Germany and seems to have been a "leading" case also for other Member States[245]. Yet, the German report rightly states that the more recent judgement of the same Court in the *Bananas* case[246] clearly shows that, at present, the control of a European act by this Court is practically excluded[247]. The German report finds the reason for the supremacy in the fact that, as opposed to classical international law, Community law does not leave the question of its relation to national law to the contracting parties, but has taken the decision by itself. Whether or not this decision is recognised within a Member State, is a different question and may be ruled by the national constitution[248]. The question, however, whether this recognition is not part of the deal, is

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[240] Kortmann, *supra* note 10, p. 305 et seq.
[241] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 337 et seq.
[242] See the references in Pernice, *supra* note 95.
[243] 283 et seq.
[244] –Bundesverfassungsgericht, *supra* note 74.
[245] See the reference to it in Schäder/Melin, *supra* note 3, p. 399; Poiares Maduro, *supra* note 50, near footnotes 26-29; Sundström/Boedeker/Kauppi, *supra* note 17, p. 12; Hogan, *supra* note 214, p. 23 with footnote 52.
[246] Bundesverfassungsgericht, Decision of 7 June 2000, *Bananenmarktordnung*, BVerfGE 102, 147; see for comments: I. Pernice, "Les bananes et les droits fondamentaux: La Cour constitutionelle allemande fait le point", *CDE* (2001) 427 at 439.
[247] Nettesheim, *supra* note 7, p. 145 et seq.
[248] Nettesheim, *supra* note 7, p. 146. For the opposite view in Portugal see: Poiares Maduro, *supra* note 50, near

left open in the report. Instead, it discusses - and rejects - the idea that notwithstanding the supremacy rule, the relationship between European and national law would have to be seen as non-hierarchical[249].

Though the conditions are very different, a similar solution seems to be found in the United Kingdom. With reference to the *Factortame* case and the statements of Lord Bridge the British report finds supremacy of Community law founded, for the UK, in three "aspects": a *contractarian*, an *a priori* and *functional*, and in the *European Communities Act 1972*[250]. Though there is no question about the recognition of supremacy rule by British courts, a limit, however, would still be the sovereignty of Parliament. The open question how the national courts would react in a case of a clash between a European rule and an Act of the British Parliament derogating expressly and unequivocally, however, is not solved. The British report finds that there is a way to construct a right for national courts to give priority to the European rule, on the basis of "normative arguments of legal principle the content of which can and will vary across time": Due to "UK's membership of the EC, as exemplified by the contractarian and functional elements" of the arguments in *Factortame*, the Parliament would not be regarded any more as legally omnipotent[251].

The Irish case is different from all other Member States in so far as Article 29(4)(3) of the Irish Constitution gives priority to all Community measures as well as national measures necessitated by the obligations of membership of the Communities. As the Irish Supreme Court has stated in the *Crotty* case in 1987, any "essential alteration in the scope and objectives of the Communities" would require an express amendment of the Constitution[252]. Consequently, the Irish courts are reported to have, safe in the special case dealing with abortion, "unhesitatingly acknowledged the supremacy of Community law[253]. One case, however, where the Supreme Court has, consequently, given priority also to a national measure implementing a Council Regulation on milk quotas because it did not more than give effect to the Regulation, has been criticised by the "anti-Nice campaigners" and has motivated the Government "to bring about greater domestic scrutiny of EU legislative proposals in advance of the referendum"[254].

Other Member States seem to envisage more generally a control of European acts by national courts in case of a clash with the national constitution. The Italian Constitutional Court is reported to maintain the "idea of the supremacy of the National Constitution over EC law, without however limiting to heavily the autonomy of the EC legal system", in requiring only "a certain structural conformity of the supranational legal order to the national Constitution" and limiting its judicial review to cases of "grave and persistent breach of fundamental human rights, not duly repaired by the judicial institutions of the Union"[255]. The new Article 117 of the Italian Constitution is said, however, to contain some basic rules concerning the supremacy of EC law over ordinary Italian legislation: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and

footnote 20, while other views are quoted ibid., in footnote 21. See, however, the approach developed by Maduro, ibid. near fn. 42-54, and after fn. 71.

[249] Nettesheim, *supra* note 7, p. 146-149.

[250] Craig, *supra* note 19, p. 11 et seq.

[251] Craig, *supra* note 19, p. 14-16.

[252] Hogan, *supra* note 214, p. 4-6, referring to *Crotty v. An Taoiseach*, (1987) IR 713, with more references.

[253] Hogan, *supra* note 214, p. 19 et sueq.

[254] Hogan, *supra* note 214, p. 24 et seq.

[255] Cannizzaro, *supra* note 39, p. 256 et seq.

international obligations"[256]. Yet, there is no sign for a general recognition of the supremacy of such law over the provisions of the Italian Constitution.

On the same line, the Portuguese report states, with regard to Article 8 of the Portuguese Constitution that "the Portuguese Constitution is generally interpreted so as to guarantee the supremacy of EU law with regard to infra-constitutional norms but it is also seen as conditioning that supremacy and in holding to itself the ultimate power of authority"[257]. The way to avoid clashes with EC law, therefore is the prior amendment of the Constitution[258]. The prevalent idea is that of a clear supremacy of the Constitution, based on a classical concept of sovereignty[259]. Also in Greece, the primacy of European law is disputed both in jurisprudence and doctrine[260]; there are judgements recognising the principle of supremacy and others rejecting it. The autonomy of the European legal order is seen to be based on Community, constitutional and international law. Yet, as long as the sovereign nation states exist in the Union, the Greek report says, the national institutions will give priority to the national constitution[261].

