

Law Department

From Pont d'Avignon to Ponte Vecchio  
The Resolution of Constitutional Conflicts  
Between the European Union and  
the Member States Through  
Principles of Public International Law

CHRISTOPH U. SCHMID

LAW No. 98/7

# EUI WORKING PAPERS



EUROPEAN UNIVERSITY INSTITUTE

European University Institute



3 0001 0032 6581 8

**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

**WP Fa9  
EUR**



**EUI Working Paper LAW No. 98/7**

**From Pont d'Avignon to Ponte Vecchio  
The Resolution of Constitutional Conflicts  
Between the European Union and the Member States  
Through Principles of Public International Law**

**CHRISTOPH U. SCHMID**

**BADIA FIESOLANA, SAN DOMENICO (FI)**

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

© 1998 Christoph U. Schmid  
Printed in Italy in November 1998  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico (FI)  
Italy



## *From Pont d' Avignon to Ponte Vecchio*

### *The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law*

Dr. Christoph U. Schmid, EUI Florence

"(...) The point of legal institutions is to set up a framework that facilitates and enhances the public use of reason; a structure of discussion which must not be deformed either through external or internal coercion and which allows the continuing of public discourse when shared understandings of lesser generality have broken down."

*John Rawls*, Political Liberalism, 1993, p. 41.

## **I. Introduction**

In 1974, in the famous "Solange" decision of the Federal Constitutional Court (FCC)<sup>1</sup>, a serious conflict between the EC-Treaty (TEC) and the German Grundgesetz (Basic Law) came to light for the first time. It remains unresolved and to a considerable extent threatens the good relationship between both legal orders and their highest courts. On the German side, the FCC, in its role as the guardian of the Grundgesetz and in line with its jurisprudence on foreign and security policy in general,<sup>2</sup> claims for itself the exceptional competence to review European law to be applied on German territory in the light of the constitutional "integration clauses" (imposing basic requirements on the participation of Germany in the EC and the Union). On the contrary, on the European side, the European Court of Justice (ECJ) has always regarded such a competence as incompatible with its own jurisdiction and, therefore, as a breach of the EC-Treaty. Even though the FCC has raised the threshold conditions for its activation in the Solange II decision,<sup>3</sup> it has up to now never ceased to insist on the existence of such a competence.<sup>4</sup> Now, in the Banana conflict, the competence could actually

\* For valuable suggestions I am most grateful to Claus-Dieter Ehlermann, Carol Harlow, Christian Joerges, Karlheinz Ladeur, Agustín Menéndez Pelayo, Bruno Simma and Francis Snyder. For the correction of the English version, I wish to thank Richard Burnley.

<sup>1</sup>BVerfGE 37, 271 - Solange I.

<sup>2</sup>See H. Schwarz, Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik, 1995.

<sup>3</sup>BVerfGE 73, 339 (374 et seq.) - Solange II.

<sup>4</sup>See the following up decision on the Maastricht treaty in: Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 89, 155 - Maastricht. Among the rich literature on the conflict since the Maastricht judgement see Bleckmann/Pieper, Recht der Internationalen Wirtschaft 1993, 969; Boom, American J. of Comparative Law (1995), 17; Cremer, Europarecht 1995, 21; Everling, Integration 1994, 165; idem, Gedächtnisschrift für Grabitz, 1995, 57; idem, CML. Rev. 33 (1996), 401; Fromont, Juristenzeitung 1995, 800; Frowein, Zeitschrift für

be made use of for the first time: The administrative court of Frankfurt has requested the FCC to review some provisions of the EC banana regime,<sup>5</sup> which it considers to be at odds with the freedoms of property and profession enshrined in the Grundgesetz.<sup>6</sup>

In a recent contribution, the relationship between the ECJ and the FCC has been compared to the Cold War logic of "mutual assured destruction".<sup>7</sup> Unlike the mere threat to do so, actually setting aside a European act as unconstitutional would be very hazardous since other States could follow this example ("domino effect") relying on some reciprocity rationale, thus putting an end to legal uniformity, which is a basic requirement of the rule of law within the EC. With regard to the constraints of globalisation,<sup>8</sup> this could generate fatal economic and geopolitical consequences even for Germany itself. However, the scenario of the mutual dissuasion should not be viewed in only the negative sense. Thus, the de-

ausländisches öffentliches Recht und Völkerrecht 1994, 1; *Gersdorf*, Deutsches Verwaltungsblatt 1994, 675; *Götz*, Juristenzeitung 1993, 1081; *Grimm*, Recht der Arbeit 1996, 66 = Columbia J. of European Law 3 (1996), 229 (English version); *Ipsen*, Europarecht 1994, 1, 9; *Heintzen*, Archiv für Öffentliches Recht 119 (1994), 564; *Herdegen*, CML. Rev. 31 (1994), 235; *Hirsch*, Neue Juristische Wochenschrift 1996, 2457, 2459; *Horn*, Deutsches Verwaltungsblatt 1995, 89; *Hommelhoff/Kirchhof* (ed.), Der Staatenverbund der Europäischen Union, 1994; *Kirchhof*, Deutsche Richterzeitung, 1995, 253; *E. Klein*, Gedächtnisschrift für Grabitz, 1995, 271; *H. Klein*, Maastrichter Vertrag und nationale Verfassungsgerichtsrechtsprechung, 1993; *Kokott*, Archiv für Öffentliches Recht 119 (1994) 207; *König*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1993, 17; *Koopmans*, Nederlands Juristen Blad 1994, 245; *Lenz*, Neue Juristische Wochenschrift 1993, 3038; *Mac Cormick*, Juristenzeitung 1995, 17; *Meesen*, Neue Juristische Wochenschrift 1994, 549; *Oppermann*, Deutsches Verwaltungsblatt 1994, 901; *Pfaff*, Das Verhältnis des deutschen Rechts zum Gemeinschaftsrecht nach dem Maastricht-Urteil des Bundesverfassungsgerichts, 1996; *Rodríguez Iglesias*, Europäische Grundrechte 1996, 125; *Schneider*, Archiv für Öffentliches Recht 119 (1994), 294; *Schröder M.*, Deutsches Verwaltungsblatt 1994, 316; *Schröder W.*, Zeitschrift für Rechtsvergleichung 1994, 143; *Schwarze*, Neue Justiz 1994, 1; *Sendler*, Neue Juristische Wochenschrift 1996, 825; *Steinberger*, Festschrift für Bernhardt, 1995, 1313; *Steindorff*, Europäisches Wirtschafts- und Steuerrecht 1993, 341; *Streinz*, Europäische Zeitschrift für Wirtschaftsrecht 1993, 329; *idem*, in: Ipsen et al. (ed.), Verfassungsrecht im Wandel, 1995, 663; *Tomuschat*, Europäische Grundrechte 1993, 489; *Voss*, Recht der Internationalen Wirtschaft 1996, 324; *A. Weber*, Festschrift für Everling, 1995, 1625; *Weiler*, Jahrbuch für Öffentliches Recht 1996, 91 = Festschrift für Everling, 1995, vol. 2, 1651 (English version); *Winkelmann* (ed.), Das Maastricht-Urteil des Bundesverfassungsgerichts, 1994; *Wittkowski*, Bayerische Verwaltungsblätter 1994, 35 et seq.; *Zuck*, Neue Juristische Wochenschrift 1994, 978; *Zuleeg*, Juristenzeitung 1994, 1.- See, for the similar debate in Ireland, *Phelan*, Revolt or Revolution: the Constitutional boundaries of the EC, 1997. For an overall view see *Fédération International du droit européen* (ed.), 'Le droit constitutionnel national et l'intégration européenne', 1996.

<sup>5</sup>Verwaltungsgericht Frankfurt a. M., Europäische Zeitschrift für Wirtschaftsrecht 1997, 182 (19 et seq.); for comments see *A. Weber*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 165; *P. M. Huber*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 517; *Classen*, Juristenzeitung 1997, 454; *Vachek*, Zeitschrift für Rechtsvergleichung 1997, 136; *Zuleeg*, Neue Juristische Wochenschrift 1997, 1201.

<sup>6</sup>In this context, the term "constitutional conflict" was first used by *Voss*, Recht der Internationalen Wirtschaft 1996, 324. However, the conflict could also be solved on the public international law track, since the WTO-Dispute Settlement Body, in its resolution of 25/9/1997, has found several violations of GATT and GATS. It is to be expected, therefore, that the EC will modify the Banana regime in order to comply with the WTO resolution. Furthermore, such resolution should have direct effect in Community law, see *Eeckhout*, CML.Rev. 34 (1997), 11; *C. Schmid*, Neue Juristische Wochenschrift 1998, 190.

<sup>7</sup>*Weiler/Halter*, 37 Harvard Int. L. J. (1996), 411, 446; *Weiler/Halter/Mayer*, W.Eur.Politics, July 1995, 4, 3 et seq.

<sup>8</sup>See e.g. *Scharpf*, Problem solving capacities of multi-level governance, 1997.



velopment of the ECJ's human rights jurisprudence would mainly be a response to the challenges by national courts, especially the FCC.<sup>9</sup>

Even though this scenario of mutual destruction has worked as an expedient up to now, and may even have contributed to the evolution of the human rights jurisprudence of the ECJ,<sup>10</sup> this article argues that a Cold War relationship between the highest courts of both sides and the legal uncertainty arising therefrom is to be considered as unacceptable in a highly integrated polity like the EC. Therefore, an attempt will be made to "re-juridify" the conflict in order to avoid negative consequences on integration. First, the positions of both sides will be briefly expounded. This will confirm the premise that the conflict has strong structural elements, in that it is but a logical consequence of the different views on the relationship between both legal orders and the supremacy of EC law. This leads to the insight that a solution is only to be found by means of a theoretical reconstruction, which sheds light on the logical well-foundedness of the different premises. This reconstruction reaches the conclusion that the relationship of both legal orders is to be regarded as dualistic. Starting from this basis, the central premises for the resolution of the conflict will be developed: Since there is no hierarchical sub- or supraordination between both legal orders, both may not try to subject one another, but must respect each other's mutual autonomy. Furthermore, the ECJ must recognise that parts of its premises are inconsistent: Supremacy ends where fundamental constitutional features of the MSS are at stake. In such case, a solution may only be found by cooperation, according to which the two judiciaries have to agree on a constitutional standard (e.g. in human rights protection) acceptable for both (here called "concordance solution"). If a concordance solution were to fail, the cooperation between both legal orders must be pursued on a higher, third level, through a conciliation mechanism. Even though the establishment of such a procedure is to be left to the European legislator, this article will show that a MS can already claim it *de lege lata*. This solution will be based on the "concretisation", by PIL principles, of the EC's duties of solidarity and of respect for national identities of the MSS enshrined in Arts. 5 TEC and F I TEU.

---

<sup>9</sup>However, further ahead, Weiler and Haltern concede the limits of their comparison: There is no "non-proliferation treaty" in EC law, so that several constitutional courts could initiate a Cold War at the same time; moreover, courts are not the only actors - rather, governments might use the threat that their courts could set aside a European act as a tactical weapon in a bargaining process at EC level (37 Harvard Int. L. J. (1996), 411, 438 et seq.).

<sup>10</sup>Generally shared view, see Ipsen, EuR 1994, 1 (9f.); Ossenbühl, DVBl. 1993, 753 (762); Weiler/Lockhart, 32 Common Market L. Rev. (1993) 579; Bleckmann/Pieper, RIW 1993, 969, 976f.; qualifying this view however Everling, GS f. Grabitz, 1995, 57 (74).

## II. The genesis of constitutional conflicts

### 1. The integration clauses of the Grundgesetz and their control by the FCC

According to the Basic Law, the transfer of state sovereignty to the EC through the German statutes of ratification of the EC treaties is subject to indispensable conditions. In contrast to the new Art. 23 Basic Law, the old Art. 24 Basic Law (which is still relevant for the EC treaties and any secondary law based on them) did not name them explicitly. Rather, they must be defined pursuant to common methodological principles. Thereby, it must first be recognised that these provisions which give constitutional authorisation to integration may not be regarded as a breach of the constitution, but have to be read in the light of its other provisions, particularly the so called "eternity clause" of Art. 79 III Basic Law.<sup>11</sup> This contains a reference to human dignity and the value of human life (Art. 1 Basic Law) as well as the fundamental federal, democratic, social principles on which the Federal Republic of Germany is based (Art. 20 Basic Law) and which may not even be set aside by the constitutional legislator acting by unanimity. In case of conflict, the conflicting principles must be balanced so that each of them retains a maximum of effectiveness (the so called device of "practical concordance"<sup>12</sup>). The new Art. 23 Basic Law, introduced before the ratification of the Maastricht treaty, now incorporates these limits to integration explicitly. Therefore, it may be understood as an abstract 'balancing formula' along the lines of the doctrine of practical concordance.

Like any other constitutional provisions, the integration clauses in Art. 23 and former Art. 24 Basic Law have to be monitored by the guardian of the Grundgesetz: the FCC. This is a clear obligation of the court from which it cannot dispense itself. Therefore, in the light of German constitutional law, the FCC did not have any alternative to the exercise of such control over EC law to be applied in Germany. Since direct control is not procedurally provided for, the control can only be exercised in an indirect way, i.e. over the "bridge" of the review of national ratification statutes: To the extent that a European act exceeds the limits of the integration clauses, the ratification statute (having the rank of standard law, inferior to the constitution) is void, and as a result, the European act is devoid of legal force on national territory.<sup>13</sup> As will be shown in more detail, this mechanism, however, does not in principle affect Germany's obligations under EC law.

<sup>11</sup>See *Streinz*, Bundesverfassungsrechtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht (abridged: Grundrechtsschutz), 1989, 247 et seq.

<sup>12</sup>The father of this famous concept is former constitutional court judge *Konrad Hesse*. See *Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. 1995, at No. 72, 28.

<sup>13</sup>For details see *Streinz*, Grundrechtsschutz, 1989, 247 et seq.



## 2. Autonomy and supremacy of EC law

As opposed to Art. 23 Basic Law, the EC treaties did and do not deal with the interface between EC and national law in any way. Rather, all related questions remained to be resolved by jurisprudence. To this end, the ECJ developed over the years the well-known doctrines of autonomy, direct effect, supremacy, pre-emption, direct effect of directives, directive-conforming interpretation ("indirect effect") and state liability. They can be reconstructed in terms of a supranational "conflict of laws", relying on the techniques elaborated in private international law.<sup>14</sup> As is known, all these doctrines became generally accepted by national courts, albeit after strong resistance by some French and German courts. These doctrines have brought about the "constitutionalisation of the treaties", thereby promoting integration even during years of political stagnation.<sup>15</sup> However, two elements of these doctrines turned out to be in potential conflict with national constitutions: the unlimited autonomy and supremacy of EC law.

### a) Autonomy

Already in the first years of the EC's existence, the ECJ defined its concept of the autonomy of the EC law:

"The conclusion to be drawn (...) is that the EC constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and which binds both their nationals and themselves."<sup>16</sup>

In the first place, the autonomy of EC law means that - like any international treaty - the EC treaties are principally not subject to restrictions by the internal law of the contracting parties. This is even true for requirements contained in national constitutions. In particular, the sole reference to the need for ratification in Art. 247 TEC can not bring about the reception of such national requirements into EC law. Thus, in the case *Internationale Handelsgesellschaft*,<sup>17</sup> the ECJ stated:

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the EC would have an adverse effect on the uniformity and efficacy of EC law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as EC law and without the legal basis of the EC itself being called in question. Therefore the validity of a EC measure or its effect within a MS cannot be affected by allegations that it runs counter to either fundamental rights as formulated by constitution of that State or the principles of a national constitutional structure."

<sup>14</sup>See C. Schmid, Vertical and diagonal conflicts in the Europeanisation process, Florence 1997 (forthcoming as a Commission document).

<sup>15</sup>Since *Les Verts*, case 294/82, ECR 1986, 1339, 1365 (confirmed in opinion 1/91, ECR I-1991, 6084, 6102), the ECJ refers to the treaties as the Community's constitution. As to the concept of constitutionalisation, see *Weiler's* classic, *The Transformation of Europe*, Yale L.J. 100 (1991), 2403.

<sup>16</sup>ECJ cases 26/62, ECR 1963, 1 - Van Gend & Loos; and 6/64, ECR 1964, 1250 - Costa/Enel.

<sup>17</sup>Case 11/70, ECR 1970, 1125.



Interestingly, Advocate General Warner advocated the contrary position, the so-called "Hypothekentheorie" (mortgage theory), some years later:

"The court has already said in general terms that it cannot uphold measures incompatible with fundamental rights recognized and protected by the Constitutions of MSS (...) I would be inclined to refine on this and to say that a fundamental right recognized and protected by the Constitution of a MS must be recognized and protected also in EC law. The reason lies in the fact that, as has often been held by the Court (...), EC law owes its very existence to a partial transfer of sovereignty by each of the MSS to the EC. No MS can, in my opinion, be held to have included in that transfer power for the EC to legislate in infringement of rights protected by its own Constitution. To hold otherwise would involve attributing to a MS the capacity, when ratifying the Treaty, to flout its own Constitution, which seems to me impossible (...)"<sup>18</sup>

However, in the *Hauer* judgement the Court strongly opposed this view by confirming its former opinion:

"As the Court declared in its judgment *Internationale Handelsgesellschaft*, the question of a possible infringement of fundamental rights by a measure of the EC institutions can only be judged in the light of EC law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular MS would, by damaging the substantive unity and efficacy of EC law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the EC."<sup>19</sup>

This view of the Court has remained unchallenged, and has ever since constituted the basis of its jurisprudence.<sup>20</sup> Moreover, the democratic homogeneity of the EC and its MSS and particularly the fact that the fundamental principles enshrined in Art. 79 III Basic Law are also acknowledged in the ECJ's jurisprudence do not mean that these principles are relevant to the EC in exactly the shape they have been given by the FCC.<sup>21</sup> The fact that the ECJ has often had recourse to national constitutional provisions in order to shape EC law (especially human rights) does not prove the contrary. For, in this sense, national constitutional law is not a legal source of EC law, but merely a "law-finding source". If EC law depended on the consent of 15 national courts, its uniform and efficient application would finally be impossible.

Beyond that, the ECJ and parts of the literature sustain the proposition that the EC has, either with its genesis or through the process of constitutionalisation of the treaties, emancipated itself from the national ratification statutes, i.e. cut the ties to its basis in public international and national constitutional law.<sup>22</sup> Already the statement in *Costa/ ENEL* in which the ECJ talked for the first time of an

<sup>18</sup>Case 7/76, ECR 1976, 1229, 1236 - Irca.

<sup>19</sup>Case 44/79, ECR 1979, 3727 at 14 - Hauer.

<sup>20</sup>See recently Case C-473/93, ECR 1996, I-3207, at 37 et seq. - Commission/ Luxemburg.

<sup>21</sup>This view is however held by the German author Eibach, *Das Recht der Europäischen Gemeinschaften als Prüfungsgegenstand des Bundesverfassungsgerichts*, 1986, 105 et seq.

<sup>22</sup>See Everling's famous essay: *Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?*, in: *Festschrift für Mosler*, 1983, 173 et seq. (190); *idem*, *Deutsches Verwaltungsblatt* 1993, 936 (942); for a similar view Oppermann, *Europarecht*, 1991, 196, at No. 525.

autonomous legal order and not any longer of a special order of international law, could be understood in this sense. In the literature, the "emancipation thesis" was mainly advocated by Ipsen in his famous "Gesamttaktstheorie" (collective act theory). Thereafter, the genesis of the EC system does not primarily depend on the national ratification statutes as in the case of ordinary PIL treaties. Rather, what is crucial is the German participation in the collective act establishing the EC which is based only on Art. 24 I GG and, for this reason, did not need to comply with the rest of the Grundgesetz, so that any problem of compatibility with it could not emerge at all. In the later jurisprudence, the emancipation perspective tends to underlie the ECJ's reference to the Treaties as the EC's "constitution", a term traditionally reserved for the "higher law" of a sovereign state. An even stronger indication in this direction can be found in the more recent first EEA-opinion whereafter a certain hard core of the treaties could not even be changed by the European legislator.<sup>23</sup> According to this view, the MSS are no longer the uncontested "masters of the treaty"<sup>24</sup>, and the EC is becoming a widely autonomous polity, its law being no longer subject to unlimited modification or control by the MSS. As a result, MSS could ensure the EC's respect for their Constitutions' limits to integration only collectively through legislative action, including those Treaty modifications the ECJ would still allow.

As far as the FCC is concerned, it is true that, in its jurisprudence, it has also ascribed to the EC system the quality of an autonomous legal order.<sup>25</sup> However, in substance, it denies a complete autonomy of EC law in this sense by maintaining the competence to control the constitutionality of EC law to be applied internally. This would not be possible, if the "bridge" (Kirchhof) of national statutes of ratification over which the judicial control over EC law is exercised by national constitutional courts would be cut. For, then, this bridge would have become a bridge in the Avignon style, on which the States may still wish to dance but which does not lead anywhere any longer.

