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**The Law in the Process of  
Constitutionalizing Europe**

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## Preface

*This essay developed out of my contribution “Das Recht im Prozeß der Europäischen Integration” to Markus Jachtenfuchs/Beate Kohler-Koch (eds.), Europäische Integration, Opladen: Leske + Budrich, 1996, p. 73-108 [in English: Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration, 2 (1996) European Law Journal, 105-135]. Since the paper seeks to address political scientists, some of its sections, especially those on the history of Europe’s ‘juridification’, may encounter déjà vu reactions from lawyers. But this should not be true for the approach as a whole. -- I presented a first draft (EUI Working Paper in Law. 7/2001) at the conference on ‘Constitutional Policy at the European Union’ of the DFG ‘Governance in the EU’ programme, organised by the Arbeitskreis Europäische Integration of the Deutsche Vereinigung für Politische Wissenschaft in Mannheim on 1/2 November 2001 and I wish to thank my commentator, Armin von Bogdandy, and the other discussants for many constructive criticisms that have been incorporated into the reworking of the first version of this paper. That revision was presented at the ARENA Conference on Democracy and European Governance in Oslo on 4/5 March 2002. Again I received helpful critical comments, in writing, orally, and via e-mail, especially by my commentator, David M. Trubek. They have left only few traces in this renewed version. This is not to say that they were unimportant. This is especially true with reference to Section 3. The reference there to the notion of governance as a concept covering analytically extra-legal, quasi-institutional arrangements is so far only descriptive. The prescriptive dimension, to which the term “constititutionalisation” points, will have to be elaborated much further. The perspective this paper already pursues will, however, remain the same: “Constitutionalisation” comprises an understanding, which I try to follow (Habermas, e.g. 1998, 58 ff., 113ff.; 2001a; 2001b), both individual liberties and the rights of citizens to political participation. This is why the impact of Europeanisation and globalisation on the configuration of the economic system, the institutionalization of the welfare state and labour market are of “constitutional” importance. They affect profoundly the balance of private autonomy and political rights. I have little hope that the so-called “Convention Method” will provide us with more than partial response to these challenges which Europe faces in the process of its constitutionalisation. Nor should the Charter of Fundamental Rights be expected to resolve these issues. – All this is to say: this essay requires further elaboration. Critical comments continue to be welcome (joerges@iue.it).*

## Introduction

This essay is continuing the path between the disciplines of law and political science that I have been following for a couple of years now. The goal has always been the same one, which, in reality, is actually two different ones. In addressing my own discipline, law, I argue that it should renew its perceptions of reality and open up its normative and dogmatic conceptual structure. To political scientists engaged in integration research, I proclaim that they ought to take the law's normative structure seriously and open up their analytical and empirical models to this peculiar reality. 'Two goals?! No wonder he never gets anywhere!' By no means. These are merely two sides of one and the same thing. To anticipating my argument and my conclusions in a thesis, Europe's constitution is too important to be left up to the law; but it is also something that cannot be grasped in an empirical, analytical approach that relies on the identification of independent and dependent variables.

Walking on the ridge that I wish to explore, Europe's constitution will be looked at from two directions. I am concerned, first, with the legal content, and with the strategies of juridification of the integration project which have, since the foundation of the European Economic Community, have led to ever-new versions of the Treaties and their interpretation. But I am also concerned with the thematic development of the law, in order to show that, in the course of the integration process, Europe has been repeatedly 'constituted' anew and differently. The law itself is subject to change; it has to learn. It 'is' not *per se* 'the' constitution of Europe; it goes through metamorphoses when Europe is re-shaped, and constituted anew. There are, of course, different ways to look at these issues, and from such a distance, or such a level of abstraction, the developments and differences that this contribution seeks to explore can become invisible: how should Europe be constituted in order for us to be able to recognise it as legitimate? This is indeed a formula that could accompany the whole history of the integration project. But the answers that have been given and institutionalised, have changed. We have to realise what kind of *body politique* Europe represents in order to understand how law can, and should, constitutionalise the European polity.

And we cannot content ourselves with looking at the texts which form its legal basis. The speed at which the foundations are developing in the Treaties has become breathtaking. Between the 1987 Single European Act, Maastricht 1992, Amsterdam 1997 and Nice 2001, there were only a few years in each case. But the ink under the Nice agreements was not even dry when it was followed by the Laeken Conference with its concluding declaration on the future of the Union and the setting up of a

constitutional convention.<sup>1</sup> The sceptically sounding question of whether Europe needs a constitution<sup>2</sup> seems to have been settled. An invisible hand or a Hegelian *List der Vernunft* at work? Anyone engaged in interpreting the Laeken declaration, who then observes the convention discussions, follows them, and tries to interpret the smoke signals, will be continually confronted with the question of what sort of structure (polity) Europe is. Evidently, one does, after all, have to ask both questions at once. I shall seek to do so in a reconstructive procedure, in which three stages in the development of European integration and its legal constitution will be distinguished below.

- (1) The first section, covering the period from the establishment of the EEC up to the Single European Act, involves the building up of a supranational legal system which claimed primacy over national law, and, on this very ground, possessed constitutional significance which was, however, basically confined to an 'economic constitution'.
- (2) The second period covers the programme of the 'White Paper on Completion of the Internal Market', of 1985 (Commission 1985), which was rooted in the Single European Act that came into force in 1987, and was taken further by the Maastricht Treaty. All of this brought Europe into the political awareness of scholarship and onto its agenda. The key question in practical politics for this stage was: can completion of the European internal market be only be achieved at the price of breaking down the various regulatory patterns that both continental and British welfarism had institutionalised? The relevant empirical, analytical and conceptual contributions from political scientists correlate to two problems in constitutional law: a) what limits does one's own constitution set to the hollowing out of statehood through integration; b) what standards as to rule of law and democracy does the institutionalisation of Europe have to meet?
- (3) This issues are by no means definitely settled. But their background conditions have once again changed. The present situation can be characterised by referring to the Commission's Governance White Paper of July 2001 on the one hand (Commission 2001), and the Constitutional Convention set in motion through the Treaty of Nice<sup>3</sup>

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<sup>1</sup> <http://www.europa.eu.int/futurum>.

<sup>2</sup> Cf., for example, Grimm (1997). Habermas used this title in the publication of his Hamburg lecture, which was delivered on 26 June 2001 ('Braucht Europa eine Verfassung'/Does Europe need a Constitution?) in Habermas 2001: 104. But his original title was much more affirmative: 'Warum braucht Europa eine Verfassung'/So, why does Europe need a constitution?); the English version is available at [http://www.iue.it/RSC/EU/Reform02\(uk\).pdf](http://www.iue.it/RSC/EU/Reform02(uk).pdf).

<sup>3</sup> OJ C 80, 10 March 2001

and the Laeken Declaration of 2001<sup>4</sup> on the other. One might think that reform of governance and constitutional convention belong together. Yet, as will be shown, one ought not to build up great expectations about this coincidence.

These three stages, divided by these dates, do not involve strict *caesurae*. The state of development of the integration project is only very incompletely mirrored in Treaty amendments or the descriptions by their observers. In each phase, the understanding of the project was controversial. The conceptual and theoretical bases of such perceptions and positions tend, to a large degree, to be immune to many changes and are often carried over into a new Treaty amendment. But such theoretical constructs can never fully represent the law. This mysterious body found its way quite incrementally, neither as unconsciously as Niklas Luhmann's metaphor of the starfish insinuates, nor through the direction of a mastermind, but through a problem-related discovery process in which both the Commission's political programmes and the many adjustments on which the 'masters of the Treaty' agreed were continuously reflected in the terms that a sensitive judiciary had enunciated and was entrusted with developing further. In reconstructing this process, I do not intend to write the legal history of the integration process, but, instead, to defend the thesis that it was common experience, and the concrete constraints towards unification that European law was able link up with, that justified its extraordinarily inventive, and often also cunning, production of law. Whether Europe can continue to pursue this path of 'constitutionalisation from below' is difficult to predict; it has, at any rate, been so successful that it ought not to be given up lightly.