Though there is no constitutional court in Finland, a move is signalled in the Finish report towards a control of constitutionality of acts by national courts under Article 106 of the Finish Constitution[262]. A subsidiary control of the constitutionality of European acts by the Federal Court would, in spite of the monistic tradition of the country, not be excluded either by the Swiss report[263]. Without an amendment of the Constitution (Article 169(3)), finally, the Cyprus' report states that the EU Treaty or the future Constitution would be below the Constitution of Cyprus, but superior to the national legislation.

b. Implicit Modification of National Constitutions by the Revision and Application of the TEU

In a number of Member States the conclusion or revision of or the adhesion to the European Treaties have made necessary express amendments of the Constitution. Such amendments are necessary, as already mentioned in the cases of Spain, France and Portugal, in any case of a conflict of the new Treaty provisions with the constitution. Austria has introduced new provisions into its Constitution to adapt it to the requirements of the EU membership, thereby opening up the Austrian legal order for the European law, but also organising the participation of the Austrian representatives in the EU system[264]. The Cyprus' report states the necessity of a profound revision of the Cyprus' Constitution before the accession to the European Union, in order to prevent conflicts with the European Treaties[265]. Several amendments of the constitution (the integration-clause, local elections, central bank), have been provoked by the Maastricht Treaty also in Germany[266]. Another amendment was felt necessary after a surprising interpretation by the Court of Justice of the directive on equal treatment of men and woman in the army. They would not have been necessary and were strongly criticised for other reasons, but the German report finds such amendments useful - and be it for reasons of "constitutional

[256] Cannizzaro, *supra* note 39, p. 249 et seq.
[257] Poiares Maduro, *supra* note 50, after footnote 4, near footnote 20.
[258] Poiares Maduro, *supra* note 50, near footnote 7.
[259] Poiares Maduro, *supra* note 50, near footnotes 58-61: "States are the only true sovereign powers and they can always revoke their acceptance of supremacy".
[260] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 48 et seq.
[261] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 51 et seq.
[262] Sundström/Boedeker/Kauppi, *supra* note 17, p. 12.
[263] Freiermuth Abt/Mosters, *supra* note 24, p. 427 et seq.
[264] Köck, *supra* note 9, p. 13 et seq.
[265] Josephides, *supra* note 12, p. 17.
[266] Nettesheim, *supra* note 7, p. 148.

esthetics"[267]. Other sensitive areas having a strong impact on existing constitutional provisions in Germany are the asylum and the anti-discrimination legislation enacted since the Treaty of Amsterdam[268].

"Implicit modification of national constitutions by the revision and application of the Maastricht Treaty are immanent to the system", the Austrian report says, and adaptations are "a matter to be decided by domestic law" and useful for the sake of clarity[269]. Also, the Spanish report states this necessity and the constitutional basis for the acceptance of such implicit modifications is seen in Article 93 of the Constitution. The report stresses that it is for this reason that an "organic law" is required to give effect to a Treaty revising the EU Treaty[270]. In Greece, there has been no amendment of the Constitution at all - neither when Greece acceded the European Union nor at a later time. With diverging dogmatic constructions all consequential changes to constitutional law are considered as tacit or quasi-tacit alterations of the Constitution and the procedure for the revision of the Constitution (Article 110) is not applied[271]. The Dutch report not only recognises that "constitutional law has surely been modified by community law in an implicit way", but also gives striking examples: The *Costa/ENEL* judgement, which exceeded what is provided in Article 94 of the Constitution in giving priority to all EC law over Dutch law, the monetary competence of the ECB being contrary to Article 106 of the Constitution, which states that the monetary system shall be regulated by an Act of Parliament and the dominant position of the Prime Minister in EU policies, which is contrary to its constitutional role as "first among equals"[272].

While other reports, like the ones from Finland, Sweden and the United Kingdom, are silent on this point, the Swiss report stresses the impact of a possible accession to the European Union on the principle of direct democracy in Switzerland. This may not exclude the accession of the country, and in fact Swiss legislation is already following the Union model "autonomously" to a great extent[273].

4. Institutional Interdependence: European Functions of National Institutions

Among the, regularly– implicit, alterations of national constitutions are the new or different functions of the national authorities in the view of their participation in the making and the implementation and application of European decisions. The Spanish report draws the attention to the fact that this influence has an impact on the constitutional autonomy of the Member States. It points out that the "dédoublement fonctionnel" does not transform the national authorities into European ones[274], and, as the Finish report reminds, the national authorities implementing European law are still appointed by the national government[275]. Yet, there is, as the German report notes, a fundamental change in the exercise of political power which affects the core of national sovereignty[276]. The European functions of the national authorities are generally recognised, though most of them are not explained or even reflected in the texts of the national

[267] Nettesheim, *supra* note 7, p. 150 et seq.
[268] Nettesheim, *supra* note 7, p. 151.
[269] Köck, *supra* note 9, p. 32.
[270] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 341 et seq.
[271] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 52
[272] Kortmann, *supra* note 10, p. 306.
[273] Freiermuth Abt/Mosters, *supra* note 24, p. 428 et seq.
[274] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 342, 346. See also Nettesheim, *supra* note 7, p. 151.
[275] Sundström/Boedeker/Kauppi, *supra* note 17, p. 14.
[276] Nettesheim, *supra* note 7, p. 152.

constitutions[277]. The Swiss report states that important modification of the Constitution would be needed to adapt it to these new tasks[278]. Without such express provisions, it is merely through the knowledge of European law and procedures that they can be identified and by the implicit alterations of the constitutions, due to the membership to the European Union, they are legitimised. The national reports explain how this looks in the practice of the Member States regarding the national parliaments, the governmental and administrative functions and the judiciary.

a. The National Parliaments in the European Legislation Process

As to the national - and, where applicable: regional - parliaments, their European role is described by mainly three functions:

- In transposing Community directives and providing for implementing measures of regulations they implement European legislation and are part of the legislative machinery of the European Union, though partly in a very formal sense[279] - at least in so far as internal decision-making powers have not delegated the implementation to the executive[280]. In Spain, a certain co-operation with the autonomous regions has settled the controversy on eventual co-ercive measures by the government in case a region, in the field of its competencies, does not implement European law[281]. The implication of national parliaments in the transposition and implementation of Community law is seen, by the German report, as another instrument of providing European legislation more democratic legitimacy[282]. The very fact, finally, that they are bound, in the frame of the "two-tier" legislative process, to implement the directives which the ministers have agreed - though progressively in co-decision with the European Parliament - at the Council, may induce national parliaments, as it was reported from Ireland, to watch more closely the positions taken by the ministers in the Council[283].

- The Dutch like the Spanish report, in addition, emphasise the fundamental role of the national parliaments in the constitutional process[284]: the ratification of the Treaties, and, in the Netherlands, the consent of the Dutch representative to certain decisions of the European Council need prior approval of the Houses of Parliament[285]. Attention is also drawn to the fact that according to the EU/EC Treaties national parliaments have to approve certain acts decided by the Council. The Finnish report stresses that since the Convention method has been invented, the national parliaments participate actively in the preparation of new Treaties[286].