### *b) Supremacy*

From the autonomous character of EC law, the ECJ has also deduced its supremacy vis à vis national law:

"The integration into the laws of each MS of provisions which derive from the EC and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal pro-

<sup>23</sup>Opinion, 1/91, ECR I-1991, 6084 at 6102.

<sup>24</sup>As to the various meanings of this concept see *Heintzen*, *Archiv des Öffentlichen Rechts* 119 (1994), 564.

<sup>25</sup>See BVerfGE 52, 293 (296); 31, 145 (173); 37, 271 (277).



visions, however framed, without being deprived of its character as EC law and without the legal basis of the EC itself being called into question (...)"<sup>26</sup>

The formula "domestic legal provisions, *however framed*" clearly shows that the ECJ has in mind a primacy of EC law with respect to any national law, including constitutional law. The ECJ's use of the term 'constitution' seems to confirm this conclusion as well. So, from the ECJ's perspective, supremacy would encompass the integration clauses of national constitutions and the limits to integration stated by them. However, if this were entirely correct, the EC could actually disregard these limits by adopting, under a majority regime, measures contrary to them; once the ECJ would have accepted a measure as compatible with EC law, the MSS would dispose of no other remedy against it. As will be shown in more detail, MSS should however have at their disposal a further device for the judicial protection of their Constitutions. This device will render necessary the limitation, to a certain extent, of primacy of European law over national constitutional limits to integration.

In the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Amsterdam,<sup>27</sup> the Council has expressed the view that subsidiarity and proportionality rationales cannot be drawn upon in order to limit the primacy of European law: "The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining of the *acquis communautaire* and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and EC law, and it should take into account Article F(4) of the Treaty on European Union, according to which *the Union shall provide itself with the means necessary to attain its objectives and carry through its policies*". However, this provision is not meant to limit the competence of control exercised by national constitutional courts by virtue of their constitutions.<sup>28</sup>

### 3. Consequences for the control of EC law by national constitutional courts

The premises of the irrelevance, in EC law, of national limitations to integration and of the unlimited supremacy of EC law are considered to imply that there is no scope for the review of EC law by national courts. Particularly, such a power would seem to be incompatible with the ECJ's position of ultimate umpire as to the interpretation and validity of EC law, as laid down in Art. 164-177 TEC.

This function of the ECJ is indeed indispensable to guarantee uniform application of EC law throughout the EC. Therefore, the reference procedure in Art. 177 TEC is particularly

<sup>26</sup>*Costa/Enel*, Case 6/64, ECR 1964, 586.

<sup>27</sup>See Treaty of Amsterdam, final version, CONF/4007/97, TA/P/d 28, No. 2.

<sup>28</sup>For a different view, see *Hasselbach*, *Juristenzeitung* 1997, 942. However, it should be noted that even an explicit statement by the Community legislator as to an unlimited primacy of European law would not change the constitutional conflict in any way, since its origin in national constitutional law would remain unaffected. Furthermore, German organs would not be allowed to vote for such a provision in the Council, since it would clearly violate Art. 23 Basic Law.

important, since it ensures that the ECJ is consulted before a potentially divergent interpretation of EC law by national courts. Within EC law, the ECJ's monopoly of interpretation clearly comprises the review of the Treaty's legislative competence provisions as well.<sup>29</sup>

From this perspective, if not the review procedure as such, at least the finding of a EC act as unconstitutional by a national court would clearly be in breach of EC law. It could be sanctioned by a treaty violation procedure (Art. 169 TEC) and other devices, including the imposition of a fine (Art. 171 TEC).

### III. A theoretical reconstruction of the conflict

The analysis in the last chapter shows that both positions are based on different conceptual premises and reach different results as to the degree of autonomy and supremacy of European law and the control competence of national constitutional courts according to a coherent reasoning. Thus, we seem to face a structural conflict which, by the means of positive law, can only be alleviated, but not resolved in all cases. However, a definitive opinion can only be delivered after a further analysis which transcends the internal perspective of each legal order and allows for an overall assessment in which the premises themselves of the two positions are critically reviewed. Such an analysis must go beyond positive law and resort to a theoretical reconstruction of the conflict. Only such an assessment will finally be capable of discerning the potential of both positions for conflict resolution and of developing, on that basis, a plausible proposal at the level of positive law.

<sup>29</sup>For a different, but unconvincing view, see *Schilling*, 37 *Harvard Int. L.J.* (1996), 389, 406 et seq. and *idem*, *Zeitschrift für Rechtsvergleichung* 1997, 96 et seq. According to Theodor Schilling, it is possible that a court of an international organisation which does not possess legislative *Kompetenz-Kompetenz* may well be endowed with judicial *Kompetenz-Kompetenz*, i.e. may well be the ultimate umpire with respect to the interpretation of legislative competence provisions. However, this judicial competence would include the power of deliberately exceeding the legislative competence of the organisation (!). In Community law, however, the existence of such a judicial *Kompetenz-Kompetenz* of the ECJ would be uncertain: Arts. 173-177 TEC might be relied on in favour of it, whereas Arts. 4 and 164 TEC would point against it. Now, this problem could be solved by according the ECJ only a "formal", and not a "substantive" judicial *Kompetenz-Kompetenz*: as a result, national courts would retain a substantive judicial *Kompetenz-Kompetenz*, which would ultimately allow them to review the ECJ's decisions on the interpretation of legislative competence provisions. This argumentation seems ill-founded. First, it is true that the Community is an order of limited competences and therefore, does not have legislative *Kompetenz-Kompetenz* (although one might read another conclusion into the ECJ's first opinion on the European Economic Area, Opinion 1/91, ECR I-1991, 6079, which would however be *ultra vires*). Secondly, however, it should be clear that the ECJ was given the power, in the interest of legal unity, to decide as the ultimate umpire also on competence issues. This power even includes very wide interpretations of legislative competence provisions, which might be considered as *ultra vires* by some, but, nevertheless, according to normal standards of public international law, are binding unless the transgression is essential and manifest (see, specifically on this problem, *Streinz*, *Grundrechtsschutz*, 1989, 324, text at fn. 177). Now, it is wrong to deduce from the competence of (even extensive) interpretation an explicit competence to *deliberately exceed* the bonds of limited legislative competences. Therefore, it is already not necessary to draw on Arts. 4 and 164 in order to justify a limitation of such a judicial *Kompetenz-Kompetenz*, since it simply does not exist. For this very reason, there is no need to differentiate between a formal and a substantive judicial *Kompetenz-Kompetenz* either. Finally, it seems self-evident that Schilling's view would be prone to destroy legal unity in the Community and therefore counteract the intentions of the fathers of the Treaty. - See also the convincing response to Schilling by *Weiler/Haltern*, 37 *Harvard Int. L.J.* (1996), 411, 423 et seq. For the origins of the concept of 'Kompetenz-Kompetenz', see *Lerche*, *Festschrift Heymanns Verlag*, 1995, 409.



The point of departure for this reconstruction must be the theoretical alternatives which exist with respect to the relationship of both legal orders: (1) EC law is only an annex of each national legal order in an overall monistic system; (2) the inverse situation: in a monistic system, EC law is supraordinated over national law, and finally (3) both legal orders stand in a dualistic juxtaposition. Now, for the sake of further analysis, the theoretical devices of a certain school must be chosen. In the present context, the devices of the Pure Theory of Law developed by Hans Kelsen, Adolf Merkel and their successors seems particularly well suited, since it is deliberately confined to the reconceptualisation of empirical phenomena, thus excluding as far as possible normative and especially ideological considerations.<sup>30</sup> Besides that, the devices of institutional legal positivism, developed by Neil Mac Cormick and Ota Weinberger,<sup>31</sup> were used in the literature. They will be included in this analysis, too.

### 1. Important basic concepts of the Pure Theory of Law

The Pure Theory of Law defines as a legal order an order of legal norms which has been recognised as a unity. The unity of this order is due to its deductibility to a common reason of existence, a (fictitious) *Grundnorm*. In this hierarchical structure, it is the highest rule for law-creation, which commands the validity of all subordinated norms. In such a chain of validity, the subordinated norm also commands, besides its other contents, the validity of the norm subordinated to itself. In this conception, the simplest solution for C law would be to derive it from the *Grundnormen* of the national constitutions of the founding countries (monism with supraordination of national law). Logically, it is also conceivable that, through a legal "revolution", i.e. the coming into existence of a new *Grundnorm*, EC law has emancipated itself from its national law base either right at the foundation of the EC or later on, and that it has taken its place above national law in a monistic system (monism with supraordination of EC law), or in juxtaposition to the latter (dualism).

However, according to Kelsen, besides the derivability from a common *Grundnorm*, a legal system presupposes that the efficiency of its norms is guaranteed through adequate sanctions. This requirement is based on the fact that a *Grundnorm* has a purely heuristic value. Thereafter, the recognition of a *Grundnorm* is only possible if a real system actually exists; for law is not created in the moment of its construction by legal science, but is given to it as a product of social and empirical processes.<sup>32</sup> So, what is needed is a constitution which, on the whole, is

<sup>30</sup>For a Pure Theory of Law reconstruction of supranationality see *Grussmann*, Grundnorm und Supranationalität, Rechtsstrukturelle Sichtweisen der europäischen Integration, in: v. Danwitz et al. (eds.), Auf dem Wege zu einer europäischen Staatlichkeit, 1993, 47; *Richmond*, Preventing the Identity Crisis, Law and Philosophie 1997, 377.

<sup>31</sup>*MacCormick/ Weinberger*, Grundlagen des Institutionalistischen Rechtspositivismus, 1985.

<sup>32</sup>*Dreier*, Sein und Sollen. Bemerkungen zur Reinen Rechtslehre Kelsens, in: *idem*, Recht-Moral-Ideologie, 1981, 217 (222).



efficient.<sup>33</sup> Drawing on Merkel, Wolf-Dietrich Grussmann however refutes this reasoning: The efficiency of an order of norms would only be an arbitrary criterion for the heuristic value of the assumption of its validity.<sup>34</sup> Only by foregoing this requirement, a theoretical analysis of old constitutions, with are no longer active at the moment of observation (e.g. Nazi or communist-GDR-law) would be possible.

This view must however be disputed. Law must, at least within the minimal bonds of the efficiency criterion, take into account its social background if it wants to be more than a theoretical castle in the air. In so far, an impure element has to be introduced into the Pure Theory of Law. This does not exclude the recognition of old constitutional orders, which are no longer efficient at present. Rather, their implications and "legacies" on the current legal order may be considered through intertemporal norms of conflict or other devices. The denial of the efficiency at the time of observation does not preclude a former efficiency somewhere in the past. Thereafter, in order to recognise EC law as a legal system, its efficiency has to be scrutinised. If it is declined, EC law can only be regarded as a subordinated annex of national law within a monistic overall order. As a consequence thereof, the ECJ would be subordinated to national courts, and their claim of competence to review EC law which is to be applied within a State would be justified.

## 2. Monism with supraordination of national law?

In two remarkable recent contributions, Marcel Kaufmann<sup>35</sup> and Theodor Schilling<sup>36</sup> have denied EC law an efficiency independent from national law, and therefore validity as an autonomous legal order.<sup>37</sup> The supranational legal order would not possess this quality, because it would prove inefficient in hard conflicts. Nearly all constitutional or supreme courts would reserve to themselves a control competence on grounds of constitutionality (resp. other important features of national law). Since the EC does not to a large extent dispose of its own administration and, therefore, has to rely on national administrations sworn to uphold their constitutions, EC law would not be able to impose itself over national law in cases of hard conflict. For this reason, only "nationalised EC law", i.e. EC law compatible with the criteria of validity of national law and therefore applied by national administrations, would be efficient. As a consequence thereof, EC law would remain integrated in the chain of validity of the legal systems to which it owes its very existence: the national legal systems. Thus, the relationship of the two legal orders could be qualified as monistic, national law being supraordinated

<sup>33</sup>Kelsen, *Reine Rechtslehre*, 2nd. ed. 1960, 196 et seq.

<sup>34</sup>Grussmann, *Grundnorm und Supranationalität. Rechtsstrukturelle Sichtweisen der europäischen Integration*, in: v. Danwitz u.a. (eds.), *Auf dem Wege zu einer europäischen Staatlichkeit*, 1993, 47 (50) drawing on *Merkel*, Hans Kelsens System einer reinen Rechtslehre, *Archiv des öffentlichen Rechts* 47 (1921), 171 (179).

<sup>35</sup>Kaufmann, *Der Staat* 1997, 521.

<sup>36</sup>Schilling, *Archiv für Rechts- und Sozialphilosophie* 1997, 568.

<sup>37</sup>Kaufmann, *Der Staat* 1997, 521 (540).

to EC law. This interpretation would have the further advantage that it allows for the use of the potentials of democratic legitimacy of the nation states for the EC. Beyond that, this view does not overlook the critique that it conceives of EC law as an - not necessarily uniform - appendix of the national legal orders. However, it wants to avoid the threat of splitting by means of the self restraint of national law, ordained in "opening clauses" like Art. 23 GG, which mandate national law to take into account the needs of the EC through a "practical concordance" balancing approach. Thus, conflicts of validity between the two orders could be avoided, and conflicts would remain in the sphere of law; the conflict decision would not require a choice between law and non-law. Finally, giving the German constitutional court the responsibility for European integration would mean putting it into good hands.

This view, which regards EC law as "außeres Staatsrecht" (external state law), does not match the European reality, though. For the strong position of the ECJ as the guardian of Community law, and especially the competences of the EC for sanctions vis-à-vis MSS who disrespect EC law or the fundamental values and principles of the community order (Art. 169-171 TEC and new Art. 7 TEU) guarantee a degree of independent efficiency to the European legal order, which cannot be neglected even in the case of hard conflicts. It is true that it is irrelevant, in this context, that the case of an avoidance of EC law by a national court has never happened so far, and that it is even a duty for national organs under national law to avoid it happening (since all national systems provide only for the membership in a stable community in which the rule of law is respected), since these circumstances do not prove that "non-nationalised" community law would be sufficiently efficient. However, it is decisive that, even if this case actually happened, the EC, disposing of the sanctions provided for in Arts. 169 et seq. TEC, would not be without any defense against the disobedience of its law. Apart from that, EC sanctions against a MS which fundamentally disobeys EC law, and thereby leaves the basis of the EC's self contained regime might, as *ultima ratio*, even be supplemented by national sanctions of other MSS (who would then act as a sort of trustor for the EC) pursuant to PIL.

Furthermore, a monism with supraordination of national law would presuppose that the EC is in principle vulnerable to any intervention by each MS, without having any defense. If a state decided to give up its constitutional self restraint with respect to the EC, no *legal* means would exist against this action. Thus, a MS could simply abolish the whole community with respect to itself by repealing the ratification statute; countermeasures according to Arts. 169 et seq. TEC would have to be viewed as "non-law" or at least as per se illegal, since they would not be compatible with the national *Grundnorm*; the EC would only exist by the grace of the MSS, and could not guarantee the essential uniformity of its law. As a result, the MS would have remained completely sovereign - which is a view that, since the last century, is not even held with respect to PIL, where only a monism with supraposition of international law or a dualism is advocated in the



literature<sup>38</sup>. This would clearly contradict reality once again. Moreover, by the assumption that the national legal order would be supraordinated to the EC one, the monistic theory blocks the only conflict solution available in practice: an equal cooperation between both orders and their courts. Finally, the argument according to which only a monistic model with supraposition of national law would allow for the use of the democratic legitimacy potentials of the nation states for the EC is misleading in two senses. First, in the normal case of nationalised Community law, these potentials could be made use of according to any model. Then, with respect to the structural peculiarities of the EC, the transfer of the legitimacy of the nation state to the Community level is not even sufficient in order to realise democratic conditions at EC level. Rather, autonomous EC devices must be drawn upon to supplement the nation state based democratic legitimacy of the EC. It would therefore seem overstated making the choice of a monistic model dependent on it.

To sum up, the assumption of a lack of efficiency and monistic subordination of EC law under national law is untenable because of the EC's independent competence in imposing sanctions. Having thus recognised the status of EC law as an autonomous legal order with its own *Grundnorm*, only two alternatives remain: Either EC law is supraordinated to national law at the peak of a monistic structure, or the relationship between both legal orders can only be conceived of as dualistic.

### 3. Monism with supraposition of EC law or dualism?

As stated above, the functional theory adopted by the ECJ postulates the complete autonomy of EC law from its constitutional and international law base, particularly from the national ratification statutes, and an unlimited supremacy of EC law over all national law, which would not be controllable by national courts. By stressing the autonomy of EC law, the Court does however not make a choice between a monistic model with supraordination of EC law *or* a dualistic model. It must be noted, though, that, logically, the autonomy of EC law in the sense of a juxtaposition of both orders - which would constitute a dualistic model - would not lead to an uncontrollable supremacy of EC law. Rather, such a model would continue to depend on a national norm opening its own legal order to community norms, a norm which could be controlled by constitutional courts like any other national law. Thus, in terms of the German legal order, the continuing validity of the ratification act which, together with Art. 23 GG, provides for its opening towards EC law, would be required. Supremacy of EC law would only exist pursuant to this constitutional authorisation.

By contrast, an unlimited and uncontrollable supremacy would logically only be possible within a monistic model, in which national law would be directly subordinated to EC law. Only then could EC law itself determine its unlimited suprem-

<sup>38</sup>See *Verdross/Simma*, *Universelles Völkerrecht*, 3rd. ed. 1984, 23 et seq.

acy over national law, and the control of national courts could be excluded. The statements of some German authors seem indeed to go into this direction: Arts. 23 and 24 would open the German legal order for a law from another source which does not depend on the continuing force of the ratification act, since EC law would impose itself pursuant to EC constitutional rules themselves.<sup>39</sup> Incidentally, in terms of legal theory, there is no difference between this version of the functional model and a purely federal model, in which state and federal law is also derived from a common *Grundnorm*.

Facing the choice now between a monistic model with supraordination of EC law and a dualistic model, it must be conceded that the former can hardly be proven in the face of the actual development of the EC and the Union.<sup>40</sup> An emancipation and supraposition at the foundation stage would presuppose that the EC was created by some sort of *pouvoir constituant*<sup>41</sup> as a federal state, or at least as some other form of autonomous polity - what Schilling called the "big bang theory" of EC law.<sup>42</sup> Such a theory is simply not tenable, since the foundation treaties have been concluded as normal PIL treaties and have been ratified as such by national parliaments. Conversely, with the establishment of a hierarchically superior system depriving them of their constitutional identity and sovereignty, the European nation states would have committed a clear and massive violation of their constitutions, which can hardly be implied from their action. Furthermore, as stated, even the ECJ was still explicitly referring to the PIL character of the treaties in 1962;<sup>43</sup> the term constitution was first used in 1986.<sup>44</sup> Thus, Schilling rightly criticises the "big bang theory" as a piece of legal metaphysics and an ex-post rationalisation of developments which were neither foreseen nor intended at the foundation of the EC.

So, at best, an evolution towards the supraposition of EC law may have taken place a long time after the conclusion of the treaties through the constitutionalisation process. But this hypothesis must be discarded as well. First, for reasons of legal certainty, one may rightly claim the need for a formal agreement of the MSS for such a far-reaching change of the EC's status.<sup>45</sup> But even if such a formal requirement were waived, any expression of consent by the MSS would seem to be crucial. There are, however, no such indications. In particular, no emancipation of

<sup>39</sup>See Everling, Festschrift für Bernhard, 1995, 1161 (1174 et seq.), relying also on Ipsen and Frowein.

<sup>40</sup>Simma, Netherlands Yearbook of International Law 16 (1985), 111 (127); Streinz, Grundrechtsschutz, 1989, 92 et seq.; Tomuschat, Europäische Grundrechte 1993, 489 (495); Blanke, Die öffentliche Verwaltung 1993, 412 (419); Scholz, Neue Verwaltungsrechtszeitschrift 1993, 817 (818); Kempen, Archiv des Völkerrechts 35 (1997), 275 et seq. The FCC's Maastricht judgement is also based on this view, see BVerfGE 89, 155 at 184, 190, 198 et seq.

<sup>41</sup>As to this concept in the Community context see Murswiek, Der Staat 32 (1993), 161.

<sup>42</sup>Archiv für Rechts- und Sozialphilosophie 1997, 570.

<sup>43</sup>Case 26/62, ECR 1963, 1 - Van Gend & Loos.

<sup>44</sup>Les Verts, Case 294/82, ECR 1986, 1339, 1365; confirmed in opinion I/91, ECR I-1991, 6084, 6102.