## **1. 'Vertical Constitutionalism': the justification of the supremacy of European law, and the theory of the economic constitution**

The distinctions between the development stages of the integration process employed here are widespread in both political and legal science, both at home and abroad. Admittedly, the accents shift a bit according to disciplines and nationalities. Authors coming from international law or 'public' law usually take the marked institutional shifts as milestones. English-speaking European law belongs entirely in this box. Economic integration research and European lawyers coming from private

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<sup>4</sup> Accessible at [http://www.europa.eu.int./comm/laeken/\\_council/](http://www.europa.eu.int./comm/laeken/_council/).

(economic) law have been more interested in the connections between market integration and economic policy. Particularly in Germany, the second, 'private-law' interpretation of the 'European Economic Community' was influential (an interpretation paid little attention to abroad: on this, cf., Gerber 1994; Sauter 1997: 26ff). *Both* viewpoints and traditions have a constitutional core. Both, in their ways, are 'right'. And the common features are as instructive as the differences.

### **1.1. Vertical constitutionalisation: 'Legal integration from above'**

It is no coincidence that public-law research into European law has dealt so intensively with the separation of European law from general international law. Nor is it any coincidence that it was this tradition that identified the European Court of Justice as the protagonist for 'integration through law'. Its characterisation by an emigrant from Czechoslovakia has become famous: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type Europe," (Stein 1981: 1).

The history of this 'constitutionalisation from above' is fascinating for lawyers, since it seems to confirm the existence of a legal culture of argumentation that is not only practised over and above the national legal systems but which is also able to find recognition (see a). It is as fascinating for legal sociologists and political scientists as Baron von Münchhausen's tale about pulling himself out of a swamp by his hair: can it really be true that, by its own resources, the law raised itself above inter-governmental politics and imposed its validity on sovereign states? What were the 'real' reasons – outside the law – for the law's success in the integration process, is the question that any self-respecting social scientist has to ask.

#### *1.1.1 The Law's Self-Descriptions*

The interpretation of the EC system as a supranational legal community can indeed be called an ingenious product of the European Court of Justice. This jurisprudence has found - in the legal system and beyond - such widespread support that it can well be regarded as the core of the dominant orthodoxy of Community law. The gradual construction of this legal architecture has been depicted so frequently (cf., for example, because of their striking similarities in this respect, Ipsen 1973: 97ff; Weiler 1991: 2413ff, and, more recently, von Bogdandy 2001: 11 ff.) that some remarks on the major steps should suffice here.



The foundations were laid in 1963 with the doctrine of “direct effect” of EC law (ECJ 1963). This doctrine declared that the rules of the EEC Treaty, as long as they are sufficiently precise, are not just binding on the Community and the Member States, but are valid ‘directly’ and establish subjective rights: anyone may claim the subjective rights contained in the Treaty, and domestic courts must guarantee their protection as if national law were at stake.

What is nowadays generally accepted was, at the time, anything but obvious. Article 169 of the EEC Treaty (now Article 226) envisaged appeals by the Commission and the Member States against Treaty infringements. This corresponded to the heritage of international law. Yet, it was possible to deduce from the preliminary rulings procedure of Article 177 (now 234) and from the extensive law-making powers of the Community that it was intended to be more than an international organisation. From these elements of the Treaty, the ECJ extracted its doctrine of direct effect:<sup>5</sup>

‘The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but also to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens ... In addition, the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community 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 the subjects of which not only comprise Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on

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<sup>5</sup> Or more exactly in the often ugly, though mostly exact, official translation. The ECJ’s working language is French. The language of a case goes according to the nationality of the parties (the plaintiff in the case of actions against the Commission or Council, the defendant in party proceedings). The Advocates-General write their conclusions in their own language. ECJ judgments are translated into all nine ‘official languages’ (thus, not into, for example, Catalan or Irish).

individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community,' (ECJ 1963: 24 f).

The second building block in this process was the doctrine of the 'supremacy' of Community law. This was introduced in the path-breaking *Costa/ENEL* decision as a legally-binding implication of the theory of 'direct effect':

'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the States, as a corollary, to accord precedent 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 executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws without jeopardizing the attainment of the objectives of the treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7' (ECJ 1964: 1269f).

Two further consequences are already discernible from the quoted passages: The 'direct effect' of Community law, leading to its supremacy *vis-à-vis* national legal systems, must also mean that Community law has the effect of pre-empting Member States from taking legislative action: if and when a policy area becomes occupied by the Community, then the Member States lose the right to act unilaterally. And demanding that Community law ought to have equal relevance in all Member States is to say that the ECJ must have the final competence to rule on the limits of its application. This consequence was forcefully drawn in the 1971 *AETR* judgment (ECJ 1971). Case law concerning the 'functional' Community competences - based on the objectives of the Treaty - as well as the 'implied powers' doctrine carried on from this judgment: even though the Treaty orders Community responsibilities 'enumeratively' and therefore limits them (Article 3B; now Article 4), these have to be understood and treated as 'goal-oriented'. This broad interpretation of the Community's competences was, in practice, limited by Article 235 (now 308) EEC Treaty, which demanded unilateral decisions on such matters. Article 100 (now 94) EEC stipulated the same for legal harmonization.

Inevitably, the application of these principles did, and still does, pose difficult problems, from which respective controversies of interpretation follow. But as long as these doctrines are accepted in principle, and as long as the ECJ remains able to take conclusive decisions in cases of conflict, we are dealing with a supranational order that is fundamentally different from the rules delineating domestic and international law. It is precisely because of this difference that one may assign the status of a "constitutional charter" to the structuration of the Community legal system as endorsed by the ECJ (Stein 1981: 1; Weiler 1991: 2413; Pernice 1993: 449, and especially the Court's own Opinion: ECJ 1991).

### *1.1.2 Explanations*

All ECJ statements on the quality and the content of Community law have been based on "strictly juridical" operations. Nowhere can we find explications of methodological premises or theoretical deliberations as to the legitimacy of Europe's 'constitutional charter'. Is this the right way to go about adopting a constitution? And how stable can such an order, which presents itself as a purely legal product of law, actually be? To these questions, we will return.

What remains remarkable and needs to be explained is the mere broad acceptance of this jurisprudence. The ECJ could not, for its landmark decisions, muster the support of the European nations; frequently, it did not even meet with the consensus of their governmental representatives (Stein 1981: 25). Equally, the Court was unable to rely on force or the kind of sanctions a supranationally institutionalised power centre might possess. Instead, support came from the Court's Advocates-General, from the Commission, and, after some resistance, from the Member States' national courts (Beutler/Bieber/ Pipkorn/Streil 1994: 98; Weiler 1993: 417). Europe experienced the strength of a silently and patiently operating 'legal community' (Höland 1993; Schepel/Wesseling 1997) of interpretation that took up the supreme judges' doctrines and used them as a framework for action.

Such technical legal references to the practice of the legal system have been taken up by political scientists. Here, the 'legal dialogue' between the ECJ and the national supreme courts is an important, if not *the* most important, fact. It was also important that the Commission stubbornly utilized the means for enforcing European law domestically, which was granted to it by Article 169 (now 226) (Börzel 2000; Tallberg 1999), and that the so-called *acquis communautaire* (the stock of European law) was never made disposable in external relations – and this is again the case with EU enlargement, to the dissatisfaction of the accession countries (Weiner 1998). As a much noted inter-disciplinary essay concluded,

“Law functions both as a mask and as a shield. It hides and protects the promotion of one particular set of objectives against contending objectives in the purely political sphere,” (Burley[Slaughter]/Mattli 1993: 72).

All of this is walking along the ridge between the normativity and facticity of the law, abstracting from the content; balancing acts as they are employed everywhere in international law. Against this, however, we must ask ourselves if the actors that helped European law to validity were not also following a vision, a ‘finalité’ of the European project, that could have more convincingly justified its ‘primacy’?

## **1.2. Ordo-liberal Economic Constitution Theory: Europe as ‘market without state’**

This is something requiring the use of an oxymoron like ‘normative fact’: technical legal ‘dogmatic’ reconstructions of European law were always accompanied, supported or criticised by metadogmatic justificatory discourses, by ‘legal-science theories of integration’, which dealt with the validity claims of this law (Joerges 1996). One justification for European law that continues to be important, and is far superior to the purely legal methodological derivation of vertical constitutionalism, was brought by the ‘*ordo-liberal*’ theory of a supranational ‘economic constitution’.