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[277] See, however, Article 93 of the Spanish Constitution regarding the obligation of the Cortes Generales and the Government to implement European law - Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 343. See also Article 70(8) of the Greek Constitution.
[278] Freiermuth Abt/Mosters, *supra* note 24, p. 429 et seq.
[279] Wivenes, *supra* note 11, p. 286
[280] Kortmann, *supra* note 10, p. 307; see also Article 43 of the Greek Constitution, and Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 59.
[281] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 344, referring to Article 155.1 of the Spanish Constitution.
[282] Nettesheim, *supra* note 7, p. 155. Similarly: Schäder/Melin, *supra* note 3, p. 400.
[283] See also Schäder/Melin, *supra* note 3, p. 400: "...it also makes the national implementation easier if the parliamentarians have had a finger in the pie".
[284] Kortmann, *supra* note 10, p. 306; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 344.
[285] Kortmann, *supra* note 10, p. 307.
[286] Sundström/Boedeker/Kauppi, *supra* note 17, p. 14.

- Above all, national parliaments have to legitimise and control national ministers acting in the Council as the decisive part of the European legislature[287]. They have a very important role to play in the European legislation process, the Swedish report states, since the legitimacy coming from the European Parliament does not suffice[288]. This control may be quite limited, as reported from Italy[289] and from the Netherlands, where the Dutch Parliament can "only exercise political pressure on the minister"[290]. It is not strong in the United Kingdom as well, where the scrutiny of European draft legislation is exercised - on the initiative of a "Select Committee on European Scrutiny" - by two "standing committees" of the House of Commons. Though the interest in their opinions, which may well differ from that of the ministers, may not be great, the British report qualifies as "undoubtedly beneficial" that there is "another body within the UK looking at such issues"[291]. In addition, the House of Lords' Select Committee on European Union exercises, through its investigations and reports, a considerable control on European policies. Much more emphasis is given to control exercised by the national Parliament on the European policies of the ministers in Finland, where the Eduskunta has to give an opinion on all matters in its field of competence, "i.e. matters concerning national laws"[292]. In Spain, practice shows that, like in Denmark, the Parliament sometimes gives clear negotiating instructions to the government or requests it to achieve a postponement of a Council's decision in order to allow its prior parliamentary examination[293]. A special "Mixed Commission for the European Union", composed of members of the Congress and of the Senate has been created by a simple law with a view to enhance the parliamentary control of the Government acting in the Council[294]. The procedure for the participation of the national Parliament in European matters has been formalised in Greece by a revision of the Constitution in 2001, through new provisions in Article 70(8) to the effect that the government is bound to forward drafts of European regulating acts to the President of the Parliament, the Parliament may give an opinion and the government has to inform the Parliament of the follow up[295]. There are similar provisions, since the accession to the European Union, in the Austrian Constitution (Article 23e)[296], and also Article 23(3) of the German Constitution, introduced in view of the ratification of the Treaty of Maastricht, provides for the Parliament to be heard before the minister takes a position in the Council. The German report suggests to see this consultation procedure idealistically as expressing the co-operative character of this joint responsibility of the government and the Parliament[297], though it acknowledges that in substance the participation of the Bundestag is extremely weak as to provide sufficient democratic legitimacy in substance to the legislation of the Union[298].

[287] Wivenes, *supra* note 11, p. 286:
[288] Schäder/Melin, *supra* note 3, p. 400.
[289] Cannizzaro, *supra* note 39, p. 257 et seq.: the contribution by the Italian Parliament to the shaping of the EC/EU politics appears in practice meaningless".
[290] Kortmann, *supra* note 10, p. 307.
[291] Craig, *supra* note 19, p. 17
[292] Sundström/Boedeker/Kauppi, *supra* note 17, p. 13.
[293] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 345. Similarly, a "Comité permanent des affaires européennes" has been created in 2001 in Greece, Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 56.
[294] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 345.
[295] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 55 et seq.
[296] See for the procedure in detail Köck, *supra* note 9, p. 35 et seq.
[297] Nettesheim, *supra* note 7, p. 153: "kooperativer Prozeß... danach steht das Recht zur Bestimmung dieser Positionen Parlament und Regierung 'zur gesamten Hand' zu".
[298] Nettesheim, *supra* note 7, p. 154.

Given the practical difficulties for a national parliament to control effectively the European legislation, the Italian report suggests a general division of responsibilities: The European Parliament "should contribute to the adoption of acts of supranational character, while the national Parliament should rather focus on acts having intrinsically an intergovernmental nature"[299].

b. European Functions of National Administrations: A Double Mandate for the Executive

Also the national executives are involved both, in the legislative process of the European Union and, in particular, in the implementation of European law. Regarding the involvement in the legislative process the Luxembourg report criticises that national administrations have a double function which is hardly compatible with the traditional principle of separation of powers, they are co-legislators at the European level and executive at the national[300]. This seems not to be the problem, for other reports. Like the German report[301], the Dutch report recognises this double role as a given fact: it is "obvious that the Dutch government and especially the ministers act as Dutch and EU officers"[302].

As to the role of the national administrations as implementing bodies for the European legislation the Austrian report says, "when applying EU/EC law, these institutions may also be regarded as exercising a function within the EU/EC system, and thus having the character of decentralised EU/EC institutions", this is one aspect of what Georges Scelle had termed "*dédoublement fonctionnel*" [303]. European law provokes substantial changes in the function of national administrations as well as of the material administrative law - discussed in Germany under the label "Europeanization of administrative law"[304]. The Spanish and the German reports explain this in detail and give examples, including new development of transnational co-operation between decentralised national administrations[305].

On the other hand, the Greek report underlines the fact that national administrations in practice do not give the same priority to European matters as to national ones, a problem which is only in part remedied by the co-operation between the European Commission's services and the national "Service Spécial du Contentieux Communautaire"[306]. The Spanish report points to the harmonising effect which this common function of national authorities has on the institutional organisation of the administrative instruments within the Member States; the ministry for environment was created in Spain to conform with European policies, like new autonomous agencies such as for energy or telecommunications, and the statute of the Spanish Central Bank, of course, was changed for the same reason.

c. Judicial protection in the European Union through National Judges

Regarding the judiciary, national reports describe the important role judges play in the application and, in case of conflicts, in the enforcement of Community law[307]. The "double

[299] Cannizzaro, *supra* note 39, p. 259.
[300] Wivenes, *supra* note 11, p. 287.
[301] Nettesheim, *supra* note 7, p. 151 et seq.
[302] Kortmann, *supra* note 10, p. 307.
[303] Köck, *supra* note 9, p. 37
[304] Nettesheim, *supra* note 7, p. 155.
[305] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 347; Nettesheim, *supra* note 7, 155 et seq., with many more references.
[306] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 56 et seq.
[307] See Craig, *supra* note 19, p. 18 et seq.; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 348 et seq.;

loyalty" resulting from the role of the national judge to apply both, European and national law, as the Spanish report notes, poses considerable problems[308]. Also in Germany, problems arise where the Court of Justice and the German Constitutional Court take positions in subsequent preliminary rulings on the same matter, even if like in the *Alcan* case they do not diverge[309]. In Austria, like in Germany, "the Court of Justice is ... regarded, for the purpose of giving preliminary rulings, as part of the Austrian judicial system". This means, as the Constitutional Courts have confirmed, that an arbitrary refusal to refer to the Court of Justice under Article 234 TEC would be a violation of the constitutional guarantee of access to the "judge established by law"[310]. The report from Cyprus announces that the national courts will become courts of the Union meaning that they will have the responsibility of applying the law of the Union in the national sphere[311].