<sup>45</sup>Tomuschat, Bonner Kommentar zum Grundgesetz, Art. 24 at No. 48.



the EC has taken place by virtue of customary law since the majority of the constitutional or highest courts of the MSS do not in principle exclude control over EC law.<sup>46</sup> This is not only true for the German constitutional court. In France, the Advocate General has, in the famous *Nicolo* case before the Conseil d'Etat, even explicitly discarded the Kelsenian model of supraordination of EC law.<sup>47</sup> The same is also true for most other European constitutional or highest courts.<sup>48</sup> Beyond that, the recent evolution from the EC to the Union shows a considerable regression to PIL patterns of intergovernmental cooperation.<sup>49</sup> This is particularly true with regard to the structure of the 2nd and 3rd pillar of the Union, which - despite important transfers from the third to the first pillar - has been left unaffected as such by the Amsterdam Treaty. Finally, also this form of monism has to face the criticism that it renders impossible an equal cooperation between both legal orders and their courts as the only realistic form of conflict resolution.

As to the only logically remaining alternative, that is a dualistic interpretation of the relationship between both legal orders, it has, first of all, the advantage of keeping this way out of the conflict open. More importantly, however, this interpretation comes closest to the reality of two legal orders, which are visibly separated despite important interconnections and which are protected by two powerful courts, each of them having the last word with respect to all legal issues arising *within* each system. Pursuant to the dualistic logic, both legal orders constitute logically independent systems with two different *Grundnormen*. As a consequence, conflicts of validity between both orders are excluded by definition, whereas "conflicts of obligation" for individuals facing the equally justified claims for validity of norms emanating from the two orders are possible.

The theory of institutional legal positivism, founded by Neil MacCormick and Ota Weinberger reaches the same conclusion.<sup>50</sup> It conceives of law as a system, directed towards a coherent unity of norms, the existence of a legal order being regarded as a sort of "regulatory ideal". Since the actual enforcement of the legal order ultimately depends on legal institutions, founded and directed by norms, it may be qualified as an "institutional normative system". The interface between legal orders is regulated in each system by specific criteria of legal validity, as contained in so-called norms of recognition (Hart). An analysis of the interplay of the EC and national legal orders along these lines of institutional positivism first shows that both orders do not constitute one monistic system, in which EC law would be subordinated to national law (monism with subordination of EC law is not

<sup>46</sup>Streinz, Grundrechtsschutz, 1989, 128 et seq.

<sup>47</sup>Reprinted in EuGRZ 1990, 99.

<sup>48</sup>As to England see House of Lords in the *Factortame*-case, 3 CMLR (1990), 375 (380); for Spain see Spanish Constitutional Court, Declaration D 1-7-1992, XXXIII Jurisprudencia Constitucional 1992, 460 (472). An unlimited supremacy based on a hierarchical supraposition was only advocated by the Belgian Court de Cassation in the case *Le Ski* (EuGRZ 1975, 308); however, the new Cour d' Arbitrage claims again a limited competence of constitutional review, see *Bribosia*, Applicabilité directe et primauté des traités internationaux et du droit communautaire, Revue Belge de Droit International, 1/1996, 33.

<sup>49</sup>Streinz, Europarecht, 3rd ed. 1996, 35 at No. 112.

<sup>50</sup>MacCormick/ Weinberger, Grundlagen des Institutionalistischen Rechtspositivismus, 1985.



even discussed). Mac Cormick states: "[The monistic picture] does not square well with the fact that the effective legislature for the EC is the council of Ministers, whose members are identifiable only by reference to the place they hold according to state-systems of law; so EC powers of legal change and criteria of validity presuppose the validity of competences conferred by state-systems, but not themselves validated by EC law. More generally, the institutional theory of law insists on a degree of sociological realism, hence is not in the Kelsenian sense a pure theory. From this point of view, it is clear that institutions of state law look to the state legal order for confirmation of their competences, not treating this as contingent upon ulterior validation or legitimation by the EC; while reciprocally EC institutions look to the foundation treaties as sufficient for their validation. A pluralistic analysis is in this instance, and on these grounds, clearly preferable to a monistic one."

The dualistic interpretation qualifies the value of the concepts of "(full) autonomy" and "emancipation" of EC law from its base in constitutional and PIL. For, as we know since Triepel<sup>51</sup>, the relationship of ordinary PIL, including international treaties, and national law may also be conceived of as dualistic. Thereafter, the juxtaposition of national and international law, the latter possessing its own Grundnorm and thus full autonomy, would be nothing special at all. As a consequence thereof, the notions of "emancipation" and "full autonomy" are not helpful in legal theory. What matters then is only the differentiation between dualism and monism, and, within the latter, between subordination and supraordination of the legal orders involved.

Now, from the existence of two *Grundnormen*, some fundamental consequences concerning the reach of conflict norms ("bridging norms"), like in particular the supremacy rule, may be derived. According to the only theoretically possible conception, the primacy norm cannot change the dualistic structure itself - in other words, it cannot bring about a "legal revolution" through the annexion of a legal order under the *Grundnorm* of another. This means that the supremacy rule can only go as far the national *Grundnorm* allows it to go; i.e. EC law can only influence the national legal order in so far as national constitutions allow it to do so through their opening clauses. In the case of German law, the admissible degree of influence is, as shown, determined by the interpretation of Arts. 23, 79 III in the sense of a practical concordance balancing, taking into account the peculiarities and needs of the EC. All in all, these provisions render possible a far-reaching, but not unlimited, "intrusion" of EC law into the national legal order. As opposed to a monistic construction with the subordination of EC law, though, the possible influences of national law on EC law are not unlimited either.

The institutional legal positivism advocates a similar restriction of supremacy: "(...) The legal systems of MSS and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity, within the criteria of validity proper to distinct systems, do not add up to any sort of all-purpose superiority of one system over another. It also follows that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate (...) What

<sup>51</sup>Völkerrecht und Landesrecht, 1899.

For the concrete possibilities of avoiding and, if necessary, resolving conflicts, important basic implications may be derived from the dualistic model.<sup>53</sup> First, it entails that there is no hierarchical sub- or supraordination between both legal orders. Thus, both may not try to subject each other, but have to respect their mutual relative autonomy. Furthermore, the ECJ must recognise that parts of its premises are inconsistent: As shown, supremacy ends where "Grundnorm-related" constitutional essentials of the MSS are stake. In such a case, a solution may only be found through cooperation, in which the two judiciaries have to agree on a constitutional standard (e.g. in human rights protection) acceptable for both; this will be called "concordance solution" here. Instead of a blind octroi of supremacy, the colliding principals have to be optimised so that each will retain a maximum of efficiency.<sup>54</sup> It is the best solution, which can claim a maximum of legitimacy. As will be shown, these principles are not only a command of reason (which could not justify the abandonment of cogent legal premises anyway) or a purely theoretical deduction from the dualistic model. Rather, they can be found in European and national positive law as well. In the following analysis, it will be shown that the FCC and the ECJ have not yet exhausted the existing potential in order to avoid conflict.

If, however, a concordance solution along the lines just described were to fail, the legal resources are, contrary to what is generally assumed, still not exhausted. For then, if one were not to think that the conflict should be deliberately left open for tactical reasons, one might still try to resort to a PIL approach of conflict resolution, consisting of conciliation, i.e. mediation and arbitration.<sup>55</sup> While being primarily legal - and not political - *these devices share the specific feature that their results are only persuasive and not necessarily binding within the involved legal orders.* Thus, at the end of the day, a conciliation device might bring about (only) an intermediary solution between monism and dualism.

Moving back now to the level of positive law, the remainder of the article explores to which extent these lessons from legal theory can be realised with the help of the existing legal devices in both national and EC law.

#### IV. Conflict-avoidance capacities of national constitutional law

On the basis of the divergent perspectives of the ECJ and national constitutional law, the capacities of national law are confined to procedural devices of conflict avoidance. First, a finding of a European act as unconstitutional must be

<sup>53</sup>For an earlier similar view see Heintzen, AöR 119 (1994), 564 (583ff.).

<sup>54</sup>See Alexy, *Theorie der Grundrechte*, 2nd ed., 78 et seq.; 152.

<sup>55</sup>These two notions are often not distinguished in the literature. Here, conciliation is used as a general term encompassing both mediation and arbitration. Whereas mediation, typically meaning a conciliation procedure by a representative of a third state, which may even have its own interest in the case, is more politically oriented, arbitration consists of the conciliation by a neutral body like a commission, often composed by international lawyers. Thus, the solution to be proposed here is closer to arbitration. However, the general term conciliation will generally be used here.



this indicates is that acceptance of a pluralistic conception of legal systems entails acknowledging that not all legal problems can be solved legally."

#### 4. Implications of the dualist model on a conflict resolution

The theoretical reconstruction permits a critical evaluation of the well-foundedness of the above-mentioned different premises of the ECJ and the German Constitutional Court, which form the basis of the conflict. From this evaluation, important implications for the resolution of constitutional conflicts will be derived, which, in a further step, will be realised with the devices available under positive law as it stands.

First, the reconstruction shows that the ECJ's postulate of an unlimited supremacy is logically inconsistent from a dualistic or a monistic perspective with supraordination of national law. The only model which would logically allow for such a far-reaching influence on national legal systems, monism with supraordination of EC law, does not correspond to the legal and social reality of the European order. According to the dualistic model advocated here, the postulate of the FCC of being the ultimate umpire regarding EC law which is to be applied within the national legal order is, in principle, justified. As will be shown, however, this competence in positive law comprises first of all only the competence to examine constitutional incompatibilities, and not to set aside European law without taking any further preliminary steps. Furthermore, under a dualistic model, Mac Cormick's conclusion that not all legal problems can be solved legally is also correct in principle. However, it does not mean that such conflicts can only be solved politically. Rather, a dualistic structure in which "conflicts of obligation" for citizens emerge on a regular basis would hardly be viable. This is the clear consequence of Kelsen's famous quotation from the bible, that no one can serve two masters.<sup>52</sup>

Instead of resorting too early to a political solution, law must first try to find an "intra-legal" solution. Generally, this may be achieved by trying to avoid or, if these efforts fail, to resolve conflicts. In this context, it should be noted that even the resolution of legal conflicts between several legal orders is a genuinely legal task. This should be particularly true for the EC since, in the face of a smaller degree of political consensus, law in the EC was always more important than politics. The "intra-legal" character of the task of conflict resolution is clearly shown, inter alia, by the existence of a whole legal discipline devoted to the resolution of conflicts between different national legal orders: private international law. To sum up, it may be assumed that conflict resolution is a legal task and that the lack of a resolution mechanism brings to light a weakness of the EC system, but does not cast doubt on the "intralegal" qualification of such measures. This means that, in the EC context, all legal devices for conflict resolution have to be exhausted before a political solution may be resorted to.

<sup>52</sup>Matthew VI, 24; see Kelsen, *Reine Rechtslehre*, 2nd. ed. 1960, 330.

reserved to the FCC in an analogous application of Art. 100 Basic Law.<sup>56</sup> This can be justified by the (at any rate) quasi-constitutional character of the European Treaties and the need for legal certainty, with which a review competence of instance court judges would be incompatible. Second, it must be ensured that the ECJ has had the opportunity to give an opinion on any relevant issue of the case at stake. Thus, before the finding of a European act as unconstitutional, the FCC is generally compelled to refer the matter to the ECJ pursuant to Art. 177 para. III TEC.<sup>57</sup> This is so even if another national court has already referred the same matter to the ECJ before, but a new important legal issue has arisen in the meantime.

Thus, in the Banana case, if the FCC were to hold the EC Banana regime at odds with Art. 24 GG, it would have to refer the case once again to the ECJ, since the latter has not yet given an opinion on the status of WTO dispute settlement resolutions in EC law, particularly as to its potential direct effect.

Lastly and most importantly: The balancing of the relevant constitutional criteria - the task of bringing about integration on the one hand and all other constitutional principles and values including human rights and respect for the competences on the other - shows that judicial self restraint as to a *general control for structural flaws* is possible. This is exactly the approach chosen by the FCC in the Solange II-decision<sup>58</sup> and (probably) confirmed by the reference to the "cooperation"<sup>59</sup> between the ECJ and the FCC in the field of human rights protection in the Maastricht judgement. So, a more or less contingent violation of constitutional essentials in a single case can still be accepted. Only if the ECJ shows structural weaknesses<sup>60</sup> - e.g. the methodologically completely unsatisfying control of human rights in the Banana judgment<sup>61</sup> - that are likely to produce divergent results in a variety of cases, can the control be effectuated. However, as was the case in the Banana conflict, whenever the review under European and national human rights standards leads to different outcomes, a "structural flaw" which would require constitutional review is likely to be found. So, in the end, a

<sup>56</sup>According to Art. 100 Basic Law, any national instance court judge must suspend a pending proceeding and refer a national parliamentary statute for constitutional review to the Federal Constitutional Court, if he or she is convinced of its incompatibility with the Basic Law and if such a finding would be relevant for the outcome of the case at issue (the so called "incidental control procedure" - konkrete Normenkontrolle). So, as a matter of fact, no instance court judge may decide on the constitutionality of a statute (as opposed to regulations and provisions enacted by the executive) - the Federal Constitutional Court has the monopoly of constitutional review.- In favour on the analogous application of Art. 100 GG, see *Grimm*, *Recht der Arbeit* 1996, 66 (70) = 3 Columbia J. of European Law, 229.

<sup>57</sup>See *Streinz*, *Europarecht*, 3rd ed. 1996, 65 at No. 217a.

<sup>58</sup>BVerfGE 73, 339 (374 et seq.) - Solange II.

<sup>59</sup>However, the term 'cooperation' is rather euphemistic in this context. More or less, it means that the FCC leaves the daily business of adjudication to the ECJ, but reserves itself the right to intervene on constitutional grounds whenever it deems necessary.

<sup>60</sup>For methodological differences in the examination of human rights violations see *Nettesheim*, *Europäische Zeitschrift für Wirtschaftsrecht* 1995, 106, and *Streinz*, *Grundrechtsschutz*, 1989, 365 et seq.

<sup>61</sup>For details, see *Everling*, 33 CML.Rev. (1996), 401, 423 et seq.



certain potential for conflicts cannot be excluded *de lege lata* by national constitutional law.<sup>62</sup> However, as will be shown below, the actual exercise of constitutional control can be smoothed out by principles borrowed from PIL.

## V. A new EC and PIL approach for avoiding and resolving conflicts

EC law, as opposed to national constitutional law, not only contains strategies for avoiding conflicts but also more far-reaching devices to solve conflicts. Substantive and procedural instruments may be distinguished. The point of departure is the duty of EC institutions to respect the essentials of national constitutions (1). This allows for a convergence of substantive standards which will render conflicts less likely to become acute. If however such a converging interpretation should not be achieved, one faces the question of whether to simply leave conflicts open, thereby continuing the present Cold War scenario, or to search for a conciliatory solution (2). If the latter decision is taken, the conditions of admissibility for gap-filling in EC law and for the recourse to PIL in particular will have to be examined (3). As these can also be complied with, a PIL solution will be expounded in detail (4) and, with the necessary adaptations, transposed to EC law (5). After that, the implications of this solution for EC law, PIL, national constitutional law and legal theory will have to be examined (6). Finally, the possible critique that this approach consists of a too far-reaching constitutional reform in "PIL clothes" will be countered (8). Following this line of reasoning, first of all, the conflict avoidance potential immanent in EC law and its procedural implications will be examined.

### 1. Chances and limits of a concordance solution

#### a) *The solidarity duty pursuant to Arts. 5 TEC and F I TEU*<sup>63</sup>

Art. 5 TEC, included in the TEC at the request of the German delegation,<sup>64</sup> is

<sup>62</sup>See *Grimm*, *Recht der Arbeit* 1996, 66 (71) = 3 *Columbia J. of European Law*, 229 (241 et seq.); dissenting *Hirsch*, *Neue Juristische Wochenschrift* 1996, 2457. However, ECJ-judge *Günter Hirsch* does not deny the conflict potential as such. Rather, he wants to render impossible the outburst of a conflict by propagating a further judicial self restraint in the sense that even the review of the standards set out in Art. 79 III Basic Law should not be undertaken on a case to case basis, but should be confined to "structural flaws". According to him, Art. 79 III Basic Law would only guarantee the indispensable minimum of democratic legitimation and legal protection. However, such a restrictive interpretation of the provision seems to be incompatible with the unlimited obligation of all German organs to respect the basic rights enshrined in the Grundgesetz (Art. 1 III Basic Law, to which Art. 79 III refers) and the role of the FCC to monitor the respect of the Grundgesetz in each single case (see Art. 92 Basic Law). In addition, reactivating the FCC's task of control only in the case of major structural flaws would bear the risk that then, the constitutional order could already be *politically* changed in a *legally* irreversible way. This, however, is exactly a mischief Art. 79 III GG has the task to avoid.

<sup>63</sup>It should be noted that such a duty might also be derived from the subsidiarity principle which might be viewed as broad enough to encompass the obligation for Community institutions to respect, whenever possible, common or specifically national constitutional values (*de Witte*, *Legal Issues in European Integration* 2 (1991), 1 (20)). However, in the Protocol annexed to the Amsterdam Treaty mentioned above, the MS have pre-empted such an interpretation of the principle. Furthermore, this author believes that Arts. 5 TEC and F I TEU are the more appropriate *sedes materiae* of a cooperation and solidarity duty than the all-purpose subsidiarity principle, so far never applied by the Court.



continuously referred to by the ECJ as a general clause to deal with all kinds of legal problems arising between the EC and its MSS. Three directions followed by the ECJ in the concretisation of this provision are relevant in the present context. The first is the deduction of *genuine legal duties which have partly been put into highly concrete terms*. Thus, the principal duty to take appropriate measures to ensure the fulfilment of treaty obligations and to facilitate the achievement of the EC's tasks is construed widely so as to include ancillary duties necessary for its efficient implementation.<sup>65</sup> Second, Art. 5 TEC was relied upon in the elaboration of the *general doctrines as to the relationship between EC and national law*. So, as stated, recourse to this provision has been made in the elaboration deduction of the supremacy doctrine. Also the duty of directive-conforming interpretation (by some called "indirect effect")<sup>66</sup> and the European principles on state liability were partly based on Art. 5 TEC.<sup>67</sup> Finally, since the middle of the 80s, the ECJ has *extended Art. 5 TEC to include also duties of the EC with respect to the MSS*.<sup>68</sup> Also here, highly "concretised" duties have been developed, e.g. the Commission's duty to pass all information relevant to the application of EC law to national courts, including the production of documents requested by a national court and the examination of a Commission official as a witness before a national court.<sup>69</sup>

To counteract the fear of an omnipotent Union and a creeping "destatisation" of the MSS, the duty to respect the national identities of MSS was introduced in Art. F I of the Maastricht Treaty.<sup>70</sup> The ambiguous term "national identity" does not mean any sort of national seclusion in the present context.<sup>71</sup> Rather, it is to be construed in the sense of a respectful attitude towards the basic structures and institutions of a state, the choice of all MSS for European integration being how-

<sup>64</sup>Blanquet, L'article 5 du traité, 1994, 8; on Art. 5 TEC in general see also Mortelmans, MJ 5 (1998), 67.

<sup>65</sup>Thus, the ECJ deemed the enactment of a national budget law to be necessary, when Community law required certain financial means to be devoted to a certain scope (Case 6/73, ECR 1973, 161 - Commission vs. Italy) Another such ancillary obligation is the duty to recover unlawful state aid regardless of internal provisions on limitation (Case C-24/95 of 20/3/1997 - Alcan). Furthermore, the ECJ even postulates that the duty of efficient implementation of Community law encompasses the duty of States to foresee appropriate sanctions with dissuasive effect: see comprehensively Steindorff, EG-Vertrag und Privatrecht, 1996, 303 et seq.

<sup>66</sup>Cases 14/83, 1984 ECR 1891 - von Colson, and 106/89, ECR I, 4135 - Marleasing. See Brechmann, Die richtlinienkonforme Auslegung, 1994, 31 et seq.

<sup>67</sup>Cases C-6/90 und C-9/90, ECR 1991 I, 5357 - Francovich; see furthermore Cases C-46/93 und C-48/93, Slg. I-1996, 1029 - Brasserie du Pecheur und Factortame III, in which state liability was extended from the incorrect implementation of a directive to any manifest and essential breach of EC law. See for an overall view Herdegen/Rensmann, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 161 (1997), 522.

<sup>68</sup>Case 230/81, ECR 1983, 255 - Luxembourg vs. Parliament; Case 94/87 - Commission vs. Deutschland, ECR 1989, 175, 192. Zusätzlich läßt sich eine solche Verpflichtung der Gemeinschaft gegenüber den Mitgliedstaaten aus dem Grundsatz der Funktionsfähigkeit der Gemeinschaft ableiten, vgl. Streinz, Grundrechtsschutz, 1989, 33 et seq.