To understand the operational history of this theory, we have to look right back to the Weimar Republic. There, the theory of the economic constitution advocated a framework order above party disputes which was intended to guarantee economic freedoms, but, at the same time, to check them legally through a competition system (Nörr 1999: 5-18; Wiethölter 1989: 225 ff.). ‘Ordo-liberalism’ had practical effect for the self-perception of the young Federal Republic, particularly because of its inclusion in the concept of a ‘social market economy’ (Abelshauser 1987; Haselbach 1991: 117 ff.; Nörr 1999: 58 ff., 81 ff.). Its leading exponents - Walter Hallstein (1946; 1969), Franz Böhm (1946), Alfred Müller-Armack (1947) – committed themselves very early and very successfully to Europe, bringing the core ideas of ordo-liberalism to bear there.

Conceptually, *ordo-liberalism* was particularly well-suited to integration. It could be used to justify the theorem of the primacy of European law and combine it with a precise “economic constitutional” content, thereby also limiting it: the freedoms guaranteed in the EEC Treaty, the opening up of national economies, the bans on discrimination and the competition rules, were easily understood as a collective decision

in favour of an economic constitution that matched *ordo*-liberal conceptions of the framework conditions for a market economic system (at least, to the degree that the many departures from the system might be classified as exceptions, and a blind eye could be turned to the original sin of the common agricultural policy). The very fact that Europe had started its integrationist path as a mere economic community lent plausibility to *ordo*-liberal arguments: by interpreting the economic-law provisions of the European Community as a law-based order committed to guaranteeing economic freedoms, the Community acquired a legitimacy of its own. This legitimacy was independent of the institutions of the democratic constitutional state and thus placed limits upon the political powers of the Community (cf., Müller-Armack, 1966).

*Ordo*-liberalism's conception of economic and legal policy was expanded, refined and altered in the Seventies (for details, see Mussler 1998: 58 ff., 91 ff., 125 ff.). But the core constitutional content remained unaffected: the validity of supranational economic constitutional law required no legitimation through the institutions of the constitutional state or political processes – and, for this very reason, had to confine its regulatory claims to the (competitive) order of the economy. A theory of this pattern cannot be easily embarrassed even by realities: if political practice does not behave as would fit the theory – and this was never the case whether domestically in the Federal Republic or at European level – then that practice is simply wrong. To be sure, once the positive-law underpinnings of the theory fall away – as happened with the Maastricht Treaty – then the theory must, as it were, emigrate and take root beyond European law; this movement has, in fact, been put in motion with the constitutional interpretation of world trade law (Petersmann 1991; 1994).

## **2. Europe as 'Regulatory State'? The 'Masters of the Treaties' as 'States without Markets'?**

*Ordo*-liberalism was supported, above all, by private lawyers and economic lawyers. German constitutional law and European law remained largely indifferent to the guiding themes, conceptions and institutionalisations of the *ordo*-liberal pattern, and rejected the practical ambitions of regulatory policy. This practice was functionalistic and technocratic. It was given legal form very early on by Hans Peter Ipsen, in calling the (three) European Communities 'purposive associations for functional integration' (Ipsen 1964; 1972), a form that was to outlast *ordo*-liberalism and experience a sort of renaissance in the great growth phase of integration policy in the mid-eighties (onwards)?.

The concept of the ‘special-purpose association’ opened up goals and practices for Community law that went beyond *ordo-liberal Ordnungspolitik* – without seeking to subject it to democratic requirements on that ground. As a special-purpose association, Europe was to deal with questions of ‘technical accomplishment’, *i.e.*, administrative tasks that could be conveyed to a supranational bureaucracy – and ought to be (Ipsen 1972: 176 ff.). With his theory, referring back to Forsthoff (1971) in terms of theory of the state and the constitution and to American neo-functionalism in terms of integration theory, Ipsen rejected both further-reaching federal integration concepts and the early interpretations of the Community as an international organisation. For him, Community law constituted a *tertium quid* between (federal) national law and international law, constituted and adequately legitimated through its ‘specialised tasks’ (Kaufmann 1997: 312 ff.; Bach 1999: 38 ff.; on this background see Zumbansen 2000: 93 ff., Joerges 2002: 65 ff.).

It is precisely this technocratic interpretation of the Community that was renewed by the political scientist Giandomenico Majone when he conceptualised the European Community as the ‘fourth branch of government’ (Majone 1994) and as a regulatory state (Majone 1996: 265 ff.). However, both the practical strengths and the theoretical weaknesses of this position become apparent when one looks at its object and its opponents in the integration process.

## 2.1 Factual Developments

The contemplative picture of the workings of European law sketched by Eric Stein in 1981<sup>6</sup> was very close to reality at the time. Undeniably, European law was advancing steadily; while politically the Community was going through one crisis after another and economic integration was looking more like the Echternach dancing procession.<sup>7</sup> The institutional reasons for this stagnation were well known: ‘legally’, the Community was able to do a great deal, thanks to the ‘functional’ interpretation of its powers in the name of bringing about the Common Market by adopting directives under Article 100 (now 94) or else on the basis of Article 235 (now 308). In practical terms, however, the

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<sup>6</sup> Cf., 1.1 above

<sup>7</sup> These alleged paradoxes – the perfecting of supranational law on the one hand, and insistence on political inter-governmentalism with veto possibilities on the other – were resolved by J.H.H. Weiler in his theory of the legal and political dual structure of the Community as a balance between law and politics (Weiler 1981; 1991: 2423).

unanimity requirement of Article 100 ensured that every Member State could defend its own regulatory concepts and economic interests through its veto. European competition law (Article 85 ff.; now 81 ff.) was – even as far as it applied ‘directly’ and despite the Commission’s administrative powers – left only torso, powerless against national, non-competitive regulatory powers.

### 2.1.1 ‘Negative integration’ and ‘regulatory competition’

In the Eighties, however, through the now legendary policy to ‘complete the internal market’ (Commission 1985), a breakthrough to new shores was achieved (on the following, see Moravcsik 1998: 314 ff.; Joerges 1991; 1994a; 1994b). The reasons for the broad support that this initiative met with are disputed among the faculties involved – lawyers, economists, and political scientists. Economists can point to their discipline’s programmatic orientation to rationality patterns: efficiency and competitiveness through deregulation (‘negative integration’), supplemented by mechanisms of ‘regulatory competition’ (Reich 1992), which would similarly keep welfare state policies in check – this rhetoric met with much unofficial approval (for example, from the Scientific Advisory Council 1986). Or else the cunning of politics – in the shape of Commission President, Jacques Delors – had brought together economic interests that were made European by the design of the new programme, thereby ultimately making use of a neo-functionalist logic (Sandholtz/Zysman 1989: 96 ff.).

The ‘first faculty’ admittedly insisted on the law: in fact, the new policy was keen to present itself in unofficial statements as a mere application of precisely the legal principles that the ECJ had disclosed in primary Community law. And, as often happens in ‘classical’ cases, this had happened in a trivial situation: it was, as the Court had found in the *Cassis de Dijon* case, incompatible with the principle of free movement of goods (Article 30; now 28) for the Federal Republic of Germany to ban the marketing of a French liqueur because German law provided for a higher alcohol content in liqueurs than the weaker French drink had (ECJ 1979). The Court’s argument that confusion of German consumers accustomed to stronger liqueurs could appropriately be avoided by indicating the alcohol content was convincing, but also trivial. Yet, the ECJ used the obvious case of *Cassis* to proclaim the new legal principle of ‘mutual recognition’ of the legal systems of Member States, thereby allotting itself constitutional competence to review national legislation and, at the same time, displaying options for a market integration supported only on primary law and independent of positive harmonisation

measures. All this had happened in judicial circumspection. This was enough for the Commission to take the ECJ decision as the legal basis for the new harmonisation policy which it developed in its White Paper on internal market policy (cf., Commission 1980; 1985). However the economic, political and legal factors are to be weighed up, the internal market programme found its way into the Single European Act negotiated by the Member State governments, which was able to enter into force in 1987. And its transposition was accompanied by large and smaller institutional innovations: the move to (qualified) majority decisions for all internal-market policy decisions in Article 100A (now 95) in the Treaty, now called the EC Treaty, was a change of fundamental importance – for the practice of both European policy *and* its constitution.