Regarding the procedures, the Spanish report emphasises the positive repercussions of the Court of Justice's jurisprudence on interim measures on the constitutional standards of judicial protection in Spain[312]. In Germany, a fundamental re-orientation of the procedural law for administrative courts is reported[313]. Though procedural autonomy of the judiciary is generally recognised as an important value, some reports find "the harmonisation of the different procedural systems of the Member States ... ineluctable"[314] with a view to the equal protection for the citizens of the Union. The Italian report stresses the need of a European remedy, at least in cases in which a national court refuses to comply with its obligation to refer a case to the Court of Justice and suggests to give the individuals the possibility to lodge an appeal with the Court of Justice[315]. It is interesting to note that in the case of an alleged violation of European fundamental rights, the German Constitutional Court has found that the refusal of the competent court to refer the case to the Court of Justice under Article 234 TEC is generally - and not only in the case of arbitrariness - a violation of the right of access to the "judge established by law" as it is guaranteed in Article 101(1)(2) of the German Constitution[316]. If all national constitutional or supreme courts followed this line, there would be not only no need for harmonisation, but this would result in a system of decentralised judicial protection of fundamental rights in the European Union which might be preferable to a system of direct access to the Court of Justice.

III. The Role of the Regions and Local Authorities in a EU Constitution

Regionalization has become a strong trend in the past decades of constitutional developments in the Member States. Although European constitutional law does not interfere with the internal structure of the Member States, the EU report shows that regions and local authorities have found recognition in the European Treaties in many respects[317]. A number of

excellent and exhaustive: Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 62 -72; Köck, *supra* note 9, p. 38 et seq.

[308] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 348.

[309] Nettesheim, *supra* note 7, p. 157 et seq.

[310] Köck, *supra* note 9, p. 38.

[311] Josephides, *supra* note 12, p. 73.

[312] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 352.

[313] Nettesheim, *supra* note 7, p. 158.

[314] Kortmann, *supra* note 10, p. 308.

[315] Cannizzaro, *supra* note 39, p. 260.

[316] Bundesverfassungsgericht, Judgement of 9 January 2001, *Teilzeitarbeit*, reported in *Europäische Zeitschrift für Wirtschaftsrecht* (2001), 255 .

[317] Oliver, *supra* note 2, p. 37 et seq.

proposals are already on the table for giving the regions and, in particular, the "regions with legislative powers" more influence on European policies, for example by giving the Committee of the Regions a special role in monitoring subsidiarity and the status of an institution of the Union and by granting it - or the regions - privileged access to the Court of Justice[318]. Indeed, also the German report sees a need for the recognition of the territorial sub-divisions of the Member States: The Union shall not be "blind" in this regard, as it would be the traditional attitude for an international organisation. European policies are part of the internal - and not "foreign" - policies[319] of the Member States, but this fact is not reflected in the institutional and procedural law of the Union[320].

The national reports give an excellent picture of not only the role of the *Länder*, regions or other territorial subdivisions - if any - of the Member States, but also of the differences in their respective status and rights regarding the participation in the definition of the national position at the Council. What was the role of the EU law in this development (infra 1.) and what are the consequences on EU law of the respective regionalization or decentralisation processes in the Member States (infra 2.)?

1. EU Law and the Constitutional Settlement in Relation to Regions and Local Authorities.

Apart from recent developments in Belgium, it seems that throughout the Union the role and status of the *Länder* in Germany is the strongest of all regions. They have the status as original states and are granted broad constitutional autonomy. Their fundamental role in the German federal structure may not be changed, it is immune - according to the "eternity clause" of Article 79(3) of the German Grundgesetz - even against constitutional revisions. The effect of the German membership in the European Union, the German report explains, is that their status as autonomous sub-national entities is drawn down to third level - or class – actors; their competencies, their room for political action and, thus, their statehood and very existence are progressively eroded[321]. New rights provided by Article 23(4) and (7) of the Grundgesetz concerning the participation of the *Länder* through the Federal Chamber in the determination of the German position at the Council are not regarded a satisfactory compensation - even though the opinions of the Federal Chamber are binding in matters where the *Länder* have exclusive legislative competence. Furthermore, the parliaments of the *Länder* are of marginal importance and the functioning of the internal parliamentary system is questioned. Therefore, a revitalisation of the German federalism is felt urgent[322]. Another new problem arising in Germany from the EU constitutional developments since Maastricht is the financial responsibility of the Federal Republic in cases where an infringement (Article 226, 228 TEC) or a failure to comply with the stability requirements under Article 104 TEC is the consequence of irregularities of one ore more *Länder*: No solution has, so far, been found for such situations[323].

The situation of the component "states" in Austria is similar. They lost competencies, and the "states have only a limited constitutional compensation through the establishment, by article 23 B-VG, of the so-called procedure for participation of the states"[324]. The positions of the states

[318] See Oliver, *supra* note 2, p. 40 et seq.
[319] For this important view see also the Spanish Constitutional Court in its judgement of 26 Mai 1994, ATC 165/94, reported in Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 353 et seq.
[320] Nettesheim, *supra* note 7, p. 159 et seq.
[321] Nettesheim, *supra* note 7, p. 160 et seq.
[322] Nettesheim, *supra* note 7, p. 162.
[323] Nettesheim, *supra* note 7, p. 162 et seq.
[324] Köck, *supra* note 9, p. 40.

may be given as "general comments" individually or are made up within a special body, the Integration Conference, and are binding for the representatives of the country at the Council insofar as the matter is coming under the legislative competence of the states[325]. Similar rights and procedures would need to be introduced for the Swiss Cantons in case Switzerland would joint the European Union: The new Swiss Constitution recognises, in Article 3, the sovereignty of the Cantons and other provisions guarantee their autonomy and their right to conduct foreign policies in the areas of their competence (Articles 47 and 56)[326]. There would be a need for a revision of the division of powers between the Federation and the Cantons as well as of the financial provisions in the Constitution[327].