<sup>69</sup>Case 2/88, ECR 1990, I-3365 und 4405, Zwartfeld I and II.

<sup>70</sup>As to the genesis of this provision see Hilf, in: Gedächtnisschrift für Grabitz, 1995, 157 (160 et seq.).

<sup>71</sup>See Hilf, in: Grabitz/Hilf (ed.), Kommentar zur Europäischen Union, 1995, Art. F EUV, at No. 7 et seq.

ever one of these. Accordingly, it is claimed that the EC may not adopt measures which intrude disproportionately into the realm of MSS<sup>72</sup> - maxims as yet difficult to put into concrete terms.

The solidarity and cooperation duty in Art. 5 TEC has been legitimately viewed as the entrance gate of national constitutional law into EC law by academic literature even though the ECJ has never made a statement in this sense.<sup>73</sup> However, the extension of this duty to national constitutions has become irrefutable by the expressly stipulated command to respect national identities of MSS contained in Art. F I TEU. For in the case of states based upon a written or unwritten *legal* constitution (which is true for all MSS of the EC), the constitutional identity,<sup>74</sup> comprising the main features of a constitution, must be qualified as an important component of the national identity.<sup>75</sup> Even though Art. F I TEU may have been largely intended as symbolic legislation<sup>76</sup> with the purpose of appeasing MSS, it would appear unjustifiable not to take its clear wording seriously. Thus, the duty must not be interpreted as a purely programmatic maxim without any legally binding value, and its scope must not be restricted to, say, cultural matters. Furthermore, it would seem untenable to exclude the protection of national constitutional identities from the scope of Art. 5 TEC and to determine in this sense, by application of the *acquis*-safeguard clause contained in Art. M TEU, the interpretation of Art. F TEU as well. It is true that the ECJ has ever since confined itself to the elaboration of independent and uniform European constitutional standards, in particular in the area of human rights. However, as shown in the theoretical reconstruction above, this interpretation of the treaties is *ultra vires* in so far as it does not guarantee the respect of national constitutional essentials (as shaped by the competent national courts); for it goes beyond the reach of the supremacy doctrine under a dualistic model. To put it differently: As opposed to the important judicial development of European constitutional standards in particular in human rights, the possible disrespect, by EC organs, of national constitutional essentials can not be recognised as a valid *acquis communautaire* which would be relevant for the interpretation of the TEC according to Art. M TEU. So, all in all, no argument can be made in favour of the exclusion of constitutional identity from the scope of Art. F I TEU. As a consequence thereof, Art M TEU may now be drawn upon just in the opposite direction: In order to avoid that the standard of protection of national identity is higher under Art. F I TEU than under Art. 5 TEC, the latter provision must be interpreted as to include constitutional identity

<sup>72</sup>Hilf, in: Grabitz/Hilf (ed.), Kommentar zur Europäischen Union, 1995, Art. F EUV, at No. 17.

<sup>73</sup>V. Bogdandy, in: Grabitz/Hilf (ed.), Kommentar zur Europäischen Union Art. 5, at No. 82; Bleckmann, Europarecht, 6th ed. 1997, 255, 71 et seq.; Streinz, Europarecht, 3rd ed. 1996, 46, at No. 142.

<sup>74</sup>See Kirchhof, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts I, 1987, 775 et seq.; Lerche, Europäische Staatlichkeit und die Identität des Grundgesetzes, in: Festschrift für Redeker, 1993, XXX.

<sup>75</sup>See de Witte, Legal Issues in European Integration 2 (1991), 1 (20): "the fairly vague notion of 'national identity' might become legally relevant by referring to the constitutions as the depositary of national identity".

<sup>76</sup>As to this concept see Deckert, Folgenorientierung in der Rechtsanwendung, 1995, 24.



as well. As a result, one may duly claim under both provisions that the EC is bound to take into account constitutional problems of the MSS and to collaborate with them in a constructive way in order to avoid conflicts. In particular, the principles constituting the constitutional identity of a MS should remain un-touchable for the Union.<sup>77</sup>

For the precise definition of the contents of its national identity, the autoportrait of a state must in the first place be decisive. For a hard core of societal, cultural and legal values and norms can only be credibly protected if a state itself may decide what is part of it. Thus, in conflict of laws-terms, Art. F I TEU may be regarded as a '*rattachement* for the sake of qualification' (Qualifikationsverweisung), which calls upon national law to decide on the concretisation of the notion of identity. It must be noted, however, that part of the national identity is also the membership in a supranational community, which, in turn, can only exist if the nation states accept a delimitation of their national sovereignty, including the far-reaching supremacy of European law over national law. As a result, Art. F I may duly be read as a formula of "concordance" similar to Art. 23 GG. The material premises of both legal orders can therefore be said to be nearly identical, which should greatly facilitate a "concordance solution" of conflicts.<sup>78</sup>

#### *b) Procedural implications*

Despite the substantive convergence just expounded, the procedural implementation of the identity guarantee does not seem to be easy. First, it is no problem that Art. F TEU is not under the jurisdiction of the ECJ (Art. L TEU) - which reflects the concept of the Union as an association of the MSS being designed to contain the supranational Communities. For the ECJ can, indirectly, give rulings on the scope of Art. F I TEU by integrating it into the interpretation of Art. 5 TEC. This is even obligatory since, as shown, the constitutional identity of MS is

<sup>77</sup>This was also the perspective adopted by the Federal Constitutional Court in the Maastricht decision (BVerfGE 89, 155 (184), when it stated that the majority principle was limited by constitutional principles and fundamental interests of the Member States. In saying this, the Federal Constitutional Court seemed however to imply that, in these cases, the majority rule shall be suspended in favour of unanimity. It seems overstated, though, to base such an incisive change in the institutional structure of the Community only on Art. 5 TEC.

<sup>78</sup>In substance, this solution is comparable to the one proposed by *Phelan* (Revolt or Revolution: the Constitutional boundaries of the EC, 1997, 417 et seq.). Thereafter, in order to prevent a dangerous revolt or revolution (also understood in the sense of the subordination of the national legal order under a new *Grundnorm*), a new norm should be introduced into EC law: 'The special type of rights embedded in national constitutions which are considered by the national courts to express basic principles concerning life, liberty, religion, and the family, to have as their interpretative teleology a national vision of statehood and morality, and to be fundamental to the legitimacy of the national legal order and the preservation of its concept of law take precedence over EC law within their field of application.' This norm should be supervised by national courts, and not by the ECJ (op. cit., at 417). However, apart from the fact that its adoption is politically quite improbable, this formula, clearly inspired by the Irish abortion case, is not exhaustive with regard to economic national constitutional rights like the guarantee of property or the free choice and exercise of a profession (which were found to be violated by the EC Banana regime). Finally, its postulation only *de lege ferenda*, does not account of the reach *de lege lata* of Arts. 5 TEC and F I TEU, as expounded here. On *Phelan*, see also *MacCormick*, 18 Oxford J. of Legal Studies (1998), 517.



protected by Art. 5 TEC in the same way as by Art. F I TEU, which explicitly orders such protection. As shown, the inclusion of constitutional identity of MS is also possible through the construction of "multilateral extension" of Art. 5 TEC.

Now, if the wording of Art. F I TEU is to be taken seriously, the protection of the constitutional identity of a MS through the ECJ via Art. 5 TEC must go much further than in the present jurisprudence, which is exclusively concerned with the elaboration of uniform European constitutional standards. For an efficient protection is only possible, if the elements of national constitutions considered by the highest national courts as "identity-relevant" are taken into account directly by the ECJ. This includes national human rights, even in so far as they are different from European human rights as shaped by the jurisprudence of the ECJ. As a consequence thereof, it seems essential that the ECJ considers national jurisprudence directly, and integrates it into its decisions. This does not mean that this court would have to respect national constitutional standards in any single case. Rather, according to the "concordance" approach described above, it must also consider the needs of the EC in this balancing procedure; thus, if it gives good reasons for why a certain national constitutional standard is not appropriate at EC level, the ECJ might of course reject it. Even though, in this way, the national constitutional standard would not always be fully respected, an explicit discussion of the jurisprudence of national constitutional courts might considerably improve the cooperation between both judiciaries, since it would engage them in a specific problem-related discourse. This might be another means for the rationalisation and de-escalation of conflicts.

*c) In particular: The reach of the ECJ's jurisdictional competence*

From the dualistic model, it may be deduced that the ECJ is not the ultimate umpire for the decision of "identity-relevant" conflicts *in application of the supremacy doctrine*. First, one must first bear in mind that such a judicial competence was not provided for at all by the treaties; under Art. 177 TEC, the ECJ was only given the task to guarantee the uniform application of EC law. With the elaboration of the supremacy doctrine, though, the ECJ automatically received the competence to enforce it and, thus, to decide conflicts with internal law. This task was taken over by the ECJ with the tacit approval of the MSS, and may probably be qualified as customary law in the meantime. However, in the case of "identity-relevant" conflicts, the ECJ's competence cannot be exhaustive. For just as, in a dualistic system, the supremacy rule must be limited, and cannot bring about the annexion of a legal order under the *Grundnorm* of another, the competence of the guardian of the supremacy rule, the ECJ, must also be limited. Thus, by virtue of the supremacy doctrine, this court has no competence to sit as the ultimate umpire over "identity-relevant" conflicts.

However, this is not the whole story. According to the principle of practical concordance read into Arts. 5 TEC and F I TEU, a mediation between national and community constitutional standards must take place, which would of course be a

task of the ECJ. Correspondingly, the scope of the ECJ's judicial competence *flowing from this mediation task* must be determined. First of all, it is clear that, in order to comply with this task, the ECJ would have to abandon its role as the motor of integration and the guardian of the treaties at least in "identity-relevant" cases. Rather, it would have to act as a true *Cour d'Arbitrage*, in other words as a genuine constitutional court, being placed over both the Communities and the MSS. As stated, this would mean that the ECJ takes into account explicitly the national constitution involved and its concretisation through the competent national constitutional court.

A duty to take into account *all* national constitutions of MSS would apply to judicial lawmaking. There, the ECJ could not act as a conciliation body whenever national courts regard a "judicial construction" e.g. on state liability as unconstitutional. For in this case, the ECJ would clearly act as a judge in its own cause, which is inadmissible pursuant to a universal legal principle.<sup>79</sup>

If the ECJ were really willing to act as a conciliation body along these lines (which does not seem probable at the present stage), it would at least be illoyal for a MS to deny authority to a ECJ conciliation decision by drawing on the dualistic model and the limited reach of supremacy. Rather, it would be entirely up to the MS in question to show why its constitutional identity is not sufficiently protected even though the ECJ has explicitly taken it into account in its decision. However, if a MS constitutional court were really able to give good reasons for an ongoing massive lack of protection (for which, in the absence of a competent organ to decide on this question, a not manifestly unfounded *bona fides* declaration must be enough), the jurisdiction of the ECJ has reached its limits. For as shown, under a dualistic model, the ECJ must be regarded as a part of the EC legal order, and cannot be qualified as a third and higher institution with the competence to decide constitutional conflicts as the last umpire. In other words, the task of a Community organ of conciliating conflicts may not be equated with a monistic subordination of the national legal order.

To sum up: As long as the ECJ refuses to act as a conciliation body and to protect national constitutional identities or such protection is clearly inadequate in the eyes of the competent national constitutional court, there exists a serious gap in the EC system with respect to the procedural implementation of Arts. 5 TEC and F I TEU. In the remainder of this article, it will be analysed whether and how this gap might be filled.

## 2. After the failure of a concordance solution

Now that it has been ascertained that the ECJ is not competent to decide "identity" conflicts as the last umpire, one has to make a choice between the alternatives of deliberately leaving the conflict open for tactical reasons, or of developing a conciliation solution which could only be found outside EC law.

---

<sup>79</sup>Streinz, Grundrechtsschutz, 1989, 322 et seq. (324).



The option of deliberately leaving the conflict open may at first glance be a surprise, but it might well be justifiable in the EC context. With respect to the lack of political consensus, the viability of the EC depends to a large extent on the good and efficient functioning of the European judiciary. With the establishment of a conciliation procedure the latter's position might be considerably weakened. It is clear that once the procedure is established, it would also be used by the MSS in order to achieve a more efficient protection of their constitutions, and the threat to use it would probably always be present even in Council deliberations. By contrast, in the current Cold War situation, the ECJ's position is more stable by virtue of the rationale of dissuasion, that setting aside a EC act would constitute a dangerous first blow, capable of destroying the EC. Therefore, a conciliation solution would have a big impact on the balance of institutional powers in the EC. With respect to that alternative, one might conceive of the present (albeit wrong) claim to unlimited supremacy, and the continuation of the Cold War between the courts as the smaller evil.

However, these reservations are plausible only at first sight. For an highly integrated community aiming at an ever closer union of its MS, a Cold War style relationship between the highest courts on both sides is unacceptable in the long run. Not only does it seem to poison even the personal atmosphere between the judges,<sup>80</sup> it is not even definitively able to allay a dangerous first blow by a national court setting aside a EC act. Up to now, the dissuasion scenario has only worked as an expedient. Beyond that, it is very unfortunate for the political and legal stability of the EC if even issues of minor economic concern like the Banana conflict, are capable of destroying its legal unity and, thus, of endangering the European peace order in the last instance. What seems to be needed is another forum in which conflicts which could not have been avoided through a concordance solution by the two judiciaries can be conciliated.

Whereas the German constitutional court, which is usually considered the most dangerous rival of the ECJ, seems to be perfectly aware of the stakes of legal unity in Europe (which is clearly shown by its "bark, but do not bite" strategy), the danger of a first blow would seem to be particularly high after the Eastern enlargement of the EC. Firstly, the legal orders of the East European candidates for membership are far less stable and show a lesser substantive convergence with respect to the further developed West European legal orders, which renders conflicts more likely and decreases the chances of a concordance solution. Beyond that, East European States seem primarily attracted by the economic wealth of West Europe, whereas they seem to be less aware of the geopolitical necessity of limiting one's own - only recently recouped (!) - sovereignty in favour of a supranational community, a conviction which most West European States seem to share. Under these conditions, it may seem quite plausible that a new or recently strengthened East European Constitutional Court will prove an overzealous pupil of the West European Constitutional Courts by actually setting aside, along the doctrinal lines developed by them in detail, a EC act as being fundamentally incompatible with its own economic interest, for example in agriculture or mining.

<sup>80</sup>See Everling, *Gedächtnisschrift für Grabitz*, 1995, 57 (72).

From the perspective of democratic theory, one might also approve the intervention of a third conciliation instance. However, right at the outset, the caveat must be expressed here that the question of whether, and how, a functioning democracy may be realised at EC level is one of the classical subjects of contemporary legal and political science research that can only be vaguely touched upon in the present context.

In the first place, it must be conceded that, in the European multi-level governance system, there is no traditional demos, and the ordinary conditions for its realisation (particularly intermediary structures like European parties, associations, citizens' movements and communication media) are largely absent. As a consequence, a traditional input-oriented, i.e. identification-based democracy, in which even massive redistributory measures were acceptable, is hardly realisable. Since, however, the problem-solving capacities of the nation states are no longer sufficient, there is no alternative to the further development of efficient supranational structures. This also means that efficient alternative concepts for the realisations of democratic conditions should be developed. These should not be purely output-oriented, i.e. result-dependent concepts, but also alternative input-concepts. Among them, the concept of deliberative supranationalism, which does not presuppose a largely uniform European demos, is probably the most prominent one. Its principal aim consists of establishing the conditions for "external and taming deliberative political processes between institutional actors and societies",<sup>81</sup> in which the best political solutions win the race because of their rational superiority. Under this perspective, even the competence of national constitutional courts to examine the constitutional compatibility of European acts (as opposed to the competence of setting aside such acts) seems useful, since it can initiate a fertile inter-institutional process of deliberation. A final decision by a third instance triggered by national constitutional courts might also seem desirable in order to maintain a useful institutional balance of power between the EC and its MSS, and to counteract a bureaucratic "autodynamic" without sufficient democratic control.<sup>82</sup>

With regard to the present situation of Cold War between the courts, it is quite obvious that the community practice of forcing obedience under the sword of Damocles - that is, a collapse of legal unity - with respect to democratically weakly legitimated majority decisions of the Council of Ministers, is incompatible with the concept of deliberative supranationalism. Rather, it must be ensured that a discourse which has failed at one level can be continued at another. Here, a statement by Rawls deploys its full strength: "(...) *The point of legal institutions is to set up a framework that facilitates and enhances the public use of reason; a structure of discussion which must not be deformed either through external or internal coercion and which allows the continuing of public discourse when shared understandings of lesser generality have broken down.*" With respect to these provisos, a conciliation decision by a body composed of EC and MS representatives like national constitutional court and ECJ judges assembled in a sort a "common senate" would seem ideal. Such a body would probably give the EC even greater legal coherence than the ECJ now.

To sum up, the deliberate leaving open of the conflict, as practised up to now, does not seem to be the best option. Rather, all possibilities of achieving a procedural solution by establishing a third body as the ultimate umpire should be exhausted. Of course, it is in the first place a task of the European legislator to set up such a body and to regulate its procedure. In this context, it should be noted that one such proposal has already been developed by two eminent authors in

<sup>81</sup>Joerges, European Challenges to Private Law, European L. J. 3 (1997), 377 (389).

<sup>82</sup>For a similar perspective see Grimm, 3 Columbia J. of European Law, 229 (241 et seq.).



academic literature: In two recent articles,<sup>83</sup> *Joseph H. H. Weiler* and *Ulrich R. Haltern* have proposed the establishment of a European Constitutional Council after the French model, which should primarily be competent to perform an *ex ante* control over competence issues, including questions of subsidiarity.<sup>84</sup> Unfortunately, at the Amsterdam summit, this extremely interesting proposal was apparently not even discussed. However, as will be shown in the next sections of this article, even without any action by the European legislator, *such a conciliation procedure is already obligatory under standing law*: PIL, whose significance for EC law is sometimes underestimated, contains principles on the relevance of violations of internal law by an international treaty and on an obligatory conciliation mechanism which may be resorted to for the sake of conflict resolution.

### 3. Conditions for gap-filling through PIL

#### a) General conditions for and methods of gap-filling in EC law

Whether the concretisation of a general clause is to be qualified as interpretation or rather as gap-filling is a rather academic question.<sup>85</sup> At any rate, recourse must be made to the acknowledged techniques of gap-filling, such as reasoning by analogy and the elaboration of general principles of law, if the wording of a

<sup>83</sup>*Weiler/Haltern*, 37 *Harvard Int. L. J.* (1996), 411 (446); *Weiler/Haltern/Mayer*, *W.Eur.Politics*, July 1995, 4 (3 et seq.).

<sup>84</sup>It is certainly true that this proposal contains an excellent political idea at the right moment and that a European Constitutional Council could easily act as a conciliation mechanism. However, the specific shape given to that body by Weiler and Haltern also entails serious problems. First, the limitation that the body should only decide on conflicts about competence is hardly justifiable; most probably, it would also generate problems of delimitation as to what falls under the term 'competence' in this sense (for example, should it also include the violation of human rights enshrined in a national constitution, since no state representative has the competence to enter into a Treaty in violation of such provisions?). More generally, if the body were to decide only according to Community law standards, its conciliation function would hardly be credible; rather it should be seen to that that body is explicitly mandated to take into account national constitutions and the shape given to them by national constitutional courts. Next, even though an *ex ante* control after the model of the French Constitutional Council would clearly be more efficient than an *ex post* control, there is apparently a huge problem of coordination with the ECJ's jurisdiction. More precisely: Should an action before the ECJ against say, a European regulation under Art. 173 TEC, be excluded if an *ex ante* control by the constitutional council has already been exercised? Following the French example, yes. But how about an action based also on grounds different from competences? Finally, the establishment of an influential Constitutional Council with the powerful competence of *ex ante* review would intrude profoundly into the institutional balance in the Community. Thus, a Council dominated by national Euro-sceptics could cause much damage to the goals of integration. All in all, a more modest solution like the one to be developed here which foresees the decision by a conciliation body only as a last resort, thus causing only a smaller change to the institutional balance in the Community, might seem preferable. However, all these objections concern technical peculiarities, and not the substance of the proposal. In addition, it must be conceded that even a conflict resolution mechanism like a European Constitutional Council would of course pre-empt the public international law solution to be proposed here.