### 2.1.2 ‘Re-regulation’ instead of ‘de-regulation’

The renewal of the integration project was not taken as exactly fulfilling the ordo-liberal vision of a ‘market without state’, but as nonetheless tending to confirm a supranational, non-state legal constitution guaranteeing economic freedoms that were effective Community-wide to the citizens of Europe’s market, thus committing both the Community and the Member States to a competitive system for the economy (Mestmäcker 1987; Mussler 1998: 125 ff.). Much faster and more thoroughly than either supporters or critics of the internal market programme had foreseen, new regulatory and juridification trends set in, where significant patterns could be identified: a trend towards regulation at high level; the development of new forms of co-operation including governmental as well as non-governmental actors; a strengthening of decentralised national political activities, and a range of participation entitlements. These are the most striking features of the internal market policy called into being:

- (1) Wherever Community law turned to the institutional framework conditions and legal fine structure of markets, this came about at an astonishing level. The best-known examples are offered by product regulations that protect consumer and health interests, which often comprise safety-at-work issues and environmental concerns. Here, the provisions of Article 100a (3) SEA and the rights of Member States with high regulatory aspirations ‘go it alone’ (Articles 100a(4), 118a(3), 130t) ensured that the opening of markets was to be had only at the cost of modernising the relevant regulatory machinery and enhancing its quality (Joerges 1994b: 154 ff.; Bückner 1997; Eichener 2000). But even in the domains of private and economic law, the ‘completion’ of the internal market was marked by a growth and



steady refinement of the patterns of economic regulation and new consumer protection policies. The originally envisaged mutual recognition of mandatory national law was thoroughly alienated in its implementation: through the partial unification of supervisory rights, as well as by taking measures to co-ordinate the practice of national supervisory bodies and through the Member States' reserved rights to protect their general interests.

- (2) Because the EU itself does not have the resources to generate standards and because it also lacks the administrative powers necessary to implement legally-binding rules in Member States, it has to try to compensate for these shortcomings. For this reason alone, the Commission must promote the development and co-ordination of national certification bodies as it develops product safety standards that co-operate with the European standardisation organisations. In other ways, it must operate through a dense network of committees in which Member State administrative experts, and also independent scientists and representatives of economic and social interests, collaborate.
- (3) While the integration process has restricted the autonomy of national policy, it has also opened up new possibilities. Formally, this can be seen in the fact that European directives regularly provide for 'safeguard procedures' that allow objections to decisions and that may lead to revisions. Article 100a(4) (now 95) allows nations to "go it alone" nationally, on condition that they regulate in more detail. At the same time, all these reservations for national policy-making are opportunities for action. The restriction of national autonomy compels the taking of 'foreign' interests into account; and conversely, one's own regulatory concerns may be 'exported' beyond one's own territory.

## 2.2 Constitutional Alternatives

This much is undisputed: the programme to complete the internal market set off a new impetus to juridification. If this flood of norms could not be blocked,<sup>8</sup> and if, as the continued extension of the Treaty

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<sup>8</sup> According to a much quoted, but now rather hoary, statement by Jacques Delors (Speech to the European Parliament on 4.7.1988, EC Bulletin 1988, 7/8, 124), the economic law in force in EC Member States is, to a large degree (80%?), enacted or brought into being by the Community. Delors rejected complaints about the regulating mania of his bureaucracy ["Europa im Umbruch. Vom Binnenmarkt zur Europäischen Union", in: Kommission der EG (ed.), *Europäische Gespräche*, Heft 9, 1992]: of 100

programmed in Article 102A of the 1987 SEA showed, it was not wanted by the European governments either, how was it to be controlled? One alternative was mentioned earlier. A second attempt, made by the German Constitutional Court subsequent to the conclusion of the Maastricht Treaty, will be dealt with immediately. The first alternative was justified ‘sociologically’ – yet what is perhaps its most important proponent is a law professor trained in social philosophy. The author of the second alternative is a Court – but this author, too, argues in trans-disciplinary fashion.

### *2.2.1 Europe as regulatory ‘state’*

The lawyer, Ipsen, who had already defined the European Community in the Sixties and early Seventies as ‘purposive associations for functional integration’, and the political scientist, Majone, who interpreted the European Single Market initiatives of the Eighties as the building up of a European regulatory state are – though not very close! - relatives in spirit. Both see the strength of the integration project in the problem-solving capacity of European institutions. The ‘objective tasks’ that Ipsen (1972) had in mind correspond to the ‘regulatory policies’ which, according to Majone, have to accompany the development of the Single Market. In both views, the tasks involved need expert knowledge for their solution. . And both authors share the view that proper performance of the tasks requires the European institutions to be walled-off from political influence: these ‘non-majority’ institutions (including the Commission itself, and most importantly for Majone independent agencies on the American pattern), which can be expected to interpret legislative instructions correctly, are to respond to this at European level. Thus, it is ‘constitutional’ theories that are involved in both cases, since the integration project brings a commitment to a particular public goal, but also has its political competence limited through these tasks (Jachtenfuchs 2001). However, the closeness to Ipsen, which was confirmed by Majone (1994:23) himself, has its limits. Ipsen thought of his ‘purposive association’ decades earlier than Majone did his ‘regulatory state’. The internal market policy, the interplay of de-regulation and re-regulation, that Majone analyses, did not exist at that time – nor did the analytical machinery of social choice theories that Majone uses.

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Community law-making initiatives, only 8 were truly to be attributed to the Commission: in 92% of cases, his officials were taking up the concerns of the Member States – and 70% of cases saw the Community taking up the law-making concerns of the Federal Republic (*op. cit.*, 12).

Such, then, is Majone's conception of the EU system; he seeks to defend it against criticisms based on democratic theory (Majone 1996: esp. 284-300; Majone/Everson 2001) at another level: even within democratic States, he argues, regulatory policy is protected against majority influence – for the EU, this sort of autonomization of the 'fourth branch of government' is essential precisely because of its political multiplicity. Control of it should be entrusted not to politics but to the judicature instead, which, though not able to review the substantive accuracy of technical decisions based on expert knowledge, is certainly able to review the transparency and fairness of the decision-making procedures, and the compliance with the legislative mandate. The non-majority institutions of European policy and the majority institutions of the Member States supplement each other: the EU is concerned primarily with regulatory policy, while the welfare-state and distributive questions are to be decided at national level since it is only there that they can be legitimised in terms of democratic majorities. This conceptual structure has empirical, analytical *and* theoretical, normative premises, to which we shall return (2.3 below). For the moment, we shall only say that the conceptualisation of Europe as a 'regulatory state' means a far-reaching disempowerment of nation states, even if they are to remain solely competent for the sensitive areas of redistributive policy in particular.

Majone based this reserve for the nation state explicitly on its legitimation for majority decisions. Would a nation state limited in this way still be a democratic constitutional state with regard to its possibility of action within the meaning of the Basic Law? In its judgment on the Maastricht Treaty of 12 October 1993, the German Federal Constitutional Court took up this question not in the light of the delegation of tasks of regulatory policy, but because of the increasing transfer of ever-broader powers, and sought to set constitutional bounds to integration.

### *2.2.2 The regrading of Europe as an association of states: the German Constitutional Court's Maastricht judgment*

The new dynamic of integration to which Majone responded with his conceptualisation of the EU as a 'regulatory state' had to be taken up in unofficial European policy, too. This happened under the slogan of the further development of the Community towards 'political union' – a decidedly thorny subject in practice, as appeared from the negotiations among the governments: what was agreed on 9 and 10 December 1991 in the cosy southern Netherlands town of Maastricht was Economic and Monetary Union, a strengthening of the Community in the area of industrial policy, new powers, and a 'subsidiarity principle' whose

chances of working were unclear – in short, a package that drove the supporters of the economic constitutional interpretation of Europe into opposition (e.g., Behrens 1994; Mussler 1998: 166 ff.), created a Euro-critical public for the first time, and seriously called the ratifications of Treaty amendments, which up till that moment had been so smooth, into question. In Germany, these debates led to constitutional complaints against ratification of the new Treaty (the TEU, Treaty on European Union). The Federal Constitutional Court rejected these complaints; however, it took the opportunity to take the debate on Europe's constitution to a new level.