Cyprus seems to intend, in the framework of its accession to the European Union, introducing a regional level in dividing the country in two new regions which would have elected councils and participate in the EU Committee of the Regions[328]. A positive effect of the EU law on decentralisation of the country is also reported from Greece. It was for being able to send elected representatives of regions - which did not exist before - to the EU Committee of the Regions that according to Article 102(1) of the Greek Constitution the "decentralisation of second degree" has been undertaken by legislation, with the result that the "departments" have been accorded legal capacity, more administrative competencies and elected representatives[329]. Similarly, local communities have been merged in order to strengthen them and they have been accorded more administrative tasks[330]. More radical seem to be the reforms in Italy concerning the role of the regions in 2001, which are said to have changed the centralised state into one which is similar to a federal state[331]. However, even where the regions have exclusive legislative competence, they do not have more rights of participation than to be informed and heard on the relevant drafts discussed at the Council. Regarding the implementation of European legislation, the State has the power to legislate in matters falling within the competence of the regions, though the regions may substitute state legislation by their own legislation so far[332]. The Autonomous Regions of Spain have gradually been given increased competencies in the field of European matters after the initial exclusion from any participation in foreign policies, including European affairs. In Particular, the Spanish report points at the famous case of the Basque country establishing a permanent office in Brussels, which was found compatible with the Constitution by the Constitutional Court - given that the European integration process has led to a new legal system which, for all the Member States, can be considered to a certain degree "internal"[333]. The co-ordination of the policies of the Regions and the central government in Spain is organised within Sectorial Conferences or the Conference for European Community Matters. A representative of the Regions' "Consejero Antonómico" exercises the function of an observer in the Permanent Representation of Spain in Brussels, but the Autonomous Regions are not represented in the Council, although its representatives may participate in the work of its working groups[334].

Other national reports do not note implications of the European constitutional process on their country with regard to regionalisation or decentralisation. This is true for the United

[325] Köck, *supra* note 9, p. 40 et seq.
[326] Freiermuth Abt/Mosters, *supra* note 24, p. 431 et seq., 433 et seq.
[327] Freiermuth Abt/Mosters, *supra* note 24, p. 434.
[328] Josephides, *supra* note 12, p. 74.
[329] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 76 et seq.
[330] Iliopoulos-Strangas/Prevedourou, *supra* note 33, p. 77 et seq.
[331] Cannizzaro, *supra* note 39, p. 261.
[332] Cannizzaro, *supra* note 39, p. 261.
[333] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 353 et seq.
[334] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 354 et seq.

Kingdom, where - apart from the statement that Scotland is responsible for implementation of EU law in the devolved areas - only the question of an "impact of the EU on separatist tendencies" are dealt with: Though, for Scotland, it may be attractive to have its own seat in the Council, the British report says that in a Union with twenty-seven Member States "the prospects of a small state, with few votes in the Council, winning significant concessions are not great"[335]. The Swedish report notes that the decentralised - "but certainly not federal" - structure of a country, in which the municipalities as local administrative authorities have a strong role, is not affected by the constitutional developments in the European Union and that their existence has no consequences for EU law and decision-making either[336]. The situation in Finland and the Netherlands seems to be the same[337]. The Luxembourg report stresses that the role of the local communities, the cities and the communes, is given insufficient attention in the European debate on regionalism and decentralisation[338].

2. Regionalisation and Decentralisation in the Member States and EU law

The Italian report stresses that "one should recall that the constitutional autonomy of local entities must be now considered as among the fundamental principles concerning the constitutional organisation of some of the MS"[339]. The development of the Autonomous Regions in Spain has led to a claim for a *ius standi* in the Court of Justice as well as for more powers of the Committee of the Regions, in which they are represented with 17 members[340]. The Swiss report, finally, stresses the advantages of its federal concept for the maintenance of cultural diversity, subsidiarity, efficiency and the better participation of the citizens in the political process. It has a strong identity building effect and could contribute to a "Europe of citizens", in which a European people could evolve, being based on an identity composed of different peoples and cultures[341].

IV. Conclusions and Recommendations for 2004

What can be drawn from these developments regarding the constitutions of, and the positions taken in the Member States and the candidate countries? It is clear that the conclusions and recommendations of each report are a result of the national law and political culture of the respective states and it is difficult to deduce from them any kind of consensus or general recommendation for the Convention and the Intergovernmental Conference of 2004. It is worth, nevertheless, identifying some common or prevailing views and some original ideas which have been developed in the reports. On that basis, recommendations are formulated with a view to stimulating the discussion[342].

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[335] Craig, *supra* note 19, p. 19 et seq.
[336] Schäder/Melin, *supra* note 3, p. 389, 401.
[337] Sundström/Boedeker/Kauppi, *supra* note 17, p. 14; Kortmann, *supra* note 10, p. 308, where, however, the autonomy of the twelve decentralised bodies implies that they cannot be compelled by government order to implement European legislation, but only by an Act of Parliament..
[338] Wivenes, *supra* note 11, p. 288 et seq.
[339] Cannizzaro, *supra* note 39, p. 262.
[340] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 357 et seq.
[341] Freiermuth Abt/Mosters, *supra* note 24, p. 437.
[342] For these recommendations only Ingolf Pernice is responsible. There was no time for the co-ordination of divergent views as they may exist.

1. A New Architecture: How Should an EU Constitution or EU Basic Treaty Look Like?

Given the constitutional character of the European Treaties, the German report notes that the question is not whether Europe needs a Constitution but rather "what kind of constitution Europe needs"[343]. There seems to be, indeed, a broad consensus on the need for what the Swedish report says: "the fundamental Treaties should be subject to an operation of 'legal cleansing'". It calls for an "EU Constitution containing the basic objectives of the Union and the fundamental rules on general principles of law to be respected, on citizenship of the Union, identifying the areas of common policy and giving the basic norms governing the institutions of the Union and the division of competencies between them would undoubtedly make the structure and legislation of the Union more clear, understandable and easy to apply for all its subjects"[344]. The Austrian report is not far from this, when it favours a European Constitution which contains only provisions "establishing the main institutions and defining their powers as well as the procedures by which these competencies would have to be exercised"[345]. The "communitarisation" of the second and the third pillars considered necessary by the Luxembourg report in the medium-term.[346] The British report considers important the inclusion of "the norms dealing with the relationship between national law and Community law and the norms dealing with the relationship between the citizen and the Community"[347]. As it appears from the EU report, the merger of the Treaties with a view to simplify the structure of the Union as well as to give it an explicit and single legal personality is not only supported by the Commission, but finds a broad consensus within the working group of the Convention[348].