<sup>85</sup>Since the "maximal meaning" of the wording - which is considered as the line of delimitation between interpretation and gap filling - is not transgressed, and since the lack of a further regulation cannot be explained as an involuntary and unconceptual omission of the legislator, this method can formally still be qualified as interpretation. See *Canaris*, *Die Feststellung von Lücken im Gesetz*, 2nd ed. 1982, 26 et seq.; *Bydlinski*, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. 1991, 582 et seq.

provision is not sufficiently clear to allow for its application in the circumstances of the case at issue. However, for the concretisation of a general clause in constitutional law, which requires a multi-faceted process in the borderland of law and politics, these techniques are only capable of providing a starting point.<sup>86</sup>

Bearing in mind this caveat, one has to start with the general conditions for gap-filling in EC law. First, the question to be dealt with by the techniques of gap-filling must be one of law as opposed to politics, diplomacy or simply power. As to constitutional conflicts, it has already been stated that this is exactly the premise on which this contribution is based. Next, the question to be dealt with must fall within EC competences. Since the EC does not dispose of universal powers, gap-filling by judicial law-making may only take place in the case of an "internal gap",<sup>87</sup> i.e. if the area at stake does not fall within the competence of MSS law. This requirement applies also to gap-filling by PIL. For, regardless of whether PIL may be applied internally within a state, it is at any rate superseded by national law at that level. In the case of constitutional conflicts, this requirement does not create any problem, however. The resolution of such conflicts may be regarded as an integral part of the European-national conflict of laws-area, which has already been developed by the famous doctrines of the ECJ named above and which can reasonably only be dealt with by EC law, since a uniform solution available for all MSS needs to be found.

Moving now to the methods of gap filling, it is clear that, for the lack of legal "material" in European primary law, recourse to analogy or to general principles of EC law is useless. The same is true for common constitutional principles of the MSS, since the absolute majority of them do not have federal systems; beyond that, one would however have to take into account that, with respect to its structural supranational peculiarities, the EC could not be equated to one of the few European federal states either. Therefore, the only remaining possibility lies in the fertilisation of PIL principles.

#### *b) Foundations of gap-filling through PIL-principles*

Since the last century, the problem of the relevance of violations of internal law through the conclusion of a treaty has been discussed in PIL. A solution to the

<sup>86</sup>As to the concretisation of constitutions see *Hesse*, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, 24 et seq. The reference to judicial law-making, which is implicit in general clauses, is paraphrased by *Teubner*, *Standards und Direktiven in Generalklauseln*, 1971, 106 et seq., as their delegatory function (*Delegationsfunktion*). For the present context, the two other functions of reception and transformation described by this author, deserve attention as well (*Rezeptions- und Transformationsfunktion* (ibid., 65 et seq. und 99 et seq.)) Thereafter, social norms and values are transformed into law. Thus, general clauses can be viewed as "legal entrance points" for social changes. Moving to Community law, one may claim that general clauses like Art. 5 TEC also serve as "legal entrance points" for political changes and shifts in the institutional balance between the Community and its Member States. It is obvious, however, that, as opposed to private law, a judicial response to such changes has to take into consideration the limitations of judicial competences vis à vis the Community's political organs.

<sup>87</sup>For this concept see *C. Schmid*, *Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht*, 1996, 22 et seq.



problem was codified in Art. 46 of the Vienna Convention on the Law of Treaties of 23/5/1969 (here referred to as Vienna Convention). Thereafter, only the breach of "internal law regarding competence to conclude treaties" can be invoked under certain conditions against a PIL treaty. Before the application of this disposition can be discussed here, however, it has to be ascertained whether PIL can be applied at all within the EC (aa) and, if yes, which methodological resources exist to do so. Besides the direct application of PIL, its indirect application through the elaboration of general principles of EC law is to be taken into consideration (bb).

*aa) Direct applicability of general PIL in the intra-communitarian legal sphere*

Despite the remaining link of the EC treaties to their PIL base, the application of PIL in the intra-communitarian legal sphere is problematic, because, through the constitutionalisation process, the EC has undoubtedly detached itself from a classic international organisation. In particular, PIL might not be suited to deal with the specific needs of supranationalism.<sup>88</sup>

However, before entering this discussion, it should be ascertained whether the latest evolution of the EC, the establishment of the European Union, has not brought about a fall-back on the PIL regime for the whole EC system. For, as stated, the Union is rather a typical PIL creation, through which the MS wanted to strengthen the control over the supranational communities and counteract supranational "autodynamics". Nevertheless, such a far-reaching intrusion into the structures of the EC can not be based on the general provisions of the TEU alone (Arts. A-F and L-S). Again, Art. M TEU, whereafter the establishment of the Union is without prejudice to the EC *acquis*, does not allow for this result since the supranational peculiarities constitute an essential element of the *acquis*. Therefore, even after the foundation of the Union, the application of PIL in the intracommunitarian legal sphere can only be allowed if, and in so far as it is compatible with the structural features of the EC.

In this respect, some authors have completely discarded the application of PIL in the intra-communitarian legal sphere:<sup>89</sup> The EC should be conceived of as an autonomous "self contained regime".<sup>90</sup> PIL is only a law for "international emergency situations", incapable of dealing with the ongoing processes of integration. The underlying logic is different: Whereas PIL promotes coordination and cooperation among sovereign nations, EC law aims at solidarity and integration. With regard to this fundamental incompatibility, general provisions of the law of treaties, esp. on violation, withdrawal, termination and suspension, would not be ap-

<sup>88</sup>See for instance *Breitenmoser*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1995, 951 (977 et seq.).

<sup>89</sup>*Schwarze*, *Europarecht* 1983, 1; *Beutler/Bieber/Pipkorn/Streil*, *Die Europäische Union*, 4th ed. 1993, 240; *Everling*, *Festschrift für Mosler*, 1983, 173, 181 et seq.

<sup>90</sup>For this concept, see *Simma's* article in the *Netherlands Yearbook of International Law* 16 (1985), 111, which gave rise to a special edition of that journal (ed. Wellens et al.).

propriate in the context of the EC. In short: PIL would be a 'Trojan horse' in EC law which might endanger the integration process. As a legal "forward defence", recourse to it should therefore be completely excluded.

However, this solution goes too far.<sup>91</sup> First, there does not seem to be any fundamental discrepancy between the goals of "cooperation" and "integration". To realise the *effet utile* of EC law, it is sufficient to exclude the application of PIL where there is an actual conflict, an actual incompatibility with the EC's aims. In normal circumstances, it is indeed true that a recourse to PIL is not necessary, since EC law is able itself to deal with all the problems arising in the EC. But under exceptional circumstances - especially regarding the interpretation of ambiguities or in gap-filling - PIL may provide a vast reservoir of provisions possibly capable of supplementing EC law. Because of the capitulation of EC law before constitutional conflicts, there is indeed an emergency situation where PIL could prove to be a life jacket rather than a Trojan horse for the EC. At any rate, it seems obvious that even the application of public international rules which possibly do not suit completely the particular character of the EC might still be better than leaving the legal conflict to an extra-legal Cold War scenario. To keep to the metaphor: Discarding completely the application of PIL as a "forward defence" could exceptionally hit the EC's own avant-garde here.

It should be noted that the exceptional application of PIL in the present case does not mean, however, that the EC is to be viewed as a classic international organisation in the PIL style. Rather, it responds to the legal duty of any state, be it a member of an integration community or not, to resolve international conflicts with PIL mechanisms, if other prior-ranking solutions have failed (see Art. 2 Nr. 2, 33 UN-Charter). For conflicts resulting from international treaties, the PIL *minimum standard* is represented by general treaty law as codified in the Vienna Convention. However, as already stated, in the course of the application of any PIL norm, it has to be verified that that norm is not in conflict with the specific structural features of the EC - in particular, it has to be guaranteed that the withdrawal of a MS from the EC is generally unavailable as a remedy.

Now that the applicability of PIL as an emergency regime in the intracommunitarian legal sphere has been ascertained, *a virtue should be made out of this necessity. In other words, PIL should be applied and, if necessary, adapted so as to ensure that it constitutes an adequate and useful supplement to the EC system.*

#### *bb) EC-conforming concretisation and adaptation of PIL*

The "compatibility analysis" just mentioned may show the need for PIL norms to be concretised, supplemented or adapted in order to meet the specific needs of the EC. This is methodologically possible through judicial - or preparing that - exegetic law-making, i.e. by shaping general principles of EC law, using the PIL provisions as a model and a frame of reference. As we have seen, the ECJ has

<sup>91</sup>Bleckmann, *Europarecht*, 6th ed. 1997, 231, at No. 624 et seq.; Oppermann, *Europarecht*, 1991, 190 et seq. at No. 506 et seq.; Streinz, *Grundrechtsschutz*, 1989, 107 et seq., 313 et seq.; Simma, *Netherlands Yearbook of International Law* 16 (1985), 111 (127).



had recourse to general principles when formulating European human rights on the basis of national constitutional rights. At this stage, PIL norms are no longer a direct source of EC law, but they are used as a sort of 'legal quarry' to shape new EC law. Like the "general principles of law recognised by all civilised nations" in the sense of Art. 38 I (c) of the statute of the International Court of Justice, they become mere "law-making sources".<sup>92</sup> In the present context, it is important to note that PIL has also been used as a "law-finding" source for the elaboration of EC law by the ECJ.<sup>93</sup>

In this procedure, PIL provisions must be put into the context of the specific features of the EC - a Community unlimited in time, based on the rule of law (its law being directly applicable and generally taking precedence over MS law) as well as on democratic principles, and aiming at an ever closer integration. Thus, norms suiting the needs of the EC can be developed by concretising, completing and adapting the PIL model. Therefore, this procedure may be termed 'EC-conforming concretisation and adaptation of PIL'.<sup>94</sup> It does not consist in pure legal inventions, but in a referential method of judicial law-making which comes close to analogy.<sup>95</sup> Compared to the "inductive filtering" of common features of norms and principles<sup>96</sup> which is used to formulate normal "general principles" of law, this method is a "minus" (and therefore, it must also be allowed as well), since input and output-provisions share more or less the same level of abstraction.<sup>97</sup>

<sup>92</sup>As to the distinction between 'legal source' and 'law-finding source' see *Esser's* classic, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 4th ed. 1990, 134. For these methodological aspects compare in the European context the comprehensive monography by *Hoffmann-Becking*, *Normaufbau und Methode*, 1973, 33 et seq.

<sup>93</sup>Summary in *Schwarze*, *Europarecht* 1983, 1 (10 et seq.).

<sup>94</sup>With this concept, I have in mind another parallel to concept used in Private International Law concept (see *Looschelders*, *Die Anpassung im Internationalen Privatrecht*, 1995) and in International Uniform Law (see *C. Schmid*, *Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht*, 1996, 11 et seq.): Both concepts include the modification of substantive norms in order to solve logical or teleological conflicts. Whereas in Private International Law, such conflicts result from divergences between two different statutes to be applied concurrently in a specific case (e.g. the law of successions of State A vs. family law of State B), they result from tensions between general Public International Law and the specific features of the EC as an integration community.

<sup>95</sup>*Hoffmann-Becking*, *Normaufbau und Methode*, 1973, 359.

<sup>96</sup>In German literature, this method is referred to as 'analogy of law' (*Rechtsanalogie*) by *Bydlinski*, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. 1991, 478 et seq., or - more precisely - as 'legal induction' (*Induktion*) by *Canaris*, *Die Feststellung von Lücken im Gesetz*, 2nd ed. 1982, 90 et seq.

<sup>97</sup>Thus, in a strict sense, the term 'general principles of law' is not exact here, at least in the German sense of the words: First, input and output provision may be quite concrete and detailed, hence not necessarily general. Secondly, if one presupposes the division between rules and principles along the line of the degree of abstraction and direct applicability in a case, the output may also be rules, and not principles. See generally for the fact that a sufficiently precise "legal input material" can lead to concrete and detailed outputs, *Kropholler*, *Internationales Einheitsrecht*, 1975, 151.

### *cc) A combined approach in the present case*

The two different approaches may be combined in the present case in the following way: As long as the outcome fits the structural peculiarities of the EC, PIL may be applied directly. In so far as this is not case, it is necessary to effect a concretisation and adaption of the relevant rules through the formation of general principles in conformity with the specific features of the EC. Thus, whereas in the first case, the EC regime is supplemented by pure PIL, genuine EC law is "newly forged" in the second. However, since the sole application of PIL in the intra-communitarian sphere must already be justified by reference to the same principles which form the basis of judicial law-making, there is no clearly discernable line of division between both approaches.

### **4. Details of PIL conflict resolution**

The consequences of a violation of internal law by an international treaty is a classic issue within PIL, which has been discussed in legal practice and literature for more than a century.<sup>98</sup> Three main solutions have been proposed.<sup>99</sup> First, there was the "theory of relevance", arguing that violations, especially violations of internal law relating to the treaty making power of the organs negotiating the treaty (i.e. e.g. parliament vs. government), should generally be relevant at the PIL level and would give the State in question a right to withdraw from the convention. The arguments made in favour of this solution were: respect for internal democracy and separation of powers (particularly, the executive should be unable to circumvent the legislature); the need for a correct internal implementation of the treaty (which would be impossible if the treaty were to violate fundamental norms of internal law); analogies with the law of agency (according to which the principal can invoke lack of or abuse of power by the agent against a third party in certain situations<sup>100</sup>). For the opposite conclusion, namely the irrelevance in PIL of violations of internal law, the following points were made: international legal certainty, the duty of a state to examine potential conflicts with internal law before entering into an international contract and the absence of an obligation of a party to a contract to verify whether the other parties respect their own internal laws by concluding the contract. As may be expected, a compromise solution between the

<sup>98</sup>For the literature of the past three decades see *Geck*, Die völkerrechtlichen Wirkungen verfassungswidriger Verträge, 1963; *Cahier*, Rivista Generale di Diritto Internazionale Pubblico 54 (1971), 226; *Wildhaber*, Treaty-Making Power and Constitution, 1971, chapt. 6, 14 et seq.; *Müller*, Vertrauensschutz im Völkerrecht, 1971, 19 et seq.; *Blumenwitz*, Der Schutz innerstaatlicher Rechtsgemeinschaften beim Abschluß völkerrechtlicher Verträge, 1972, 27 et seq.; *Bleckmann*, Grundgesetz und Völkerrecht, 1975, 29; *Ress/Schreuer*, Berichte der Deutschen Gesellschaft für Völkerrecht 23 (1982), 7; *Verdross/Simma*, Universelles Völkerrecht, 3rd ed. 1984, § 68 et seq., 44 et seq.; *Cronauer*, Der internationale Vertrag im Spannungsfeld zwischen Verfassung und Völkerrecht, 1986, 21 et seq.; *Jennings/Watts* (eds.), *Oppenheim's International Law*, 9. Aufl. 1992, Vol. I, peace, 8 et seq.

<sup>99</sup>As to the following points, see the summary in *Wildhaber*, Treaty-Making Power and Constitution, 1971, 175 et seq.

<sup>100</sup>Compare, as to European Private Law, *C. Schmid*, Die Aktiengesellschaft 1998, 127 with further references.



two to conciliate the needs of legal certainty and the respect for internal law and democracy was finally proposed: the so called "theory of evidence".<sup>101</sup> Thereafter, the withdrawal from a treaty should only be possible if the other party has, or, according to normal standards of good faith, should have, noted the violation of essential internal law. Furthermore, it was contested whether the kind of internal law capable of being invoked should be limited to the competences of the organ concluding the treaty or not.

In 1969, the "theory of evidence" was codified in the Vienna Convention on the Law of Treaties<sup>102</sup> (abridged VC). The general rule is contained in Art. 27 VC:

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

Art. 46 is phrased as follows:

"Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practices and in good faith."

However, in the latter article, the dispute just mentioned (concerning which provisions of internal law should be integrated into the formula) was not resolved. First, "internal law regarding competence to conclude treaties" could refer only to provisions delimiting the "organic" competence of various institutions of the state (e.g. the powers of a government representative). Then, indirectly, the treaty-making power, and thus also the competence of the organ representing the state, is limited by all internal law, especially constitutional provisions on human rights etc. As stated above, in the Federal Republic of Germany, organs entering into an international treaty or participating in EC decision making processes must especially respect the hard core of the constitution as enshrined in Art. 79 III Basic Law. The genesis of the Art. 46 VC shows that the latter option was apparently chosen, albeit no definitive answer seems to be possible.<sup>103</sup> Thus, the commentary on Art. 43 of the 1966 draft convention (Art. 46 in the final 1969 version) ex-

<sup>101</sup>See *Verdross/Simma*, *Universelles Völkerrecht*, 3rd ed. 1984, 444, § 690 m.w.N.

<sup>102</sup>Official Records, UN Doc. A/Conf. 39/11/Add. 2, New York 1971, 287. Text and *travaux préparatoires* are well documented in *Wetzel/Rauschning*, *The Vienna Convention on the Law of Treaties*, 1978.

<sup>103</sup>See *J. P. Müller*, *Vertrauensschutz im Völkerrecht*, 1971, 19 et seq., 207. According to Art. 32 of the same convention, recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion may only be had if an interpretation based on the wording, the object and the purpose of the treaty leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Since this disposition only codifies standing customary law, it may certainly applied to the rest of the convention as well. Here, however, the preparatory work helps to clarify the purpose of the provision and is therefore examined before.

plicitly states:<sup>104</sup>

"Constitutional limitations affecting the exercise of the treaty-making power take various forms. Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; *others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties...* The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent..."

This result had already been advocated by special reporter *Sir Humphrey Waldock*<sup>105</sup>. However, the International Law Commissions deliberations on the 1966 draft seem to show that a majority of the commission members was again the integration of substantive provisions in order to safeguard legal certainty at the international level.<sup>106</sup> According to their view, only few and narrowly defined exceptions to the principles of irrelevance were to be admitted. This perception is still relied upon by several commentators.<sup>107</sup>

However, this view seems not only to ignore the Official Comment quoted above, but also not to account for the changes the 1966 draft underwent with respect to the 1969 final version. Thereafter, following fruitless negotiations in the aftermath of the allegation of the breach of essential internal law, a State no longer had the possibility of simply discarding the application of the relevant treaty provision. Rather, it was only given the right to a conciliation procedure in front of the United Nations (Art. 66 b VC) resp. the International Court of Justice (Art. 66 a VC). By the introduction of these procedures, still missing in the 1966 draft, dangers for legal certainty were considerably diminished. Thus, an important rationale for excluding substantive provisions can no longer be relied upon.

Moreover, a teleologic interpretation also confirms this result. As *Alfred Verdross* and *Bruno Simma* have pointed out, the need to integrate substantive provisions is all the greater since these provisions are not protected in any other way at the PIL level.<sup>108</sup> *Rudolf Streinz* rightly emphasises that especially the manifest violation of substantive provisions like human rights, fundamental to the

<sup>104</sup>See ILC-Yearbook 1966 II, 240.

<sup>105</sup>ILC-Yearbook 1965 II, 71: "The Commission was fully aware [in the 1963 draft, C.S.] that constitutional restrictions upon the competence of the executive to conclude treaties are not limited to procedural provisions regarding the exercise of treaty-making power but may also result from provisions of substantive law entrenched in the constitution..."

<sup>106</sup>See ILC-Yearbook 1966 I, 124 et seq.; comment by *Wildhaber*, *Treaty-Making Power and Constitution*, 1971, 348; for a summary of the preparatory work see *Geck*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 27 (1967), 429, at 437.

<sup>107</sup>See the references in *Verdross/Simma*, *Universelles Völkerrecht*, 3rd ed. 1984, 445, Fn. 19.

<sup>108</sup>*Verdross/Simma*, *Universelles Völkerrecht*, 2nd ed. 1984, 44 et seq.



good functioning of a state, would lead to unacceptable tensions with PIL.<sup>109</sup> *Philippe Cahier* stresses that, in the Vienna Convention, there is no apparent reason for the different treatment of formal and substantive provisions having an impact on a state's treaty making power.<sup>110</sup> Finally, *Jörg P. Mueller* argues that the integration of substantive provisions has a meaningful parallel in the increasing importance of *ius cogens* and human rights in PIL, which is also reflected in the express reference to human rights in the Vienna Convention preamble.<sup>111</sup>

To these well-founded arguments, one may add that PIL has to account for the functional changes of international structures and law,<sup>112</sup> particularly the genesis of strong regional alliances and communities. In this context, the "idyllic" classical constellation underlying Art. 46 VC, i.e. the danger that heads of state may enter into a binding international treaty without consulting parliament etc., while being by no means obsolete, may have lost some importance. Rather, conflicts over the delimitation of competences and a common standard of substantive values like human rights increasingly arise. Now, it is exactly in these situations that PIL must offer procedural devices for the peaceful settlement of disputes. According to the generally acknowledged methodological principle that long standing norms have to be adapted to changed social circumstance, and that, then, they may acquire a meaning different from the one their drafters had in mind, these changes in international structures, and also the institutional needs arising thereof, should be taken into account in the interpretation of Art. 46 VC.<sup>113</sup> Thereafter, what is important in Art. 46 is not only its substantive side, the rebuttable presumption of the relevance, in PIL, of manifest breaches of internal law. Equally important is its procedural side, the compulsory dispute settlement procedure, only at the end of which a definite decision as to the respect of internal law on the PIL level is taken. Taking all the above arguments together, the conclusion may be drawn that substantive norms should be integrated into Art. 46 VC.