The judgment will not be examined here by all the rules of the legal art (for an exhaustive account, see Mayer 2000: 98 ff.). It is, however, interesting because of its integration-theory perspectives, and, as it were, trans-disciplinary statements. They are methodologically instructive for the relationship between legal science and political science. And although they have quite rightly brought technical concerns, they are, however, mostly for the wrong reasons.

#### *2.2.2.1 Restrictions on 'vertical' constitutionalisation*

First and foremost, the judgment appeared odd because it called into question core statements of the *communis opinio* in European law on the relationship between Community law and national law, and, indeed, even called into question the authority of the ECJ.

European lawyers were alarmed. That Europe is a 'Community' constituted through the supranationality of its law is the founding principle of European law as such. Political scientists were less concerned. "Less than a Federation. More than a Regime" – this famous formula by the British political scientist and politician William Wallace (1983) oscillates between legal institutional categories and the analytical ones of political science. It negatively delimits the specific feature of the European edifice, but leaves its positive description open. In fact, it does exactly what the ECJ, too, had done when it located the EEC 'between' international law and national law – and what lawyers continue to do in diagnosing that the term 'Community' is merely a 'Gestalt' label, of the type that is universally appropriate 'where and for as long as legal conceptualisation in abstract criteria has not yet set in' (Ipsen 1994: 7; cf., *idem* 1983: 79 ff.).

At any rate, as Ipsen explains his statement, the term Community was a 'clarifying, concretising, empirically justifiable description of a phenomenon, fitting the objective of the action'. But the Federal

Constitutional Court avoided using this otherwise ordinary term: the European Union was an ‘association of states’ that took account of the ‘national identity’ of the Member States; membership was in a ‘supranational organisation’, not in a ‘European State (BVerfG 1993: 181; cf., 188 ff.).<sup>9</sup> But this indefiniteness does not prevent the Court from operationalising the importance of its fundamental concept very clearly in several directions, “Less than a federation. Even less than a Community!” – a message that was bound to be disquieting.

Still more irritating was the fact that the Federal Constitutional Court, quite consistently, distanced itself from the principles of direct effect and the supremacy of European law. In substance, the most revealing passage is found in the context of the Court's statement on majority-decisions (the area of application of which the Maastricht Treaty had further enlarged) – which, in principle, the Court accepts as a functional necessity of integration. But, here, the Court adds: “Yet the majority principle is limited - through the requirement for mutual respect - by the constitutional principles and fundamental interests of the Member States (184). With the requirement of mutual respect the Court elaborates on its own understanding of the term “community of law” and thus limits the validity of European law through national law. The reference to the “fundamental interests of the Member States” goes beyond the heteronomy that European law fully respects – for example, the positive right of a Member State to unilateral action which European law recognizes in Article 100a (4) (now 95) of the EC Treaty. Thus, the Court questions the (procedural) *juridification* of the relationships between the Community and the Member States as such. The interests which are of “fundamental interest” for Germany can and should only be determined by Germany herself. The cohesiveness set up through the supremacy of Community law breaks down into a ‘disordered’ heterarchical relationship.

Limitations on the supremacy principle weaken the institutional position of the ECJ, which, as can be deduced from the submission obligations in Article 177 (now 234), is to have the (first and) last word on the interpretation of European law. Now, however, every interpretation of the validity claims of European law simultaneously

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<sup>9</sup> The term ‘Staatenverbund’ (Association of States) was used by the Second Senate's rapporteur, Paul Kirchhof, as a term for a form of organisation ‘between an alliance of states and the de-statization of the Member States’, without combining this with any claim to a definitive legal substantive description (Kirchhof 1992: 859ff). There has been much puzzlement over its meaning both in Germany, since this is indeed, once again, merely a ‘Gestalt’ term (Kahl 1994; Möllers 2000: 378ff), and elsewhere, since it was hard to know how exactly to translate ‘Verbund’.

contains a statement on the validity of national law – thereby limiting the authority of the national judiciary. This is not to be unreservedly accepted: the Federal Constitutional Court does not view itself as the lower tier in a European judicial hierarchy, but prefers to define its link to the ECJ as a ‘co-operative relationship’ (174). In particular, this wording refers to the Court's mandatory protection of human rights under the Basic Law (headnotes 7 and 174). Equally, the Court reserves for itself a specific, non-transferable right of adjudicating on the assignment of competences. Should the Community misjudge the power to extend its competences unilaterally when, in fact, a Treaty revision is called for, then this process will not have binding-effect on Germany (210).

The Federal Constitutional Court's refusal to recognise the ECJ's right to delimit the competences of the Community touches on a precarious element in the architecture of European law.<sup>10</sup> The difficulty of appreciating these limits is contained in the rules which govern the transferral of competence themselves. On the one hand, these are described substantially and are, therefore, explicable as a transfer of enumerated powers.<sup>11</sup> On the other hand, in Article 100 (now 94) EEC Treaty, the powers of legal harmonisation were simply described “functionally”, by way of the goal of ‘creating a functioning Common Market’. Beyond this, Article 235 (now 308) simply states that - if Community action is required in an area not envisaged by the Treaty - the Council decides unanimously on a proposal from the Commission after consulting the European Parliament on suitable measures.

With its broad treatment of the competence rules in cases decided before the transition to the qualified-majority rule, the ECJ had already brought much criticism upon itself (e.g., Steindorff 1990; Weiler 1991: 2453 ff.). These concerns now inevitably increased. But the fact that, through its opinion on the competence issue, the Federal Constitutional Court did not merely astonish but acted very provocatively had to do with the reasons it adduced for its reservations regarding integration law, which went far beyond the competence questions.

The Federal Constitutional Court found access to the substantial examination of the Maastricht Treaty through the interpretation of Basic Law Article 38 in which its stipulations about electoral rights shape the democratic principles. Article 38 guarantees ‘the subjective right to participate in the election of the German parliament and thereby to co-operate in the legitimisation of state power by the people at a federal level,

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<sup>10</sup>Cf., Weiler 1991

<sup>11</sup>(Article 3 & 4 EEC Treaty, confirmed through Article E EU Treaty, Article 3b I 4 EC Treaty)

and to influence the implementation thereof', (171f). This interpretation of electoral rights as a 'claim to the existence of a democratically constituted statehood' (Ipsen 1994: 2) is easily turned into the conservation of the form of the nation state. From this, one may draw protective rights against the recognition and implementation of 'foreign', not domestically legitimated, sovereign acts. This sort of defence of national statehood would admittedly be incompatible with the Federal Republic's openness to integration rooted in Article 24 and now Article 23 of the Basic Law. And this is something that the Federal Constitutional Court can scarcely be accused of (Möllers 2000: 413f).

The tension between integration, constitutional statehood and the democracy precept is not finished with here, though. The reliance on the 'integration lever' (Ipsen 1972: 58) of Basic Law Article 24 to transfer sovereign rights had already caused some concern (Schilling 1990: 161 ff.) in the past, even before the Maastricht Treaty. What barriers to integration do the principles and rules of Article 79 (3) - declared as irrevocable - pose to integration? The Federal Constitutional Court's statement on the collision between the openness and the limits to integration contained in constitutional German law is derived from its understanding of the principle of democracy. This principle demanded that the execution of sovereign rights must derive from 'the people of the state' ['Staatsvolk'] (182). This did not exclude membership in a 'community of states authorised to issue sovereign acts', yet it also meant that the authority of the Community remained limited and that the body representing the German Staatsvolk was left with 'sufficient powers of substantial political weight' (207). 'If the peoples of the individual states (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on the extension of the EC's functions and powers. State power in each of the states emanates from the people of that state. The states require sufficient areas of significant responsibility of their own, areas in which the Staatsvolk concerned may develop and express itself within a process of forming political will which it legitimises and controls' (186).