Yet, there are different views on particular points and a number of specific suggestions on what the Laeken process should aim at:

a. A "Constitutional Treaty" for the European Union: Concepts and Supremacy

While, for the Swedish report, there is no problem with the use of the term "Constitution" for the European Union, even if a limited approach were to be chosen of "just sorting out the rules of a fundamental character from the present Treaties and arranging them in a separate document"[349], the Luxembourg report could accept this only in "a vision of constitutional pluralism" which considers as a constitution any infra-state, para-state or supra-state structure[350]. On the same line, the Italian report favours "the establishment of a legal frame in which a plurality of entities endowed with partial sovereign powers may co-exist... What the European legal order needs is a pluralist Constitution governing a pluralist legal order"[351].

It is interesting to note that the Cyprus' report stresses the establishment of the Convention being a development which is showing that the Member States are not, any more, the only "masters on board" and that this is a welcome evolution in the process of transformation[352]. The Constitution would certainly be complementary to those of the Member States and, following a

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[343] Nettesheim, *supra* note 7, p. 165.
[344] Schäder/Melin, *supra* note 3, p. 402; Craig, *supra* note 19, p. 21. For a simplification of the treaties also: Nettesheim, *supra* note 7, p. 169.
[345] Köck, *supra* note 9, p. 41 et seq.
[346] Wivenes, *supra* note 11, p. 290
[347] Craig, *supra* note 19, p. 21.
[348] Oliver, *supra* note 2, p. 17 et seq. (near footnote 70).
[349] Schäder/Melin, *supra* note 3, p. 402.
[350] Wivenes, *supra* note 11, p. 289, with a reference to the former Judge of the ECJ, Pierre Pescatore.
[351] Cannizzaro, *supra* note 39, p. 262.
[352] Josephides, *supra* note 12, p. 20

step-by-step approach, there will be, the report says, in 2004 rather a constitutional Treaty than a Constitution in the classical sense[353]. While for the contents the Dutch report does not diverge much from the above-mentioned lines, it also stresses that "a real European Constitution" would be rather unlikely and that "a basic European Treaty seems feasible"[354]. This is the solution favoured by the Spanish report as well[355].

The Dutch report also underlines the need for splitting the Treaties: "The tasks of policy of the institutions of the European Union should not be covered by the basic Treaty, but laid down in one or more substantive Treaties"[356]. This is what the European University Institute in Florence has tried to work out and what the Commission seems to support as well[357]. Yet, the Luxembourg report takes a more cautious position: It finds it difficult to distinguish between fundamental questions to be dealt with in a constitutional Treaty and more technical provisions the revision of which might be subject to a simplified procedure in which unanimity is abandoned[358]. Though the Swedish report opts for reserving the "present complicated and time-consuming amendment procedures for rules of a fundamental character", thereby allowing a simplified procedure "not necessarily involving national parliaments in their legislative capacity"[359], the statement of the Swedish Prime Minister has to be kept in mind saying that he would "not be prepared" to accept that a transfer of competence from the national to the European level could be made without ratification by national parliaments[360].

The first recommendation for 2004 is:

> The European treaties should be merged and streamlined into one single European Constitutional Treaty which lays down objectives and principles of the Union and, in particular the primacy of European law over conflicting national law, and which includes the fundamental rights as laid down in the Charter, the rights of the citizen, the attributions of the competencies of the Union in a clear and systematic order, provisions on institutions and legislative procedures, financial provisions, and provisions on the amendment of the Treaty as well as on a simplified procedure for the amendment of Protocols in which the existing EC and Euratom Treaties are kept in force as "organic laws" insofar as they are not replaced by or contrary to the Constitutional Treaty.

b. Common Values: Giving Teeth to the Charter of Fundamental Rights

While the Luxembourg report sees it rather as a question of political philosophy[361], the integration of the Charter of Fundamental Rights as binding law into the Treaties is a common suggestion of the majority of national reports[362]. The Cyprus' report makes clear that this would indeed introduce a new dimension to the future of the Union which is not a simple economic union but more and more a union of states and peoples based on the common values of democracy, human rights and the rule of law[363]. The Austrian report, however, like also the German report[364], sees no problem in keeping the Charter as a separate instrument "if only it were binding on the institutions"[365], and, similarly, also the Spanish report considers such a

[353] Josephides, *supra* note 12, p. 20 et seq.
[354] Kortmann, *supra* note 10, p. 309.
[355] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 364.
[356] Kortmann, *supra* note 10, p. 309.
[357] Oliver, *supra* note 2, p. 12.
[358] Wivenes, *supra* note 11, p. 290
[359] Schäder/Melin, *supra* note 3, p. 403.
[360] Schäder/Melin, *supra* note 3, p. 394
[361] Wivenes, *supra* note 11, p. 290
[362] See for example: Kortmann, *supra* note 10, p. 309; Nettesheim, *supra* note 7, p. 166.
[363] Josephides, *supra* note 12, p. 74 et seq.
[364] Nettesheim, *supra* note 7, p. 166.
[365] Köck, *supra* note 9, p. 42.

solution to be realistic and perhaps even more adequate for maintaining the equilibrium of the established European system for the protection of fundamental rights[366].

It is worth noting that the Commission, the Council and the European Parliament have already taken action with a view to ensuring compliance with the Charter[367], that the Court of First Instance and the Advocates General of the Court of Justice refer to it, while the Court of Justice as such abstains from doing so[368] - a practice which is probably meant to respect the decision of the governments not (yet) to make it a legally binding instrument. The EU report lists the options under discussion for making it legally binding and finds that the majority of the working group on the Charter favours the incorporation of the full body of the Charter into the Treaties[369]. There are, nevertheless, open questions, it points out, as to the preamble of the Charter and some overlapping – e.g. for the citizens' rights - with more or less identical provisions in the existing Treaties[370].