Finally, Art. 46 VC is unanimously considered by the literature to be codified customary law.<sup>114</sup> Such a qualification has already been explicitly stated by the

<sup>109</sup>*Streinz*, Grundrechtsschutz, 1989, 32 et seq.

<sup>110</sup>*Cahier*, Rivista Generale di Diritto Internazionale Pubblico 54 (1971), 226 (244 et seq.).

<sup>111</sup>*J. P. Müller*, Vertrauensschutz im Völkerrecht, 1971, 20 et seq.

<sup>112</sup>See *Verdross/Simma*, Universelles Völkerrecht, 3rd ed. 1984, §§ 52-59, 41ff;

<sup>113</sup>This perspective is also present in the opinion of *Lucius Wildhaber*. Whereas the integration of substantive provisions into Art. 46 VC is generally discarded by him, he wants to revise this assessment if international treaties should increasingly become a danger for national constitutions in the future (Treaty-Making Power and Constitution, 1971, 349). Obviously, this state of affairs has already been reached within the Community law "subsystem".

<sup>114</sup>*Cahier*, Rivista Generale di Diritto Internazionale Pubblico 54 (1971), 226, 244; *Streinz*, Grundrechtsschutz, 1989, 326; *Jennings/Watts* (eds.), *Oppenheim's International Law*, 9th ed. 1992, Vol. I, peace, 1288, § 636.

International Court of Justice for other provisions of the Vienna Convention,<sup>115</sup> and it may even be correct for most of its provisions.<sup>116</sup> Moreover, with the long and uncontested standing of the Convention, even provisions resorting from compromise at the drafting stage can be regarded in the meantime as having acquired customary status.<sup>117</sup> With regard to the evolution from the theories of relevance and irrelevance to the compromise formulated in the theory of evidence, a customary law "crystallisation" will probably have already been approved at the time of entry into force of the Vienna Convention. Finally, taking into account the interpretation of Art. 46 VC just expounded and the long and uncontested standing of this norm, substantive provisions may today at least be integrated into the customary law version of the theory of evidence.

As to the procedural consequences of a state's allegation of a manifest breach of internal law, the Vienna Convention foresees the following devices: First of all, the state has to notify the violation and the intended measures to all the other MSS (Art. 65 I VC).<sup>118</sup> Notification can also be made in answer to another party claiming performance of the treaty or alleging its violation (Art. 65 VC) if the state in question, after becoming aware of the facts, does not have to be considered as having expressly or by reasons of its conduct acquiesced in the validity of the treaty or in its maintenance in force or operation (Art. 45 VC). If, within a period of not less than three months, no party has raised any objection, the party making the notification may withdraw from the treaty (Art. 65 II VC). The withdrawal can - and, for reasons of proportionality and pursuant to the principle of *favor conventionis*, must - be confined to the provisions in conflict with internal law, if those are separable from the rest of the treaty with regard to their application, if they do not constitute an essential basis of the other's party consent, and if the continued performance of the remainder is not unjust (Art. 44 III VC).<sup>119</sup> If, however, objections are raised after the said notification, the parties shall seek a solution through the means indicated in Art. 33 UN-Charter, i.e. negotiations, mediation, arbitration, decisions by a court etc (Art. 65 III).

If no solution has been reached within a period of 12 months following the date on which the objection was raised, any one of the parties may set in motion an obligatory conciliation procedure by the UN, provided for in an appendix to the Vienna Convention (Art. 66 b). Thereafter, a conciliation commission shall be set out, which is constituted of five conciliators, two of whom may be named by the parties and the remaining one by the four other conciliators. The commission shall report within twelve months of its constitution.

<sup>115</sup>Compare the summary in Müller/Wildhaber, *Praxis des Völkerrechts*, 2nd ed. 1982, 9 et seq.

<sup>116</sup>See Simma, *Archiv des Öffentlichen Rechts* 100 (1975), 7 et seq.

<sup>117</sup>Jennings/Watts (eds.), *Oppenheim's International Law*, 9th ed 1992, Vol. I, peace, 1199, § 581.

<sup>118</sup>Verdross/Simma, *Universelles Völkerrecht*, 3rd ed. 1984, 53 et seq., §§ 83 et seq.; *Cahier, Revue Générale de Droit International Public* 76 (1972), 645; Frowein, in: *Festschrift für Scheuner*, 1973, 107; *Conforti/Labela*, *European J. of International Law* 1 (1990), 44.

<sup>119</sup>Vgl. dazu Jennings/Watts (eds.), *Oppenheim's International Law*, 9. Aufl. 1992, Vol. I, peace, 129 et seq., § 644; Verdross/Simma, *Universelles Völkerrecht*, 3rd ed. 1984, 537, § 845 m.w.N.



The report shall consist in recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement; it shall not be binding upon them.

More problematic, however, is the question to what extent these procedural provisions can be recognised as international customary law. Since Art. 66 VC was introduced only at the Vienna Conference, it can hardly be qualified as such. This is primarily true for the jurisdiction of the ICJ in Art. 66 a VC, which applies only to the parties to the Vienna Convention who have signed it without reservation to this provision.<sup>120</sup> The same should be true for the details of the provisions concerning the conciliation procedure under the guidance of the UN and the deadlines which must be respected. However, the basic lines of the procedural implementation of the theory of evidence should be regarded as customary law, since otherwise, as already stated, the result would be an incomplete regulation posing threats to legal certainty. These basic features include: the duty of a state to notify the intended disapplication of international treaties (including the possibility of making the notification in answer to another party claiming performance or alleging a violation), the principle of separability of single treaty provisions, the non-automatic relevance, in PIL, of the violation of internal law and finally the duty of a state to reach a conciliatory solution before unilaterally withdrawing from a treaty. This refers to the recourse to negotiations among the parties and other means for peaceful dispute settlement, and, if these efforts were to fail, to a neutral (albeit not binding) conciliation procedure.<sup>121</sup> In addition, the duty of a state to search for a peaceful and just solution in any international dispute is already enshrined in Art. 2 Nr. 3, 33 UN-Charter; therefore, a fall-back to the Vienna Convention is superfluous. In the case of disputes over the validity of treaty provisions, this duty can, by the very nature of things, only mean negotiations, and, if these were to fail, a conciliation procedure. Correspondingly, for the lack of alternatives, one can assume a reduction of a state's discretion as to the appropriate means of dispute resolution in the sense of Art. 2 Nr. 2, 33 UN-Charter. Thereafter, a state alleging a manifest breach of essential internal law through an international treaty has the right to negotiations among the parties (or other appropriate means of peaceful dispute resolution) and, if necessary, to a neutral conciliation procedure to be organised by the parties.<sup>122</sup> An exception to this right could only apply when the allegation of breach is manifestly abusive or unfounded. If the other MSS should deny such a procedure to the state in question, the presumption of PIL relevance of the alleged breach becomes irrebuttable. As a sort of self-executory "PIL-default judgement", the state in question may law-

<sup>120</sup>Verdross/Sinma, *Universelles Völkerrecht*, 3rd ed. 1984, 535, § 840, Fn. 5.

<sup>121</sup>Conforti/Labella, *European J. of International Law* 1 (1990), 44 (46), Fn. 2 m.w.N.; Calfisch, *Zeitschrift für Schweizer Recht* 112 (1993), I-307 (31 et seq.)

<sup>122</sup>Compare Art. 33 (1) UN-Charter which reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." (emphasis by this author).

fully assume the relevance, in PIL, of the alleged breach and withdraw from the treaty in question or respectively disapply the incriminating provisions.<sup>123</sup>

To sum up: According to the customary law version of the relevance theory, manifest breaches of essential national provisions, as opposed to any other violation of internal law, need not to be tolerated by a State. As a consequence, however, the violated internal provisions do not become automatically relevant at the PIL level, entailing the nullity (or partial nullity) of the conflicting international treaty. Rather, the state in question only has the right (and the duty) to a conciliation procedure in which the question of the PIL relevance of the violated internal provisions will be decided definitely. Moreover, this rule means that the disapplication, by a state, of international law which is in conflict with essential internal law, cannot be equated to a "normal" treaty violation. Thus, the sanctions PIL provides for treaty violations may be applied only after a conciliation procedure. The procedural consequence is that the allegation of a manifest breach can be viewed as an *exception* to the duty of performance of a treaty. Finally, since no general duty of provisional application is stated in PIL, a state alleging a manifest breach should be allowed to disapply the treaty respectively the incriminating provisions of it pursuant to reasonable internal standards for interim measures as long as the conciliation procedure lasts.

## **5. Application of these principles to constitutional conflicts between the EC and its MSS**

### *a) Resort to customary law*

With regard to the possible application of the theory of evidence to constitutional conflicts between the EC and its MSS, the customary law version of the PIL provisions has to be applied. Even though the substantive requirements of the Vienna convention could be complied with,<sup>124</sup> its direct application is impossible, since it was enacted only after the EC-Treaty<sup>125</sup> and since not all MSS of the EC have ratified it.<sup>126</sup> However, this does not constitute any obstacle to the solution to be proposed here, since no relevant differences have been found between the two versions.

---

<sup>123</sup>See Vamvoukos, Termination of Treaties in International Law, 1985, 21 et seq. (with particular reference to *clausula rebus sic stantibus*).

<sup>124</sup>The EC-Treaty is an international treaty between States (Art. 1, 2 Nr. 1 (a) VC), which - at least at the time of its conclusion - was the constituent instrument of an international organisation (Art. 5 VC).

<sup>125</sup>In the case of a conflict provoked by secondary law, this obstacle could be superated as well. As will be shown immediately afterwards in the text, the treaty provisions conferring to the EC the power to enact secondary law could be qualified as an authorisation to amend the original treaty by new sub-treaties to be concluded within the international organisation in the sense of Art. 5 2nd alternative VC. Thereafter, the VC could be applied to all such "sub-treaties" enacted after its conclusion.

<sup>126</sup>All the Community Member States except France and the UK have done so.



b) General applicability of the evidence theory

In the first place, it has to be emphasised once more that in the EC a legal conflict resolution is even more important than in normal PIL conflicts. Because of the close "dovetailing" of important areas of policy, economy and law in the integration process, such conflicts would be capable of generating devastating effects on both the EC and its MSS. With respect to the (at least) de facto-irreversibility of the integration process, a withdrawal of a state from the EC, or the suspension of its membership, is not a viable solution. For these reasons, EC law cannot simply ignore the violation of fundamental internal law, but, as already stated, has to provide for a conciliation mechanism capable of enabling a state to remain in the EC without having to abandon constitutional essentials. It is clear that in such a procedure, *all possible solutions must be available in principle, including the invalidation of a EC act.*

Now, since the EC has not yet evolved into a monistic federal system in which the MS would be hierarchically subordinated to the EC, but is characterised by the dualistic juxtaposition of several legal orders, constitutional conflicts fit structurally into the basic pattern of the theory of evidence: essential internal law is violated by an international treaty, and a solution has to be found in order to avoid fatal legal tensions and "conflicts of obligation" for citizens. Beyond that, it cannot be held that the application of the theory of evidence would be pre-empted by EC law. In the first place, it may be repeated that there is indeed a serious *lacuna* in the EC system as to the resolution of constitutional conflicts, since, as shown, the jurisdiction of the EC is limited in this respect.<sup>127</sup> Next, following the dualistic logic, recourse to the theory of evidence is not precluded by the development of judge-made human rights at EC level either, as long as they are not capable of protecting the constitutional identity of MSS. Finally, the resort to a quasi-judicial device is not pre-empted by Art. N, whereafter legislative modifications of primary law may only be adopted by the MS in an IGC. For we are not dealing here, *stricto sensu*, with a legislative modification of the treaties, but with the supplementation, by judicial resp. exegetic lawmaking, of EC law by existing international law. What is more, a conciliation device would not even contradict the ratio of Art. N: It would indeed seem reasonable and desirable with respect to the efficiency of EC law if the MS, as the "Masters of the Treaty", were not confined to the cumbersome treaty modification procedure or the enactment of new secondary law, but could also exercise a supplementary quasi-judicial control over the application of EC law in cases in which their constitutional identity and, hence, their status as "Masters of the Treaty", is crucially at stake. Be that as it may, however, a functional equivalent to the theory of evidence is at any rate lacking at EC level, so that PIL may as shown at least be drawn upon as an emergency regime.

<sup>127</sup>For this reason, Art. 219 TEC is not pertinent either. As shown, the TEC does not contain any device for the settlement of "identity-relevant" disputes.

However, as in all other matters of EC law, the existing *acquis communautaire* must be respected here as well. This means that a PIL solution can only be applied in a subsidiary way, if all intracommunitarian devices of conflict resolution have failed. As already stated, this means that a national constitutional court must respect Art. 177 III TEC and all other internal means of conflict avoidance must have been exhausted. Hence, according to German constitutional law, not a single violation of constitutional essentials, but a "structural deficiency" in EC law or jurisprudence rendering probable the violation of the Grundgesetz in a multiplicity of future cases,<sup>128</sup> must have been found.

### *c) Substantive requisites of the evidence theory*

First of all, it may be stated that a conflict between secondary law and national constitutions could be captured by the wording of the evidence theory in the Vienna Convention: Even though general treaty law does not explicitly provide for the distinction between primary and secondary law, secondary law authorised by treaty provisions may be regarded as a "supplemental treaty" concluded by the organs of the international organisation set up by the "original treaty" (see Art. 5, 2nd alternative VC), which, however, shall enjoy primacy over the supplemental provisions (i.e. secondary law). So, the PIL solution could be separately applied to a specific act of secondary law only - which is very important in the EC context. Moreover, this also means that the state of development of international customary law at the time of the conclusion of the secondary law act is relevant with respect to the integration of substantive competence provisions in the evidence theory.

In setting up the standard for relevant violations of internal law in line with the device of "community-conforming concretisation and adaptation" of PIL, it must first be noted that several arguments in favour of the "theory of relevance" gain weight in the EC context. Thus, the EC's respect of essential national law is all the more necessary because of the far-reaching homogeneity between the EC and its MSS as to the respect of human rights, democracy and the rule of law; the hard core of human rights in particular, as an integral part of the national legal identity in the sense of Art. F I TEU, can be regarded as intracommunitarian *ius cogens*. Moreover, in the EC context, it is equally undesirable that basic national provisions may be circumvented at the EC level. The need for efficient national implementation is another argument. Since the EC system largely depends on national administrations which are sworn to uphold their own constitution, imposing a European norm violating national constitutions would be difficult in practice - notwithstanding the autonomous efficiency of the EC system which may, as shown, be derived from Arts. 169 ss. TEC. Furthermore, several arguments in favour of the "theory of irrelevance" seem to be less persuasive in the EC context. First, under a majority regime, a state does not any longer have the possibility to make the ratification of a "sub-treaty" (i.e. an act of secondary law) dependent on the non-existence of violations of internal law. Moreover, the argument that a

<sup>128</sup>See above sub III.



state entering into an international treaty cannot be expected to investigate its partners' internal laws in order to avoid violations, loses weight, since the EC organs have specialised lawyers from all MSS at their disposal, who can well be expected to enquire about potential violations of national law. For the latter reason, the required degree of "manifestness" of a breach can be presumed to be lower than in the normal PIL context.

In line with the "dissuasive function" of the "manifestness" criterion, a breach has to be manifest at the moment of the adoption of secondary legislation by the competent EC organ; a subsequent decision by a national constitutional court would therefore be too late. Thus, by contrast to a violation of the European Convention of Human Rights, the violation of a national constitutional right will not normally be obvious to other MSS of the EC.<sup>129</sup> However, it should be sufficient that, in the Council procedure, a MS's representative draws the other council members' attention to a possible violation of the national constitution (or other essential internal law). Taking into account the increased loyalty duties in the EC context, such a warning should be considered as sufficient to comply with the "manifestness" requirement. Conversely, in the EC context too, the right to invoke a ground for avoidance must be deemed to be lost whenever a State has, explicitly or tacitly, expressed its consent to the validity of the incriminated act (ratio of Art. 45 VCLT). In particular, a State may not have voted in favour of the act in the Council without expressing its constitutional reservations.

As a consequence, therefore, the procedure will mostly be carried out when the secondary law act in question has been taken by a majority decision against the vote of one or several MSS (as it has been true in the case of the Banana regulation). However, in the case of a "package deal", the application of the evidence theory should not be pre-empted by the mere fact that a State - after having pronounced a warning as to the potential incompatibility of a part of the "package" with its own constitution - has voted in favor of the whole package for paramount reasons of self interest. The fact that with the possible annulment of a component of the package, the balance of the whole package is disturbed, should not justify a different result. For MSS have always to bear in mind the possibility that a component of the package might be struck down as a result of constitutional review, regardless of whether this review has been undertaken by the ECJ or a conciliation body.

However, also in the EC context, the needs of a smooth functioning of the EC and of legal certainty prevent a violation of essential internal law from being automatically relevant at the level of EC law. Rather, just as in PIL, a MS alleging such a breach can only be accorded the right (and the duty) that a conciliation procedure be carried out. All in all, it may be concluded that, as far as the substantive side of the theory of evidence is concerned, its direct application largely fits the structural peculiarities of the EC.

#### *d) Procedural requirements*

Somewhat more complicated, since it is less accurately regulated in PIL, is the

<sup>129</sup>Idem Streinz, Grundrechtsschutz, 1989, 32 et seq.

procedural realisation of an manifest breach of essential internal law. Four main issues have to be separated: The limitation of the procedure on the conflicting provisions of secondary conflict (aa), the negotiation stage (bb), the conciliation procedure in case negotiations fail (cc) and the legal consequences in the case such a procedure is denied to the aggrieved party (dd).

#### aa) Limitation of the procedure to the conflicting provisions

As to the procedural implementation of the theory of evidence, first, the conciliation procedure has to be limited to the secondary legislation in question - which has been interpreted as a supplementary treaty in the sense of Art. 5 2nd alt. VCLT. Beyond that, following the ratio legis of Art. 44 VCLT, even a limitation of the procedure on the incriminating provisions of the act in question seems necessary, in order to minimise its disintegrative effects.<sup>130</sup> In both cases, the separability requirements contained in Art. 44 paragr. 3 must be fulfilled. Whereas, thereafter, a junctim with the ongoing validity of the primary law basis of the secondary law act or even the whole EC-Treaty seems to be excluded, the avoidance of the secondary act in question might deprive accompanying measures of their conceptual basis ("Geschäftsgrundlage").

#### bb) The negotiation stage

As to the negotiation stage provided for in PIL (see Art. 65 III VCLT and Art. 33 UN-Charter), no particular measures seem to be necessary since the standing organs of the EC always have the discretion to revoke or amend an act allegedly in conflict with internal law. However, if such negotiations or other peaceful means of dispute settlement fail within a reasonable period of time (one year, as proposed in the Vienna Convention, seems appropriate if no other time limit is fixed) a conciliation procedure has to take place as stated.

#### cc) Establishment, procedure and effects of the decisions of a conciliation body

Even though the need of its existence is derived from PIL, there must be an *upgrading from a PIL to EC constitutional law standard* with respect to the establishment, procedure and composition of a conciliation body. The PIL conciliation model of the VC is not even applicable as a last resort here. In particular, an *ad hoc*-nomination of the body by the executive, its composition of conciliators only from both sides and the non-binding character of its decision would not fit the legal character of the EC. Because of the constitutionalisation of the treaties by the ECJ, and particularly as a consequence of the doctrines of direct effect and supremacy, the EC participates in the exercise of public power directly affecting the citizen. This means that the EC and its organs must meet democratic stan-

<sup>130</sup>This argument refutes the objection against the application of Art. 46 Vienna Convention raised by *Streinz* (Grundrechtsschutz, 1989, 32 et seq.) and *Weiler/Halter* (37 Harvard Int. L. J. (1996), 411, 441, Fn. 115) that Public International Law would not make available an alternative to the invalidation of the whole EC-Treaty.



dards (however, because of its essential structural peculiarities, it cannot be expected to comply with democratic principles of the exactly identical shape and to the same degree as MSS).<sup>131</sup> Accordingly, it follows that an organ deciding as the ultimate umpire over the recognition of a national constitutional standard in human rights or in other fields at EC level - and exactly this would be the effect of a conciliation decision - must be democratically legitimated. Therefore, a conciliation body would need to be set up by the European legislator.<sup>132</sup>

The establishment of a conciliation body would thus require a regulation or a Treaty amendment. In theory, a regulation could be considered as sufficient: For if the theory of evidence is regarded as an integral part of intra-communitarian law, it would only need to be completed as regards the procedure to be followed etc., without causing any conflict to the Treaties as they stand. However, the only legal base on which such a regulation might be founded is Art. 235 TEC. Taking into account the ancillary "gap-filling" function of this provision, it seems however overstated to base an important change of the institutional structure of the EC only on it.<sup>133</sup> At best, an "emergency regulation" serving as a transitory legal base for a conciliation procedure till the more cumbersome treaty amendment procedure (Art. N TEU) might be based on Art. 235 TEC.