This would mean that the theorem of the association of states has empirical and normative dual status. On the one hand, it is to be interpreted as an analysis of the existing position, combined with a diagnosis of the bottlenecks and developmental possibilities of the European political system. If, and in so far as, that system's incapacity for democracy emerges here, it obliges a limitation of integration.

The Federal Constitutional Court's statements in which it substantively and concretely brings out its methodical position are couched obscurely. On the one hand, the judgment contains passages

according to which further democratic development of the EU political system seems possible. On the other, it also contains sentences in which a link between democracy and the nation state is set up that would make supranationality 'in conformity with democracy' inconceivable. The criterium and yardstick which the Court invokes is the democratic legitimation of state power, requiring 'constant free debate among social powers, interests and ideas that encounter each other' (185) It is this requirement, which the EU political system does not meet. Yet, the judgment goes on to concede, it might also be that, in the future, the political objectives of the European polity no longer need to be specifically 'mediated through the nations'; this might happen, once the process of forming a 'public opinion in Europe' is sufficiently advanced.

But then the Court seems to erect an insuperable barrier to further integration, which has been mocked as its 'people's democratic' (*volksdemokratisch*) turn. (Bryde 1994: 305 ff.). Democracy requires, so the Court explained, democracy precept that the formation of political will should enable the people (*Staatsvolk*) concerned to 'give legal expression to ... that which spiritually, socially and politically links it ... relatively homogeneously' (186). What is so objectionable about this? Hermann Heller, who is cited for this proposition, had, in fact, described 'a certain degree of social homogeneity' as a requirement for the self-assertion of the Weimar Republic's parliamentary system (Heller 1928: 427 f.) is no good exemplar for the Court's statement about the role of the peoples of states (Böckenförde 1991: 348ff; Bryde 1994: 311 f.; Pernice 1995; v. Bogdandy 2000: 295; cf., also, La Torre 2001). It was at any rate not Hermann Heller but his polar opposite, Carl Schmitt, who felt himself tied to a German 'people's nation' (on this concept, see M.R. Lepsius 1982). Since Heller's notion of homogeneity belongs in the context of the crises of the Weimar Republic, its use by the Federal Constitutional Court is rather incomprehensible (cf., Weiler 1997: 224 ff. on the one hand, Everson 1998; v. Bogdandy 2000: 291 ff. on the other). The capacity of the Basic Law of the nation state to solve economic and social problems has been more thoroughly eroded – and, at the same time, its internal European peaceableness made enormously stronger – than seemed conceivable in Heller's time. Among the supranational normative principles that accompanied this process of erosion, however, are such anti-nation state provisions such as the ban on discrimination in Article 6 (now 12) and the anti-protectionist provision of Article 30 (now 28).

The statement that European integration – currently and until further notice – constitutes a league of peoples organised in states is, however, thoroughly compatible with these provisions – the 'Staatsvolk' [the people constituting a nation] is a constitutional concept denoting the



‘subject of legitimation’ of the power of the state – under the Basic Law (Möllers 2000: 407) and, indeed, in Weimar already (O. Lepsius 1994: 13 ff.).

#### 2.2.2.2 *The ‘masters of the Treaties’ as ‘states without markets’: A belated victory of German ordo-liberalism*

A theorem of the association of states ‘relatively homogenous in themselves’ has, admittedly, one ironic implication that was not mentioned in the comments on the judgment, which were dominated by constitutional and European lawyers. Yet, it constituted the core concern of the complainant, Mr Brunner, who was concerned about the future of the Deutschmark. He asserted that the capacity of the constitutional state to shape the living conditions of its citizens politically would be affected if it abandoned its powers in economic law. This, however, failed to impress the Federal Constitutional Court, which held that there could be no notion of Europe becoming a state, if only because, Mr Brunner was given to understand, the European powers, ‘in so far as exercised through the exercise of sovereign rights in essence remain activities of an economic community,’ (190).

The Federal Constitutional Court was, without doubt, much more thorough in its treatment of the agreements on monetary union. According to the overall conception of its argument, the Court also had to examine in this respect whether the projected European Monetary System was in line with the German constitution. However, German monetary policy was not explicitly determined by the Basic Law. Article 88 merely envisaged the creation of a central bank, whose independence was later guaranteed in an ordinary law, the Federal Bank Act of 1957. Since then, the constitutional debate has been concerned with whether the transfer of a monetary policy that is not constrained by explicit legal rules to a politically independent institution is compatible with general constitutional principles (cf., Ladeur 1993: 466). The Court sums up the discussion only very briefly: the “modification of the democracy principle”, with which monetary policy is being protected against short-term interests and pressures, has been proven to be successful and seems “acceptable”(208).

The Bundesbank's “external relations” were reorganised by the new Article 88(2), inserted into the Federal Bank Act by the Amending Act of 21 December 1992. It stipulates that the Bundesbank's tasks may be transferred to a European Central Bank that is “independent and which serves the primary objective of price stability”. Tensions between supranational and domestic law result primarily from the fact that the institutionalisation of monetary policy is more insulated against

democratically legitimised decision-processes in the Treaty on the EMS than in the Basic Law - this increase in the autonomy of monetary policy-making is not addressed directly by the Federal Constitutional Court. Any independent European monetary policy also lacks the legitimacy that emerged after decades of positive experience that was acknowledged by the social partners and by public opinion, which included quasi-unanimous professorial consensus - the “pre-legal preconditions” - which were the Federal Republic’s basis for the institutional independence of the Bundesbank and the orientation of its monetary policy.

In contrast to its approach to the democratic deficit, the Court refrained from specifying the conditions for the workability of monetary union. Instead, it declared the relationship between monetary and economic union to be contingent and politically determinable (206f). And it is precisely in this way that politics becomes indirectly involved: according to the Maastricht agreements, the federal parliament has the right, before the third stage of monetary union is entered, to examine the fulfilment of the Treaty criteria on price stability and convergence - and the exercise of the Bundestag's right to review is bound to the objectives agreed-upon (202f). Furthermore, if monetary union “could not develop continuously in line with the agreed stability mandate”, then the Treaty conception assumed by the German ratification law would be abandoned (205).<sup>12</sup>

Thus, economic integration is perceived as an apolitical phenomenon occurring autonomously outside the states, and European Monetary Union as a project committed to success – and legitimated only by its success; it is, therefore, downright surprising how little these statements were taken into account. Yet, they were enormously more problematic than the somewhat strange reference to Hermann Heller: has the Federal Constitutional Court found both the *ordo-liberal*, and *neo-liberal* theory of the economic constitution (1.2 above) that conceives supranational economic law as a system that has never been at the disposal of politics, to be correct? Has it confirmed the interpretation of the Community as a ‘purposive association for functional integration’ (2.2.1 above), remaining limited to questions of ‘technical accomplishment’ and therefore adequately legitimated through ‘expert knowledge’? Or does the Court’s argumentation confirm the classification of economic integration as ‘low politics’ in functionalist theories of integration?

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<sup>12</sup> The Court again proved to be subsequently conciliatory; it has explicitly confirmed the constitutionality of the monetary union (Federal Constitutional Court 1998).

At any rate, by linking the ratifiability of the Maastricht Treaty by the Federal Republic with criteria that all Member States had to comply with, the Court has over-extended its own competencies rather than limiting those of the ECJ. Has it found ‘right’ and ‘correct’ the critical political-science diagnoses that assert that the EC system conserves the nation state (while halving it) precisely by abrogating its power to act in economic and social policy terms (Streeck 1998)? On all this, nothing definite can be derived from the judgment. However, one cannot overlook the point that, if one could treat economic integration as irrelevant from the constitutional policy viewpoint, Europe would then become a ‘market without a state’ and the so-called ‘masters of the Treaties’(for this concept, see Everling 1995) would be left as ‘states without markets’.<sup>13</sup>

### 2.3 Interim Summary

In the two sections so far, we have reconstructed specific legal and constitutional guiding ideas as normative answers to the state of the European project. In the first, formative phase of European law, the primacy of European law over national law was postulated, and Europe was thereby lifted out of international law as a supranational legal community. But this legal revaluation of the Community was associated with limitations: thanks to the unanimity principle in legislation and the limitation of Community powers, the Member States remain the ‘masters of the Treaties’. The ordo-liberal idea of a supranational ‘constitution of the economy’ is a special variant of this ‘vertical’ constitutionalism that defined the objective sphere of validity of supranational law.