The second recommendation for 2004 is:

> The European Charter of Fundamental Rights should become the first part of the European Constitutional Treaty, together with the objectives and principles, whereby its Preamble should be slightly adapted to become the Preamble of the Treaty, its provisions on the citizens' rights should form a separate Title and substitute similar provisions of the EC-Treaty, and the more objective guarantees such as for access to services of general economic interest, environment and consumer protection, should be incorporated into the Title on objectives and principles; there should also be provisions on effective remedies and for the accession of the Union to the ECHR.

c. Who Does What in Europe: Towards a Clearer System of Attributions

"The future European Constitution cannot be construed as curtailing existing powers of the EU/EC", the Austrian report says and, like the Charter of Fundamental Rights, the distribution of the powers between the EC/EU and the Member States may come into it "useful, although the latter may also be deduced from the powers given to the EU/EC institutions[371]. A number of national reports, indeed, see no absolute necessity of a new system – or even a catalogue[372] - of competencies, though more clarity and flexibility of the distribution of powers is a general demand[373]. The Commission, like others, is said to be absolutely opposed to the idea of a catalogue, while all sides in the Convention agree on the need for clarification[374]. What is needed, the Spanish report says, is a better identification of the titles of competence and a simplification and clarification of the structure of the normative attributions, which differ from norms on procedure or directives - a solution which would not give all the power to those who ultimately interpret the relevant provisions[375]. The report also suggests to consolidate the political control of the application of the principle of subsidiarity[376] and the German report discusses the option for a specific "Mediation Committee" as it is proposed in the German doctrine[377].

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[366] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 360 et seq.
[367] Oliver, *supra* note 2, p. 29 et seq.
[368] See Hogan, *supra* note 214, p. 30 et seq.
[369] Oliver, *supra* note 2, p. 32.
[370] Oliver, *supra* note 2, p. 32.
[371] Köck, *supra* note 9, p. 42.
[372] For references regarding this proposal see Nettesheim, *supra* note 7, p. 166 et seq. with footnotes 433.
[373] See: Kortmann, *supra* note 10, p. 309; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 363 et seq.
[374] Oliver, *supra* note 2, p. 22.
[375] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 364
[376] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 363.
[377] Nettesheim, *supra* note 7, p. 167 et seq.; see also the proposals discussed by V. Constantinesco/I. Pernice, "La

The third recommendation for 2004 is:

> The chapter on competencies in the European Constitutional Treaty should be structured so as to distinguish clearly exclusive and shared legislative competencies, powers for encouraging and co-ordinating national policies, and executive powers, for each category containing clear and simplified attributions, while for monitoring the respect of the principles of subsidiarity and proportionality, and of the limits of the EU competencies, a special body should be instituted, in which those political actors are represented who have the most immediate interest in safeguarding legislative powers of the Member States: The National Parliaments.

d. Strengthening the European Executive: Institutional reform of the European Union

The question of a European government is discussed in the Spanish report. But it does not make a specific proposal, just drawing the attention to the risks of a parliamentary system based on simple majorities, in which a "permanent minority" of Member States may evolve. It points out that safeguards are necessary, in case a majority rule is generally introduced, for the protection against the violation of, though very concrete, interests of a Member State[378]. According to the Austrian report, "transforming the Commission into *the* executive organ of the EU/EC and thus to a kind of European government, might also make the Union, and the Community, respectively, more comprehensible, and thus emotionally more acceptable to the man in the street"[379]. The Italian report notes that the process of European integration is leading to the co-existence of a plurality of international actors, each disposing of some competence, but none disposing of full sovereignty"[380]. This problem for international partners will probably continue to exist for a while, but a European government – or President – giving the Union a visible and reliable "face" towards the outside world would provide for more clarity and enhance the effectiveness of its foreign policies[381].

The fourth recommendation for 2004 is:

> The executive function of the Union should be reorganised in the European Constitutional Treaty so as to ensure that the Union has a "face" and is represented by one single person - a President of the European Union - to its international partners as well as vis-à-vis its citizens, and it is the original function of the Commission's President to take this responsibility; the Council should, in its legislative function, act in public as a Second Chamber while, in its executive function regarding economic, employment and financial, foreign and security policies it should be the forum in which the policies to be implemented by the Commission or the national governments are co-ordinated.

e. Enhancing Democracy in Europe: European and National Parliaments

The role of the European Parliament would be confirmed, the Luxembourg report says, by the extension of the co-decision regime with the democratic deficit being remedied by associating national parliaments more closely to the decision-making process of the Union[382].

Question des Compétences Communautaires: Vues d'Allemagne et de France", WHI-Paper 6/02 <www.whi-berlin.de>.

[378] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 361 et seq.

[379] Köck, *supra* note 9, p. 20.

[380] Cannizzaro, *supra* note 39, p. 264.

[381] For different options to reform and streamline the institutional arrangements for CFSP decision-making procedures and the external representation of the positions thus agreed upon see I. Pernice/D. Thym, "A New Institutional Balance for European Foreign Policy?", 7 *European Foreign Affairs Review* (2002) issue 4 forthcoming. More details on and arguments for the "President of the Union", elected by the European Parliament, are given in I. Pernice, *supra* note 57, at p. 527-529, and: "Reform der Aufgabenverteilung und der Entscheidungsverfahren in der GASP/ESVP", WHI-Paper 8/02, as well as: "Neuordnung der Exekutive in der EU", WHI-Paper 10/02, both <www.whi-berlin.de>.

[382] Wivenes, *supra* note 11, p. 290.

The Dutch report calls for a bicameral parliament, based on a parliamentary system as it is – broadly speaking – present in some Member States[383]. The Spanish report also considers the possibility of creating a second chamber, but does not take a definitive position. It signals, however, the consequence of such a debate on a possible claim of regional parliaments to get a greater stake in European policies[384]. The Italian report is most critical against a "direct involvement of the National Parliaments in the European decision-making process", as they "express a fragmented democratic legitimacy" and since it is found appropriate to "assign to the National Parliaments a role subsidiary to that of the European Parliament" in view of the asymmetric character of the European integration[385]. This is in line with the German report which, against the many options discussed in Germany, favours enhancing parliamentary democracy in the Union not by a vertical parliamentary mix but rather by a horizontal strengthening of the powers of the European Parliament[386]. There is a broad feeling in the Convention that the role of national parliaments should be enhanced, but given the "wealth of ideas" submitted, there is not yet a consensus[387].