Beyond that, it should be noted with respect to the composition of the conciliation body that, since the procedure is to contribute to the control exercised by the MSS over the application of EC law, their representatives should have a strong voice in the conciliation body. Correspondingly, the body might well be made up of judges of the national constitutional resp. highest courts and the ECJ following the example of so-called "common senats" (Gemeinsame Senate) known in German procedural law.<sup>134</sup>

As far as its contents is concerned, a conciliation decision would in principle, in line with its (quasi-) judicial quality - be confined to declaring a breach of essential national law relevant or not at EC level. This should be done by balancing the intensity of the breach, the desirable standard of human rights protection at the EC level, the consequences for the EC arising out of the disapplication of the act at stake etc; in doing so, the conciliation body would have to start from from the rebuttable presumption of relevance following from a state's allegation of an

<sup>131</sup>Incidentally, this finding must be also taken into account when interpreting Art. 23 Basic Law and similar constitutional provisions of other Member States, whereafter a Member State is only allowed to participate in a Community meeting *inter alia* basic democratic standards.

<sup>132</sup>Even de lege ferenda, it seems excluded to establish the ECJ as an arbitration board. This follows from the fact that, as shown, such a procedure would be admissible only as ultima ratio and that the ECJ would have to have dealt with it before according ordinary treaty law. Thus, by dealing with the same case again as an arbitration board, the ECJ would act as a judge in its own case.

<sup>133</sup>See I. Schwartz, in Groeben/Thiesing/Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed. 1997, Art. 235, No. 1-8.

<sup>134</sup>Similarly, Weiler and Haltern (see above, text and fn. 51 et seq.) recommended that a European Constitutional Council be composed of national constitutional court judges and presided by the President of the ECJ. However, the latter might have already contributed to the ECJ's former decision about the Community act in question and might therefore be considered as biased. For this reason, if members of the ECJ are supposed to participate in the conciliation body, they should not have been involved in the previous procedure.

essential breach.

Besides avoiding or maintaining a European act, the conciliation body could also have recourse to "mitigating mechanisms" used at times by national constitutional courts. Thus, it might further a compromise by not declaring a European act void with immediate effect but by demanding its (possibly only partial) substitution within a reasonable period of time. In addition, after setting aside a European act, it could set forth more or less precise requirements a similar European act would be expected to meet in order to be compatible with the treaties and the core of national constitutions.<sup>135</sup> Even such a far-reaching intertwining of the judiciary and the legislature would seem acceptable in the EC.

Next, with regard to the close relationship of the MSS in an integrated community and the need of legal uniformity in the EC, the decision of the conciliation body should be directly applicable and binding *erga omnes*<sup>136</sup> at EC level. Even in PIL, the non-binding character of the report of the conciliation commission was agreed upon only as a compromise formula, which for many countries did not go far enough. All the more, it would be inappropriate in the EC context. Finally, through its *erga omnes* effect, the decision on the exceptional relevance of national norms (e.g. constitutional human rights) at the European level would indirectly adapt the "contours" of the corresponding European rights to those of the national provisions. Thus, such a procedure would be capable of bringing about a gradual convergence between European and national law standards. Since, in the case of conflict, the conciliation decision would have to enjoy priority over the ECJ's interpretation of Community law, there would not be any dangers of a contradictory jurisprudence and, thus, legal uncertainty.

Finally, it should be noted once more that the European legislator may of course forego the application and procedural concretisation of the theory of evidence along the lines just described in favour of another institutional arrangement. This would only have to ensure a legal solution to constitutional conflicts. However, as long as no other device exists, the fall-back on the theory of evidence remains obligatory.

#### dd) Legal consequences in the case of denial of a conciliation procedure

Starting from the ECJ's premises as to the unlimited primacy of European law over national law, the logical consequence would be that the ECJ's jurisdiction over EC law is exclusive. On that basis, it should be expected that the EC denies a conciliation procedure to a MS alleging the breach of its constitution. However,

<sup>135</sup>See for an extreme example the judgement of the Federal Constitutional Court on the new German abortion law (BVerfGE 88, 103 (251et seq.)). There, the court concretised the constitutional requirements as to the protection of the fetus by imposing a minimum standard (the so called "Untermaßverbot"). See critically *Hain*, Deutsches Verwaltungsblatt 1993, 98 et seq. Even such a far-reaching competence of a judicial organ seems to fit the legal character of the Community. With regard to the latter point, see below text accompanying Fn. 138.

<sup>136</sup>If, however, the European act in question falls within an area where differentiation according to conventional Treaty law or closer cooperation pursuant to the new Amsterdam rules is possible, it might be attempted by the European legislator to convert the European act at issue into "relative law", valid only in the Member States which have approved it.



since PIL cannot be disposed of arbitrarily by the EC, the latter could not legitimately deny a MS such a procedure without offering a functionally adequate EC law substitute. Therefore, the PIL solution would seem appropriate even for that case: The presumption of the relevance, in EC law, of the alleged violation of the constitution becomes irrebuttable, and the MS in question may lawfully discard the application of the incriminating act.<sup>137</sup> This could be perceived as the utmost legal consequence of the remaining responsibility of the MSS for the EC.

In practice, the declaration by a national judge of the definite disapplication of a European act should however be dispensable. As will be explained, under certain conditions, the MS can grant measures of interim relief when asking the EC for a conciliation procedure. If, however, the EC makes no effort to do so, the State in question can simply continue the interim measures, and no other steps seem to be necessary. However, if the EC not only denies a conciliation procedure to a MS, but also starts a Treaty violation procedure (Art. 169 TEC) with respect to the transitory disapplication, by way of the said interim measures, of the European act at stake, a political solution would finally be unavoidable.

## 6. Dogmatical and legal theory implications of this solution

### a) EC law

The concretisation of Art. 5 TEC and F I TEU through the theory of evidence, as elaborated in the previous sections, can be summed up in that a MS has the right to invoke a manifest violation of constitutional law as an exception to its duty of performance. By doing so, it can ask for a conciliation procedure, in which the question will be ultimately decided by a neutral body. A treaty violation procedure pursuant to Art. 169 TEC would be admissible if the State in question refuses to obey the conciliation decision. Thus, the duties of loyalty and of the respect of the constitutional identity of a MS constitute an exception to the ECJ's jurisdiction and to the doctrine of unlimited supremacy of EC law, which may be limited through the exceptional "victory" of national law in the conciliation procedure. As a result, this should be a dogmatic way out of the alleged "structural conflict".

Next, if a state has the right that a conciliation procedure be carried out, all interim measures preparing such a procedure - especially measures capable of avoiding the "de facto-anticipation" of the decision by factual circumstances ("Vorwegnahme der Hauptsache" in German administrative law terminology) - must be allowed by virtue of standing case law, constituting an exception to Art. 185, 186 TEU.<sup>138</sup> So, the disapplication of the challenged act of secondary legislation pending the decision of the conciliation body would be lawful in cases where the individuals or firms concerned would otherwise face the danger of irreversible losses or bankruptcy. However, any national measures capable of un-

<sup>137</sup>See above, text accompanying Fn. 119.

<sup>138</sup>See case C-465/93, ECR I-1995, 3761 - Atlanta; case C-142/88 and C-92/89, ECR I-1991, 415 - Zuckerfabrik.

dermining the practical efficiency of the (future) conciliation decision would generally still be illegal. This would be particularly true for a national constitutional court decision declaring nationally inapplicable European provisions before the conciliation procedure is completed. In Germany, such a decision would have legal force pursuant to Art. 31 of the Statute on the FCC (Bundesverfassungsgerichtsgesetz). Such a decision would not, though, be relevant at the EC level, it would not exclude a conciliation procedure to be carried out, and it would not create problems unless the MS in question looses the conciliation procedure. However, renouncing *a priori* the factual possibility of respecting a future decision by an international dispute settlement body is in itself a clear violation of international law.

#### *b) Public International Law*

Next, the applicability of the theory of evidence entails very important consequences even if, contrary to the position advocated here, one considers EC law as a completely decoupled self-contained regime with regard to constitutional conflicts and, as a consequence thereof, does not admit the application of the theory in the intracommunitarian legal sphere. In this case, even the disapplication of EC acts by way of interim measures would be illegal under EC law. Now, however, if a state decided to leave the basis of the EC order by doing so, this does not mean that we are in a legal vacuum. Rather, PIL must then be resorted to as an emergency regime. As shown, it does allow for the disapplication of an international treaty, but only under the very restrictive conditions of the theory of evidence. Therefore, *the competence of constitutional control, retained by the FCC, would, insofar as it were to include the avoidance of an EC act without a previous conciliation procedure according to PIL, be a massive violation of PIL independent from its incompatibility with EC law.*

Even if one should feel inclined to discard the direct applicability of the theory of evidence as to substantive competence limits of the treaty-making power of a state (or for other PIL reasons), the lesson to be drawn from PIL should be at least that a *legal* solution is to be found for constitutional conflicts. Thus, at any rate, before setting aside a European act, a MS has to make every reasonable effort in order to establish a legal mechanism capable of conflict solving. This obligation should again be derived from Art. 23 Basic Law as well as from Art. 5 TEC and F I TEU.

#### *c) National constitutional law*

On the level of national constitutional law, this solution has important implications as well. As stated, the integration clauses of the Grundgesetz aim at a stable EC governed by the rule of law. Otherwise, the homogeneity requirements Art. 23 Basic Law imposes on the EC would be completely illusory. Now, since there is a PIL procedure capable of decreasing the potential disintegrative effect of constitutional conflicts, German institutions would be bound to make use of it. Thus, setting aside secondary legislation without substantial efforts by German organs to set up a conciliation procedure in the EC would not only be a violation of PIL



and EC law but also of national constitutional law.

*d) Legal theory implications for the structure of the Union and the relationship of EC and national law*

Finally, the consequences in legal theory of the concretisation of the EC's solidarity duty with respect to the MS shall be expounded. As to the localisation of the conciliation procedure within the EC system, a conciliation body might best be conceived of as an organ of the Union, competent for the procedural implementation of Art. F I TEU read together with the theory of evidence. Thus, the Union's "roof construction" above the MSS and the Communities, otherwise nearly devoid of content, could be rendered useful for the sake of legal coordination between them. This construction would comply well with the rationale of a Union containing the supranational Communities and counteracting bureaucratic autodynamics. Along these lines, the three-tier structure of the Union might even be characterised as the very initial stage of a - federal or confederal - "all-state" structure, similar to the famous theoretical debate in the fifties and early sixties about the structure of German and Austrian federalism.<sup>139</sup>

This debate focused on the question whether the federal structure consisted of two or three entities ("zwei- oder dreigliedriger Bundesstaat"): the *Laender* (the States), the *Bund* (the Federation) and possibly also a third level representing the State as a whole ("Gesamtstaat"), on which, among other things, conflicts between the *Laender* and the *Bund* could be solved. This reconstruction resolves the conflict that, under the Basic Law, the *Bund* is in some respects supraordinated, in others on an equal footing with the *Laender*, in favour of the highest "coordination competence" of the "Gesamtstaat". This puts the *Laender* and the *Bund* together as complementary parts of one polity, and, thus, represents them as one coherent unity. Under the constitution, *Bund* and *Laender* are awarded different competences and are, for this very reason, within their relative sphere of competence the highest, and hence, sovereign, legal entity. Furthermore, the constitutions of the *Bund* and the *Laender* are derived from the constitution of the *Gesamtstaat*. The latter possesses legislative *Kompetenz-Kompetenz*.

This view was criticised, though, by the partisans of a two-tier federalism (who were joined by the FCC in the *Hessen-judgment*<sup>140</sup>), as a theoretical castle in the air. In reality, only two entities could be found: The *Bund* and the *Laender*.<sup>141</sup> The three-tier construction would only pursue the aim of awarding the *Laender* sovereignty and an equal footing with respect to the *Bund*; thus, what was at stake in reality was not the delimitation of real political task, but the question of hierarchy and supremacy. The real problems of the federal state, however, go well beyond the delimitation of several spheres of competence, and lie at the interface of several centers of decision-making: in the influence of the *Bund* on the *Laender* (legal control, intervention, administrative execution, political homogeneity etc.) and, conversely, in the participation of the *Laender* in the decisions of the *Bund* (second chamber, constitutional amendments etc.) and, finally, in the mechanisms of achieving compromises between the two entities. The three-tier model would distort this

<sup>139</sup>The three-tier model goes back to *Kelsen* (*Allgemeine Staatslehre*, 1925 (reprint 1966), 199 et seq.) and *Nawiasky* (*Allgemeine Staatslehre*, 3. Teil, 1956, 151 et seq.). See e.g. *Hesse*, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20. Aufl. 1995, 96 at Fn. 1; for an instructive summary, see *Stein*, *Staatsrecht*, 13th ed. 1991, 310 et seq. For Austria, see *Oehlinger*, *Der Bundesstaat zwischen Reiner Rechtslehre und Verfassungsrealität*, 1976.

<sup>140</sup>See BVerfGE 13, 53 (77).

<sup>141</sup>See e.g. *Scheuner*, *Staatstheorie und Staatsrecht* (Gesammelte Schriften), 415 (422 et seq.).

finely-tuned system by overemphasising the delimitation of competences and the question of hierarchy. Analysing these two positions, it must be admitted, though, that the difference between them is not very big, because the different notions are to be found at different levels of comprehension, and because they have a partly complementary function. In the first place, undoubtedly, the Gesamtstaat is not a political entity existing in reality. Rather, it is but a theorem, embodying the idea of unity of the Bund and the Laender as a political-ethical idea, a fictitious subject of imputability of the common good, which brings together all constitutional elements which, legally or factually, guarantee this unity. In the reality of the German political system, the competences of the Gesamtstaat are also pursued by the Bund; the latter is, in one entity, Zentral- and Gesamtstaat, part of the whole, and its guarantor.<sup>142</sup> In so far, the three-tier construction is indeed not needed at the German level. Notwithstanding that, it is a useful tool for the reconstruction of the competence structure, which is one of the paramount goals of the Pure Theory of Law. However, as opposed to the German situation, a three-tier structure does, albeit in a very initial stage, exist at EC level, consisting of the Union which the European Council as its own institution, and below it both the Communities and the MSS. If the Union, according to what has been proposed here, is also competent to conciliate conflicts between the Communities and the MS, a three-tier model seems to make sense. This structure would be monistic in so far as the decisions of the conciliation body would be respected. Since, as explained, they are however not binding *de lege lata* under national constitutional law, the present constellation might be qualified, by analogy to conflict of laws terminology, as one of "limping monism".<sup>143</sup> However, an important difference with respect to the classic three-tier Kelsenian model can not be overlooked: The Union as the third level is relatively weak, its legal competence-competence being limited by the constitutional essentials of the MSS. In so far, one may note a meaningful substantive law-"intertwining" of the three-tier structure: While, on the one hand, the Union is supraordinated to the MS, on the other this position is limited in that a primary law norm close to the Union *Grundnorm* stipulates the identity-relevant components of the national legal systems as prior-ranking at EC level, albeit contained by the mechanism of a "concordance-oriented optimisation" of the underlying colliding principles. Beyond that, the critique of the three-tier model of German federalism is also partly true for the European Union: Its legal and political reality is indeed not so much characterised by questions of supremacy and the delimitation of competences, but rather by the multiple and complex "dovetailing" of buracracies, politics, and law. However, this does not change the fact that these questions are crucial for the resolution of constitutional conflicts which happen in reality, even if they are (luckily) not the part of the Union's daily business. Furthermore, it must be stressed that the three-tier model does not even claim to reconstruct the multiple relationship of the Union and the MS in an exhaustive way.

To sum up, the three-tier construction of "limping monism" advocated here seems to be capable of avoiding the dangers of an unlimited dualism to a large extent, under which two legal orders stand side by side like medieval strongholds and restrict the relationships between each other, to the ultimate detriment of both. If one wishes to take up again Paul Kirchhoff's "bridge metaphor", the three tier-construction may be conceived as the Florentin Ponte Vecchio, with the conciliation mechanism being a common European house on the bridge.

## 7. Summary of the procedural consequences

As to the procedure to follow for a national constitutional court, the following summary may be stated: If it were to regard a European act, assessed by the ECJ to be in conformity with EC law, as a violation of the own constitution, it would have to suspend the procedure and refer the case to the ECJ pursuant to Art. 177 III TEC if the latter has not yet had the opportunity to pronounce itself on all the

<sup>142</sup>Compare *Isensee* in: *Isensee/Kirchhoff* (eds.), *Handbuch des Staatsrechts* IV, § 98, C, 562 et seq.

<sup>143</sup>In Private International Law, the expression "liaison boîteuse" is used to describe a legal relationship which is not recognised as legally valid in all states involved. The example par excellence is a marriage, which, for the lack of certain legal preconditions (e.g. one state recognised religious marriages, the other does not), is not recognised in another country.



relevant legal issues. In the reference decision it may already indicate, in the form of an obiter dictum of course, that it intends to demand a conciliation procedure if the ECJ were to approve the incriminating provisions again.

If however the ECJ should actually do so, a new reference concerning the concretisation of Art. 5 TEC in the sense of the theory of relevance would not be necessary. For, first, the application of general international law cannot be disposed of by the EC as long as it does not provide for a specific functional equivalent. Secondly and decisively, the ECJ would be biased as to this question since it relates indirectly to its own competences. For this very reason it would even be irrelevant if the ECJ - in response to the *obiter dictum* in the reference decision or simply for "preventive" reasons - were to deny the concretisation of Art. 5 proposed here by claiming unlimited jurisdiction.

Thus, if the conflict is not resolved by a cooperation between the ECJ and national courts in the Art. 177 TEC procedure as stated, the constitutional court, backed by its own government, should demand a conciliation procedure to be carried out. In this regard, it would first of all have to notify the EC and all other MSS. The procedure before the constitutional court might still be suspended in the meantime; the provisory disapplication of the incriminating European provisions might be ensured by interim measures. Now, three alternatives are possible:

1) *The EC establishes a conciliation body and this decides in favour of the MS declaring the European act in question void erga omnes (or only with respect to the MS alleging the breach, if upholding it as a measure of closer cooperation might appear feasible).* Then, the procedure before the constitutional court might simply be stopped.

2) *The EC establishes a conciliation body and this decides in favour of the EC by upholding the act in question.* As already stated, regardless of whether one considers the decision to be binding under EC law, it would at any rate not be binding *de lege lata* under national constitutional law. If the national limits to integration were complied with, the constitutional court would not be prevented from finding a violation of the Constitution and setting aside the act for the territory of the MS. The conciliation solution proposed here would then have failed as well. However, as also expounded, the "cumulative weight" of the Basic Law's mandates to further European integration and to guarantee the respect for international law might probably enable the Constitutional Court to give up, by virtue of the balancing principle of practical concordance, more constitutional ground in the field of human rights or elsewhere, than before.<sup>144</sup> Beyond that, the denial of respecting and implementing a conciliation decision would now be a clear violation of EC law, and the Commission could start a Treaty violation procedure pur-

<sup>144</sup>It is submitted here that the constitutional court might well change its opinion after the report of the conciliation body, to which political pressure and the undoubtedly higher level of acceptance might contribute. In particular, even if the procedural rules on the conciliation should presuppose the conviction of the constitutional court of the unconstitutionality of the Community act in question for the initiation of a procedure (similar to Art. 100 Basic Law, which presupposes the conviction of the lower court judge of the incompatibility of a law with the constitution), this would not prevent it from changing its conviction later. For, this is exactly the domain of the conciliation procedure.

suant to Art. 169 TEC.

3) *In response to the State's claim that a conciliation procedure be carried out, the EC denies any such possibility by claiming exclusive jurisdiction for the ECJ or by alleging other reasons.* As stated above, such a reaction would indeed be the logical consequence of the EC's (however unfounded, as shown) presumption of supraordination and unlimited supremacy of EC law over national constitutional law. As a result, the constitutional conflict would remain unresolved. However, since it brings about the juridification of constitutional conflicts, the solution proposed here would still have considerable advantages even in that case. For the EC, the outcome would be positive in that the potential threat to destroy the uniformity of EC law would be decreased, and another "level of de-escalation" would be introduced. It would even be up to the EC to avoid any danger by setting up a conciliation procedure. The advantages for the MS lie in the fact that it would not longer have to resort to clearly illegal devices in order to guarantee respect for its constitution. Particularly, the claim to respect common PIL standards rather than merely the alleged constraints of its own internal law would be more prone to sympathy by other MSS. Furthermore, by discarding the negative effects of the current regime, the positive effect of the national competence of constitutional review would become plain. In addition, this solution, even if not carried out, might at least make European and national politicians more sensitive as to the pathological points of unlimited supremacy of EC law; and thus, it might ideally allow for a common solution in European and national constitutional law of these issues. Finally and most importantly, the threat to establish a competing organ for constitutional adjudication puts the ECJ under pressure to avoid constitutional conflicts. Thus, the solution might have the effect of a Solange III decision, and like its famous predecessors, it would prove most effective if it could contribute to preventing a violation of national constitutions by European acts - all this, however, without the negative flavour of the current Cold War scenario.