Then, as a second phase, we dealt with the deepening of the European project in the wake of the 1985 Single Market Initiative, along with two constitutional policy reactions to these changes: the alternatives of a European ‘regulatory state’ on the one hand, and the attempt to defend the autonomy of the nation states on the other.

In all this, it should also have become clear how the role of law was changing. The first phase of integration was under the sign of ‘integration through law’.<sup>14</sup> ‘Vertical constitutionalism’ had interpreted

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<sup>13</sup> European law is a field for public lawyers. This may explain why even comprehensive analyses barely mention the ironic consequence of defending nation-state democracy brought out in the text, while the echoes of Schmitt have very much been taken seriously (cf., Bryde 1994 and Weiler 1995 on the one hand, Ladeur 1997: 35ff and v.Bogdandy 2000 on the other).

<sup>14</sup> ‘Integration through Law’ was the programmatically intended title of a trans-Atlantic project comparing the American and European experience, by Mauro

Europe as a ‘legal community’; a polity constituted primarily through law that ought to act, above all, in the medium of law. In the second phase, however, when the ‘completion of the internal market’ became polity objective number one in Europe, the weights were to shift: the New Internal Market Policy was introduced as a strategy to advance Europe’s competitiveness, as a project dictated by economic reason. However, it soon proved that the internal market programme called for pro-active operations in increasingly wide areas, a transition from the mere application of legal rules to the organisation of solutions to problems in numerous policy areas.

The debate over these developments and their institutional policy implications has not ceased in either legal science or political science. The objections to the other side’s concepts in each case are mirror images: (1) the programme of a European regulatory state which is able to legitimate itself through its problem-solving capacity is seen to neglect the very political and ethical dimensions of the regulatory problems that it deals with, thus ignoring Europe’s inextricable involvement in redistributive policies, and also failing to take account of the institutional conditions of the Community system. (2) Those wishing to retain the political prerogative were seen as denying the consequences of the integration process that were not up for disposal: the problem-solving capacity would be so thoroughly eroded that invoking it as a guardian of democracy threatened to discredit the self-same democracy.

While this debate continues, its object is, at the same time changing – and both are promoted by the insight that the need is to understand both poles of the controversy as inter-dependent elements in a new ‘system’: ‘from integration research to the theory of governance of the European Union’ (Grande 2000) is a very good label for this transformation.

### **3. Constitutionalisation of Governance in the European Multi-level System**

In both stages of the integration project that we have reconstructively dealt with, Europe ‘constituted’ itself ‘from below’ in dealing with objective questions and concrete programmes. It was neither constituent assemblies nor referendums that gave the Treaties a constitutional significance, but a Court of Justice which, at the right time, enunciated principles and rules that met with so much assent in the

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Cappelletti, Monica Secombe and Joseph Weiler (1986) at the European University Institute in Florence in the early eighties.

national legal systems, governments and societies that enabled the Treaties to mutate into the ‘Constitutional Charter’ (ECJ 1991).<sup>15</sup> This is evidently not to remain so. A kind of turn of the millennium in European law is heralded, which found and is still finding its expression in two projects. In October 2000, the Commission adopted its ‘Working Programme’ for a ‘White Paper on the Governance of the European Union’, bearing the programmatic subtitle ‘Enhancing Democracy in the European Union’, (Commission 2000). At Nice – the Treaty was signed on 26 February 2001 – there followed the solemn Declaration on Human Rights,<sup>16</sup> and, in Laeken, a constitutional convention was set up in December 2001.<sup>17</sup>

The new point is that the working out of a constitutional text is being separated from the day-to-day business of integration policy. The de-coupling of (incrementalist, object-related) law-finding and constitution-making has not made the state and future of the integration project any easier to grasp, if only because it will now be necessary to take both levels of law into account. In line with the reconstructive approach in this paper, the observations below will concentrate on the former, namely, incrementalist law-finding. This is without doubt not in line with the expectations of the conference planners, but does fit the circumstance that ARENA had already organised a conference on the first constitutional building block, the Nice Human Rights Convention, and has published its findings (Eriksen/Fossum/Menéndez 2001), whereas there is still little to see of the second, the Convention set in motion in Laeken.

I wish to cover three points:

- (1) The career of the governance concept, which, in my view, confirms that Europe is no longer betting on ‘integration through law’, and that the primary economic mechanisms to which the internal market programme was committed cannot sustain the integration process, either.

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<sup>15</sup> Cf., 1.1.1 above.

<sup>16</sup> OJ C 34, 18 December 2000.

<sup>17</sup> The language setting it up is kept instructively vague: ‘The question ultimately arises as to whether this simplification and reorganisation might not, in the long run, lead to the adoption of a constitutional text in the Union...In order to pave the way for the next Intergovernmental Conference ..., the European Council has decided to convene a Convention....[I]t will be the task of this Convention to consider the key issues arising for the Union’s future and try to identify the various possible responses,’ (SN 300/01 ADD 1, 7).

- (2) The career of ‘multi-level’ analysis in European political-science research, which, in my view, shows that, in its constitutional debate, legal science ought to focus on a non-state heterarchical polity whose functional capacity depends on its sub-autonomous actors institutionalising ‘deliberative’ problem-solving processes.
- (3) The July 2001 Governance White Paper programme in the area of regulatory policy, which, in my view, is a symptom of crisis. It documents a u-turn into technocratic blind alleys and thus threatens to block the hitherto so successful process of constitutionalisation from below, at a time when the constitutional discourse is apparently losing sight of Europe’s problems and conflicts.

### **3.1 Governance as a key concept?**

‘Governance’ has become a key concept in the Europe debate. In the theory of international relations in political science, the term has been in vogue for a considerable time (Steinberg 1999; Schmitter 2000); in integration research, it refers, above all, to the decision-making processes that have taken shape in the EU system (Kohler-Koch 1999); legal science uses it unashamedly in international law (‘good governance’), but otherwise still shows reticence towards it.<sup>18</sup> Jérôme Vignon, who led the work on the White Paper at the European Commission, writes: there is a need for ‘a profound mutation of democracy in the nations of Europe and elsewhere’; this is ultimately based on a ‘transformation of the knowledge used in the formation of rules of public life. Knowledge is no longer ‘given’ and accessible by the mechanisms of elected representation or by the concentration of specialist expertise, but is, instead, thought to be ‘constructed’ and renewed in a process of collective learning that draws support from social pluralism’, (Vignon 2001: 3).<sup>19</sup>

In this version, the concept is suited to denoting phenomena that do not fit properly into the traditional legal categories, but which the law has nonetheless to adapt to. There is a second reason for this, which has already been alluded to in the passage cited: ‘governance’ is not to be equated with either reactions of governments or administrations, or law-making activities, or the law-applying activity of administrations and courts. It is all this, ‘too’. But it is a special feature of modern regulatory

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<sup>18</sup> For the reasons, cf., 3.2 below, as well as the indications in Joerges (2001), Joerges/Falke (2000: 363 ff); for comparable difficulties in German administrative law with the concept of regulation, cf., Ruffert (1999).