The fifth recommendation for 2004 is:

> The democratic legitimacy and accountability should be strengthened in the European Constitutional Treaty by giving, on the one hand, the European Parliament the right to elect and, if necessary, to dismiss the European President, the right of co-decision in all areas of legislation and to right to assess and adopt the budget of the Union, while, on the other hand, the National Parliaments should be given a direct control on the national ministers acting in the Council, the right to evaluate and comment on the annual legislative program of the Union and a role in the body monitoring the respect of the principle of subsidiarity.

f. Specific Suggestions for Consideration

Other suggestions to be considered are the extension of the jurisdiction of the Court of Justice as a "Constitutional Court" to all matters related to the EC and the EU Treaty[388], to anchor more clearly the European construction and their implications in the national constitutions[389], to introduce a more precise rule on the citizens' access to documents held by the institutions and, in particular, an enumeration of the "general grounds on which a document may be kept secret"[390], and to provide for a possibility for a Member State to recess from the system, even if this would be a cause for a great deal of practical uncertainties: "In an enlarged Europe, the possibility, albeit theoretical, that a State can recess and pursue its own way outside the frame of the integration would strengthen rather tan weaken the stability of the system", the Italian report says[391].

2. A Constitution for the European Union: Conditions of Adoption and Amendment

According to the Swedish report, the adoption of a Constitution of the European Union in the classical sense, which is "adding new fundamental rules to those existing in the present Treaties, for example (by) introducing a formal Bill of Rights, would - in order to possess the legitimacy for the future of such a document -, require a broad general debate and a specific form

[383] Kortmann, *supra* note 10, p. 309.
[384] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 362 et seq.12
[385] Cannizzaro, *supra* note 39, p. 263.
[386] Nettesheim, *supra* note 7, p. 165 et seq.
[387] Oliver, *supra* note 2, p. 20.
[388] Köck, *supra* note 9, p. 42
[389] Wivenes, *supra* note 11, p. 290.
[390] Schäder/Melin, *supra* note 3, p. 402.
[391] Cannizzaro, *supra* note 39, p. 264 et seq.

of adoption involving the peoples, if not the people, of the Union". Thus, it opts for a more limited approach consisting in the adoption of the Constitution "in the same way as are the fundamental Treaties at the present"; in such an approach "no new competencies would be transferred from the Member States to the Union"[392].

More openness is shown in the Austrian report: A future European Constitution should be based on a Treaty concluded and ratified by the Member States according to Article 48 TEU, whether it "contains itself the Constitution or empowers a particular body (e.g. a 'convent') to adopt a Constitution with binding effect for all Member States"[393]. Similarly, the German report confirms that there is no objection to making a Constitution for the Union by means of an international agreement. The Grundgesetz would allow such an option as long as the ratification is provided for by a national legislative act. Even a European referendum is said not to be excluded, but it would not substitute the ratification required by Article 23(1) of the German Constitution[394]. The Spanish report takes the view that whatever the reform will produce, ratification under Article 93 of the Constitution would be necessary, if need be, following a modification of the Spanish constitution. Nevertheless, in case of a real split of opinions in Spain concerning the new Treaty, a prior referendum under Article 92 could be appropriate. The modification of Article 48 TEU with a view to include the preparatory work and recommendations of future conventions to future intergovernmental conferences would, finally, not be objectionable, but rather enhance the legitimacy of the process[395].

The Dutch report is even more radical in considering a modification of the procedure provided for in Article 48 TEU: Not all Member States would need to agree to amendments of the Treaty, the chapter on fundamental rights, for example, could be "amended by a referendum of the citizens of the European Union, on a joint proposal of the Council of the European Union and the European Parliament"[396]. Accordingly, the Cyprus' report considers generally to abandon the principle of unanimity and instead envisages an adoption or amendment of the Constitution with a very large majority of Member States and peoples. A long-term perspective could even be the adoption by a direct referendum, an option which would, however, presuppose a strong feeling of belongingness which may evolve within the European political system and would draw its legitimacy from a European *demos*[397].

The sixth recommendation for 2004 is:

> The European Constitutional Treaty should be adopted in accordance with the procedure laid down in Article 48 TEC, though a European referendum, in addition, would compel the drafters of the revised Treaty to keep it simple and to convince the citizens to accept it as their Constitution; the procedure of Article 48 TEC should be completed by the formal involvement of the Constitutional Convention which prepares and submits to the IGC a draft for discussion and adoption and which shall be represented at the IGC by the its President and the two vice-Presidents for explanation and mediation purposes.

3. Merging the Constitutional Process and Enlargement: How to Involve the Candidates?

The question how to ensure a fair participation of the candidate countries to the debate on the European Constitution within the Convention has been appropriately solved by the Laeken

[392] Schäder/Melin, *supra* note 3, p. 402 et seq.
[393] Köck, *supra* note 9, p. 42.
[394] Nettesheim, *supra* note 7, p. 172 et seq.
[395] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 365 et seq.
[396] Kortmann, *supra* note 10, p. 310.
[397] Josephides, *supra* note 12, p. 21.

Declaration as well as by the Presidency of the Convention: They are equally represented and have an "invitee" in the Presidium; but although they have full rights of participation in the debates, they may not block a compromise arising among the representatives of the European institutions and the Member States[398]. The comments of the national reports - if any - on this arrangement are generally positive[399]. The Spanish report raises some doubts, however, concerning the positive effects of the inclusion of the candidate countries in the evaluation of the work of the Convention by the subsequent Intergovernmental Conference[400]. In contrast, the only report from a candidate country, Cyprus, emphasises that the candidate countries' effective participation in the process will prepare the minds and contributes to develop the feeling among the citizens of these countries that they belong to the European people, a feeling which it considers being the basis for the adoption of a Constitution of the Union.

The seventh recommendation for 2004 is:

> The full participation of the candidate countries in the Convention as well as in the IGC 2004 should be ensured, including their representation in the Presidium, so as to include them closely in the discourse on, and the preparation of the draft of the European Constitutional Treaty, which should be, for the citizens of the candidate countries, as much as for the citizens of the Union, the expression of their common values and a democratic and fair instrument to meet their common interests and challenges internally as well as at the international scene.

[398] Oliver, *supra* note 2, p. 6 et seq.
[399] See e.g. Köck, *supra* note 9, p. 43; Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 366; Kortmann, *supra* note 10, p. 310 et seq.; Schäder/Melin, *supra* note 3, p. 404; Cannizzaro, *supra* note 39, p. 265: "politically wise".
[400] Martín y Pérez de Nanclares/López Castillo, *supra* note 36, p. 366 et seq.