### 8. A too far-reaching constitutional reform in PIL clothes?

A principal misgiving about this solution could be the fact that it constitutes a too far-reaching law-making in the sensitive area of constitutional law. This critique may be first countered by emphasising the low law-making component of this solution as compared to e.g. the ECJ's jurisprudence on state liability. Rather, we are dealing with the simple application of PIL norms, which are unaltered in their substance. Already for this reason, it is hardly admissible to say that only the political organs of a State might venture out into a conciliation solution *de lege ferenda*, but not judicial organs *de lege lata*.

However, when evaluating the institutional implications of this solution, one will have to admit that they are indeed overwhelming. We are dealing with nothing more or less than a constitutional reform of the Union system in PIL clothes, in which the ECJ is weakened in favour of a more decentralised, but not neces-



sarily less efficient, constitutional adjudication structure. However, it is to be argued that such a development fits the structural peculiarities of the EC and the Union well. For the specific features of the intracommunitarian division of functions are widely different to the separation of powers in European nation states. Because of lower levels of political consensus, legal solutions are bound to play a conspicuously more important role in the EC, as compared to the MS. Thus, even societal, political and constitutional essentials, which would and could be decided by politics in the Nation States, are left to the judiciary in the EC setting.<sup>145</sup> Presumably, the best example is provided by the famous doctrines concerning the relationship of EC and national law (direct effect, primacy etc.), which, though being judicial inventions, were implicitly approved by the MSS. In a Nation State political environment, it would have been impossible to invent a norm like "EC law breaks national law"; as is well known, a similar norm is even contained in Art. 31 Basic Law concerning the relationship of federal and state law within Germany. It follows from this that the status of the judiciary, and therefore also its responsibility, is much more important in the EC system. Now, it seems perfectly suited to this particular status that the judiciary itself develops constitutional solutions for institutional problems, all the more so if those are of a genuinely legal nature and can be widely solved by the application of existing law, albeit not EC law itself. However, since the concretisation of Art. 5 TEC in the sense proposed here would weaken the ECJ's position in favour of a more policy centric structure of constitutional adjudication, such a solution can clearly not be expected from this court. Rather, national constitutional and high courts, together with their governments, are called upon to develop such a solution. All in all, if one shares the authors's opinion that, on the one hand, the unbridled dualism of the two legal orders reflected in the cold war between their two judiciaries is highly detrimental to the stable and democratic development of the Union and therefore, is to be replaced by a more monistic overall structure, and that, on the other hand, the political potential for the development of such an institutional solution is rather small, there hardly seems to exist any alternative to the present legal solution.

To sum up: As opposed to the other "federal conflict of laws doctrines" developed by the European judiciary to enhance the *effet utile* of European law, the concretisation of Art. 5 TEC and Art. F I TEU along the lines of the PIL theory of evidence adds an important institutional mechanism capable of mediating constitutional conflicts and ensuring a possibly better constitutional balance between the EC and its MSS. At the same time, the residual national competence of constitutional control over European acts would be stipulated as an integral part of the checks and balances of the EU's constitution. Thus, the widely criticised, but, under a dualistic system and under standing law, unavoidable challenge to the ECJ by national constitutional courts, would result in a positive outcome.

<sup>145</sup>See Ehlermann, *Neue Juristische Wochenschrift* 1992, 1856 (1856).

## Summary

This contribution starts from the new and dangerous escalation, in the "Banana saga", of the conflict between the European Court of Justice and the German FCC concerning the residual competence of the latter to review European acts to be applied in Germany on grounds of constitutionality. In the first part, it is shown that this conflict is largely structural in that it is but the logical consequence of the contrary conceptions of both courts as to the limited vs. the unlimited supremacy of European law. According to the German Basic Law, on the one hand, the devolution of sovereign powers to the EC is limited (Art. 24 old version, Art. 23 new version Basic Law). Like any other constitutional provisions, these limits to integration have to be monitored by the FCC, which forces this court to indirectly review European law over the "bridge" of the German ratification statutes. By contrast, no such reservation in favour of national constitutions is contained in the EC Treaties, which is quite understandable, since it might have a fatal effect on legal unity within the EC. According to the ECJ's understanding of the nature of the EC, on the other hand, the EC Treaties would have cut the ties to their roots in international and national constitutional law and would have metamorphosed into a Constitution in the true sense of the term. If this 'emancipation' did not happen already at the foundation stage, it must be at least conceded as a result of the constitutionalisation process which has taken place in the meantime. Consequently, the MSS would no longer be "Masters of the Treaties", who could control and modify them at any given moment. Rather, through the emancipation of the Treaties from the national statutes of ratification, a constitutional control through the review of these statutes would no longer be possible; thus, they would have become an interrupted bridge in the Avignon style.

Since both positions are, per se, theoretically coherent, but start from different premises, a further clarification can only be achieved through a critical analysis of the well-foundedness of these premises. Such an analysis must go beyond the bonds of positive law and resort to a theoretical reconstruction of both positions. As analytical devices, this reconstruction makes use of the Pure Theory of Law and institutional legal positivism. The first result is that EC law is a legal order on its own and not just an appendix of the national law of each MS. For at least the sanctions which may be imposed under Art. 169 et seq. TEC and, which, as a very last resort, might be completed by PIL sanctions of other MSS acting as trustors of the EC, endow EC law with a minimum of autonomous (i.e. independent from national law) efficiency. Thus, a monistic model with supraordination of national law is untenable. The second result is that a monism with supraordination of EC law, as advocated by the functional theory held by the ECJ, is untenable as well, since it would render possible in theory an unlimited intrusion of EC law into national law. The establishment of such a powerful EC, which would also have violated their constitutions by foregoing their sovereignty to a large extent, was however neither intended nor realised by the founding states. A monistic



structure with supraordination of EC law has not in the meantime been achieved through the constitutionalisation process either. For MS have never agreed on such an incisive change of the EC's status. Furthermore, it cannot be implicitly assumed either, since nearly all constitutional resp. highest courts of the MS do not in principle exclude the constitutional review of EC law which is to be applied on national territory. As a consequence, the relationship of EC and national law can only be conceived of as dualistic. This interpretation indeed comes closest to the reality of two visibly separate legal orders protected by two powerful judicial guardians. This means that we are dealing with two principally independent systems with two different *Grundnormen*, between which no conflicts of validity, but only "conflicts of obligation" for the citizens may arise. With respect to "bridging norms" between the two orders as, in particular, the supremacy rule, the dualistic model implies that those norms cannot, by definition, change the dualistic structure itself and, thus, may not bring about a legal revolution through the annexion of a legal order under the *Grundnorm* of the other. This means that the premise of the FCC, whereafter national law is competent to decide on the degree of influence of EC law on its own legal order, is correct in principle. An unlimited supremacy of EC law, uncontrollable by national courts, would only be possible under a model of monistic supraordination of EC, and is therefore to be excluded under a dualistic model. For the possibilities of conflict resolution, the dualistic model sets up important premises. First, it implies that there is no hierarchical supra- or subordination between both legal orders. Since supremacy is limited there, "Grundnorm-relevant" conflicts can only be resolved through judicial collaboration in which both courts must agree on a standard of protection of constitutional fundamentals like human rights, which is acceptable for both of them (here so-called concordance solution). Even though, on the basis of the pluralistic model, not all legal conflicts can be solved legally, it is further submitted that, before a capitulation of law in the face of constitutional conflicts, all legal mechanism of conflict avoidance and resolution must be fully exhausted.

In the remainder of the article, it will be attempted to implement these theoretical findings at the level of positive law. After a short analysis of the restricted possibilities of conflict avoidance of national constitutional law, the resources of EC law are analysed further. First of all, it is argued that the cooperation and solidarity duties enshrined in Arts. 5 TEC and F I TEU force the ECJ to take into account national constitutional essentials much more than in the past. In particular, it is claimed that the ECJ must explicitly refer to the jurisprudence of national constitutional courts. In doing so, the ECJ must, however, also bear in mind the needs of the EC, since the membership in a stable community is also a constitutional essential of all MSS. It is further argued that the chances of a concordance solution may be considerably increased through such a problem-oriented discourse on common constitutional standards. If, however, such a solution were to fail, it is submitted that the ECJ can not be the ultimate umpire over EC law to be applied in the MSS, since the competence of this court cannot go further than the

reach of the supremacy norm which it is bound to protect. Beyond that, the ECJ would not be a neutral institution either with respect to its task as the guardian of EC law. Having ascertained this limitation of the ECJ's jurisdiction, the choice must now be made between deliberately leaving the conflict open (and thus allowing the Cold War between the Courts to continue), or searching for a conciliation solution through a third instance. With respect to the fact that leaving open the conflict could be highly detrimental for the stability of the EC and its democratic evolution (since a first blow of a national constitutional court is never excluded and could even become more probable after the East enlargement), the decision is taken in favour of a conciliation solution, even though it entails a massive intrusion into the existing institutional balance in the Union.

Though it is of course the primary task of the European legislator to establish such a procedure, it may be shown that the essentials of such a solution can already be derived from existing law. The points of departure in EC law are the basic provisions of the Treaty as to the interplay of EC and national law: the duty of the EC to respect the national identity of MSS (Art. F I TEU) and the general duty of loyalty (Art. 5 TEC), which was extended by the ECJ to also include obligations of the EC with regard to MSS. Since a EC law concretisation of these provisions is not sufficient to come to grips with constitutional conflicts, recourse must be had to the acknowledged devices of gap-filling. By doing so, only the application of PIL principles seems promising. In this context, it is first claimed that a fall-back to PIL as an emergency regime must be allowed even in a widely self-contained regime like the EC, at least as long as EC law does not contain any pertinent rules and the PIL provisions in question do not create contradictions with the structural peculiarities of the EC. The contrasting view would preclude the application of norms potentially useful for conflict resolution unnecessarily. Second, it is shown that PIL may not only be applied directly, but also used as a "legal quarry" in order to elaborate general principles of law which can deal better with the specific features of the EC. Thus, a virtue shall be made out of the necessity of resorting to PIL.

The PIL provisions relevant here are the customary law rules on the exceptional relevance, in PIL, of the violation of internal law through the conclusion of a Treaty, which have been codified in Art. 46 of the Vienna Convention on the Law of Treaties of 1969. Thereafter, only the manifest violation of essential internal law regarding competence is relevant; as may be shown by reference to the preparatory works and the teleology of this norm, the term competence is meant to include any national law affecting the treaty making competence of the acting State representative, also substantive limits like human rights. As a consequence, however, the violated internal provisions are not automatically relevant, but the State in question only has the right to a neutral conflict resolution procedure. This is to be confined to the incriminating provisions of the Treaty if those are separable from the rest of it. The procedure consists of two steps: first, of political negotiations or any other means of peaceful dispute settlement, and second, if those



means were to fail, of a conciliation procedure to be carried out by a neutral dispute settlement body. If however a party should deny participating in this procedure within a reasonable delay, the presumption of PIL relevance, immanent in the allegation of manifest breach of essential internal law, becomes irrebuttable. Thus, the State in question may lawfully rely on the disapplication of the incriminating international provisions.

As will be shown in the following chapter, these rules also fit, even though only as *ultima ratio*, constitutional conflicts in the EC. First, the enactment of secondary law may also be considered as a subtreaty to the original treaty, to which general treaty law may be applied. In applying the theory of evidence, the violation of internal law of the MSS, especially constitutional provisions, must also be contemplated; though again only with the consequence that the State in question will be given a right to a neutral conciliation procedure, in which the fate of the secondary law provisions at issue (and only them, since separability of the EC Treaty is the rule) will be definitively decided. As far as the single procedural steps are concerned, it has to be stated first that separate political negotiations among the parties are superfluous in the EC context, since the EC disposes of standing organs who can well be expected to do this job. The most difficult task is the handling of the conciliation procedure, since important deviations from the PIL model are necessary there: As the conciliation body *de facto* performs the task of constitutional adjudication, it must principally be democratically legitimated in the EC context; therefore it must be set up by the EC legislator through a Treaty amendment; a regulation based on Art. 235 TEC would not be compatible with the ancillary gap-filling function of this provision. The conciliation body should be entitled to take binding decisions *erga omnes* as to the relevance of the national constitutional standard in EC law, and, in the case of conflicts, its opinions should take precedence over ECJ rulings. By contrast, the PIL conciliation scheme as codified in the Vienna Convention (a neutral conciliation commission composed of five members which are nominated by the Executive of both parties on an *ad hoc* basis and issue non-binding reports on the settlement of the dispute) would not comply with the legality and democracy requirements of the EC. Thus, the application of PIL only shows that a conciliation solution is necessary, but it does not indicate what form, composition and procedure a conciliation organ should have. Finally, if the Community however denies the MS a conciliation procedure, the PIL legal consequence should be operative again: The State may lawfully discard the application of the incriminating EC law provisions.

Important legal implications in EC law, PIL, national constitutional law and legal theory can be deduced from the concretisation of Art. 5 TEC and F I TEU through the theory of evidence. In EC law, a MS has the right to invoke a manifest violation of constitutional law as an exception to its duty of performance. A treaty violation procedure pursuant to Art. 169 TEC would henceforth only be admissible if the State in question refuses to obey the conciliation decision. Thus, the duties of loyalty and of the respect for the constitutional identity of a MS

constitute an exception to the ECJ's jurisdiction and to the doctrine of unlimited supremacy of EC law, which may be limited through the exceptional "victory" of national law in the conciliation procedure. Next, to bridge the time until a conciliation procedure can be carried out, all interim measures preparing such a procedure - especially measures capable of avoiding the "de facto-anticipation" of the decision by extra-legal factors - must be allowed by virtue of existing case law, constituting an exception to Art. 185, 186 TEU. Besides that, even if the fall-back to the theory of evidence were denied under EC law, PIL would still be applicable as an emergency regime if a State decided to violate EC law by displacing a EC act. For this could only be done pursuant to the requirements of the theory of evidence; otherwise, there would be an additional massive breach of PIL. Thirdly, as to national constitutional law, it should be taken into consideration (since otherwise, the homogeneity requirements Art. 23 Basic Law imposes on the EC would become completely illusory) that, if there is a PIL procedure capable of decreasing the potential disintegrative effect of constitutional conflicts, German institutions are bound to make use of it. Thus, the setting aside of secondary legislation without substantial efforts by German organs to establish a conciliation procedure would also be contrary to national constitutional law. Finally, with regard to the theoretical reconstruction of the EC system, it may be noted that, through the establishment of a Union conciliation mechanism, the Union approaches a three-tier - federal or confederal - structure. This structure would be monistic to the extent that decisions by the conciliation body would be respected. Since the decision is however not binding *de lege lata* at the level of national constitutional law, the expression "limping monism" is proposed by analogy with conflict of laws terminology.

As to the chances of this solution coming into fruition, it must be conceded that a conciliation procedure is likely to be denied to the State asking for it by the EC claiming exclusive jurisdiction for the ECJ. Such a reaction would even be the logical consequence of the EC's (however unfounded, as shown) presumption of complete autonomy and unlimited supremacy of EC law over national constitutional law. However, since it brings about the juridification of constitutional conflicts, the solution proposed here would still have considerable advantages even in this case. For the EC, the outcome would be positive in that the potential threat to destroy the uniformity of EC law would be decreased, and another "level of de-escalation" would be introduced. It would even be up to the EC to avoid any danger by setting up a conciliation procedure. The advantages for the MS lie in the fact that it does not any longer have to resort to clearly illegal devices in order to guarantee respect for its constitution. Particularly, the claim to respect common PIL standards rather than merely the alleged constraints of its own internal law would be more prone to sympathy by other MSS. Furthermore, by discarding the negative effects of the current regime, the positive effect of the national competence of constitutional review would become plain. In addition, this solution, even if not carried out, might at least sensitise European and national politicians as to



the pathological points of unlimited autonomy and supremacy of EC law; and thus, it might ideally allow for a common solution in European and national constitutional law as of these issues. Finally and most importantly, the threat of establishing a competing organ for constitutional adjudication puts the ECJ under the pressure to avoid constitutional conflicts. Thus, the solution might have the effect of a Solange III decision, and like its predecessors, it would prove most effective if it could contribute to preventing a violation of national constitutions by European acts. All this, however, could be attained without the negative flavour of the current Cold War scenario by completing the Avignon bridge by a conciliation procedure. The result might be described with the metaphor of the Florentin Ponte Vecchio, i.e. a bridge on which one can find houses, the conciliation institution being one of them.



# EUI WORKING PAPERS

EUI Working Papers are published and distributed by the  
European University Institute, Florence

Copies can be obtained free of charge  
– depending on the availability of stocks – from:

The Publications Officer  
European University Institute  
Badia Fiesolana  
I-50016 San Domenico di Fiesole (FI)  
Italy

**Please use order form overleaf**



# Publications of the European University Institute

To                    The Publications Officer  
                      European University Institute  
                      Badia Fiesolana  
                      I-50016 San Domenico di Fiesole (FI) – Italy  
                      Telefax No: +39/55/4685 636  
                      e-mail: [publish@datacomm.iue.it](mailto:publish@datacomm.iue.it)  
                      <http://www.iue.it>

From                Name .....  
                      Address.....  
                      .....  
                      .....  
                      .....  
                      .....

- ☐ Please send me a complete list of EUI Working Papers
- ☐ Please send me a complete list of EUI book publications
- ☐ Please send me the EUI brochure Academic Year 1999/2000

Please send me the following EUI Working Paper(s):

No, Author        .....  
Title:                .....  
No, Author        .....  
Title:                .....  
No, Author        .....  
Title:                .....  
No, Author        .....  
Title:                .....

Date                .....

Signature                .....



# Working Papers in Law

Published since 1996

## **LAW No. 96/1**

Silvana SCIARRA

Verso una costituzionalizzazione dei diritti sociali fondamentali nell'Unione europea

## **LAW No. 96/2**

Christian JOERGES

The Market Without the State? States Without a Market? Two Essays on the Law of the European Economy \*

## **LAW No. 96/3**

Massimo LA TORRE

Significato, azioni, giudizi di valore

## **LAW No. 96/4**

Marie-Bénédicte DEMBOUR

Harmonization and the Construction of Europe: Variations away from a Musical Theme

## **LAW No. 96/5**

Karl-Heinz LADEUR

Proceduralization and its Use in Post-Modern Legal Theory

## **LAW No. 96/6**

Silvana SCIARRA

How 'Global' is Labour Law? The Perspective of Social Rights in the European Union \*

## **LAW No. 96/7**

Marie-Jeanne CAMPANA

Le droit français des entreprises en difficulté

## **LAW No. 96/8**

Marita KÖRNER

The Impact of Community Law on German Labour Law - The Example of Transfer of Undertakings

\*\*\*

## **LAW No. 97/1**

Massimo LA TORRE

Law and Power. Preface to a Non-prescriptivist Theory of Law

## **LAW No. 97/2**

Paul L. DAVIES

The Relationship Between the European Court of Justice and the British Courts over the Interpretation of Directive 77/187/EC

## **LAW No. 97/3**

Antoine JEAMMAUD/

Martine LE FRIANT

La directive 77/187 CEE, la Cour de Justice et le droit français

## **LAW No. 97/4**

Yota KRAVARITOU

An Introduction and a Bibliography on Feminist Jurisprudence

## **LAW No. 97/5**

Yota KRAVARITOU

Du Droit et de l'Amour dans l'Union européenne

\*\*\*

## **LAW No. 98/1**

Massimo LA TORRE

Theories of Legal Argumentation and Concepts of Law.  
An Approximation

## **LAW No. 98/2**

Massimo LA TORRE

Two Essays on Liberalism and Utopia

## **LAW No. 98/3**

Massimo LA TORRE

Meaning, Actions, Value Judgements - A Moderate Non-Cognitivist Approach

## **LAW No. 98/4**

Christian JOERGES

The Science of Private Law and the Nation State

\*\*\*

Die Wissenschaft vom Privatrecht und der Nationalstaat

## **LAW No. 98/5**

Andrea BARENGHI

Note sull'arbitramento della parte

\*out of print



**LAW No. 98/6**

Francis SNYDER

EMU Revisited: Are we Making a  
Constitution? What Constitution Are we  
Making?

**LAW No. 98/7**

Christoph U. SCHMID

From Pont d'Avignon to Ponte Vecchio.  
The Resolution of Constitutional  
Conflicts Between the European Union  
and the Member States Through  
Principles of Public International Law



\*out of print