<sup>19</sup> One can find all this thoroughly discussed in Ladeur (1995).

policy in that it builds on (and is dependent on) knowledge and society, and the management capacities of enterprises and organisations. It cannot simply act in 'sovereign' fashion; but such co-operative relations cannot appropriately be simply termed as the 'delegation' of regulatory tasks to non-governmental actors, either. The new governance structures respond to problem situations of both the society and the political system.<sup>20</sup>

These abstract explanations become clearer if they are contrasted with the programme for 'integration through law' and the strategies set out in the 1985 White Paper: the emergence of European governance structures confirms that not just traditional harmonization of laws but also the concepts of the internal market initiative were insufficiently complexly designed. This verdict concerns not just the, as it were, unofficial programmes of legal and market integration, but also the technocratic concepts of integration and the protagonists of the European regulatory 'state'. None of them were able to take account of the social and political dimensions of economic integration, and they systematically underestimated the need for a continuing social and political embedment of market integration. The transposition of de-regulation strategies on the one hand and re-regulation on the other has repeatedly confirmed that Europe neither obeys a unitary discipline of negative integration nor falls under centralising regimes.<sup>21</sup>

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<sup>20</sup> In line with all this, the Commission's 'work programme' states: "Governance" will be taken to encompass rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness'. The 'interdependence and interaction between various powers at multiple levels' is emphasised just as much as 'the involvement of regional, local and non-governmental actors in the policy-making process'. (White Paper on European Governance. 'Enhancing democracy in the European Union.' Working Programme", SEC (200) 1547, 7 final 11.10.2000, 4; <http://europa.eu.int/comm/governance/work/en.pdf>);

<sup>21</sup> It is not surprising that the practices of European government to be found in reality can best be grasped with the concept of governance. 'Markets' have not become Europe's rulers, nor have non-majority agencies been able to establish themselves as the authorities for a European regulatory policy. Instead, Europe's governance comes about in networks. Its administrative core institution is a committee system where the European Commission continually reaches agreements with national bureaucracies, which is advised by 'epistemic communities' where well-organised interests have a say, but is also observed by the European Parliament and, at least sporadically, by a critical public, too. The practical achievements of this 'underworld' (Weiler 1998) of the European system of governance, which was discovered very late by the academic world (but cf., Schmitt von Sydow 1980) are widely recognised (Bach 1999: 88ff; Joerges/Falke 2000; Töller 2000; Wessels 2000). Its normative evaluation is, however, controversial (cf., on the one hand Joerges/Neyer 1998 and Joerges 2001a; and on the other, for example, Weiler 1999).

## 3.2 Multi-level analysis

Europe, so political-science integration research has been telling us for some years now, is a ‘multi-level system of governance *sui generis*’ (Jachtenfuchs/Kohler-Koch 1996; Scharpf 1999). Each component of this description fits the findings and questions in the foregoing sections – and points to subsequent problems that will be causing legal scientists headaches. Yet the reality of a governance that has to have recourse to forms of action that include national and European actors is simply unavoidable in the light of the legal institutional provisions of the Treaties. This can easily be shown by the example of the structure of competences and the so-called (legal) implementation of Community law. We shall come back later to the constitutional-policy and theoretical implications.

### 32.1 Competence conflicts and ‘diagonal’ dispute situations

Competence conflicts in the EU are distinguished by the fact that the Member State defending its autonomy itself belongs to the Community against whose power it is seeking to defend itself. In this sort of conflict, both the Member State concerned and the Community each bring their specific legitimation to bear. Here, the principle of ‘limited individual empowerment’ (Art. 3-4; now 3-7), according to which the Community may act only in the areas explicitly allotted to it, is quite often dysfunctional: action oriented towards the various technical problems may involve both Community and Member State powers. The resulting overlaps in practice compel Community and Member States de facto into complex mutual adjustments of their claims to act: each can block the other, but neither can arrive at solutions to problems alone (Scharpf 1985; Benz 2000). This finding is very hard for the case law to deal with because it treats the allotment of competences as both empowerments to action and restrictions on action which, at the same time, make political responsibilities transparent (for details, see Mayer 2001; v. Bogdandy/Bast 2001).

The ECJ case law is known for its very broad interpretation of European competences. As the same time, however, it offers rich exemplary material for a prudent self-restriction in the practical treatment of the validity claims of the competences of European law (Furrer 1994). The institutional context compels the law into ‘procedural’ settlements of conflicts that take the regulatory concerns of the Member States seriously and still manage to harmonise them with the functional conditions of the EU system, which prove to be ‘protective of autonomy and compatible



with the Community', (Scharpf 1993). One absolutely typical situation for the European multi-level system is the 'diagonal' conflict. Here, the Community has a competence which only extends to one sub-area of inter-dependent technical questions, while the Member States only have partial powers which do not enable them to reach autonomous solutions to the problems, either. As a result, these conflict situations force co-operation; they can then only be solved co-operatively, and, at best, in deliberative processes.

### 3.2.2 '*Implementation*' of Community law

Things are very much the same with the so-called implementation of Community law. *De jure* the EU, at least as it is perceived by the ECJ (ECJ 1998), is thoroughly entitled to administrative enforcement of its own and not tied to the model of administrative federalism that the Federal Republic offers. *De facto*, the dependence of European governance on the collaboration of the Member States is drastically perceptible everywhere one looks. This dependence determines the EU's shaping of political programmes: the preference for broad legislative framework programmes which are then transposed with the help of the committee system; the inclusion of non-governmental organisations, and the preference for 'soft law' and information policy measures (Snyder 1994). Equally important is the fact that the freedoms that European law guarantees are exercised outwith, or away from, one's own Member State and, at the same time, can be upheld against one's own 'sovereign'. The EU's *de facto* administrative weakness has strengthened the importance of these freedoms and engendered synergetic effects: it has promoted the development of autonomous transnational areas of governance that constitute neither mere modifications of the national polity nor supranational areas of administration. The hybrid rules of control that characterise the EU system, in which national and European, as well as public and non-governmental actors collaborate, are responses to these institutional framework conditions. How are they to be assessed? This will depend on whether the law can guarantee 'deliberative' practices through which these hybrid governance structures can be legitimated.

## 3.3 Prospects

However technical the two problem areas sketched out above may look, the differences between 'constitutionalisation from below' and constitutional thinking that clings to the categories which apply in the

constitutional state can be clarified by using them in exemplary fashion. The more general implications of this will be addressed in the conclusion.

### *3.3.1 The decoupling of law-finding and constitution-making*

Both of the phenomena that have just been discussed, the settlement of competence disputes with decision-makers outside one's own 'sovereign sphere' *and* the emergence of transnational governance structures, are located beyond the horizon of traditional constitutional legal theory (which, in Germany, used to be called the theory of the law of the state): 'a differentiated state power that could be demarcated from society and was specialised in bringing about collectively binding-decisions constituted the pre-condition for the constitution's regulatory intervention' (Grimm 1994: 633).

Both this sort of defence of the nation state, in the name of the combination of state and democracy, and the ideas in the Commission's July 2001 Governance White Paper (Commission 2001) complement each other in a most unfortunate fashion. This assertion may seem downright paradoxical. But one only has to ask how European institutions can assert themselves *vis-à-vis* restrictions that uphold the state. In such a situation, the temptation is to undermine the defence of the democratic constitutional state organised as a nation state by having Europe systematically immunise its regulatory claims against the demands for democratisation. It was strategies like this that marked the formative phase of Community law (1.2 and 2.2.1 above), and this tradition has been renewed by the Governance White Paper. Admittedly, the White Paper's institutional ideas on regulatory policy adduced to prove this assertion are, by no means, its sole theme; but, for the viewpoints followed here, they are absolutely exemplary in their significance (for details, see Joerges 2001c).

The Commission would thoroughly like to root regulatory policy within the institutional structure of the Council, the Parliament and the Commission, and wrench it from the grasp of the Member States, which is expressed in their collaboration on the committees which 'implement' Community law. To compensate for the administrative resources that the Member States have so far provided, new executive agencies which are able to decide autonomously on the basis of a clearly defined mandate have to be created, though, admittedly, their decision-making powers must remain confined to individual decisions, and not cover any 'questions of political discretion' (Commission 2001: 31). The Commission presents itself as the top of the internal market's 'administration', which merely has to enforce the will of a European

sovereign. Such ideas insinuate a transnational polity that does not exist. They presuppose that Europe sees itself as hierarchically ordered, and that it has an overall sovereign whose will a transnational administration is empowered to act upon.

With all this, the White Paper has archived the promises of its Working Programme (Commission 2000) which offered prospects of ‘democratising’ European governance. To be sure, it can appeal to the fact that its proposals formally fit in with the institutional provisions of the Treaties. In reality, however, the Commission’s demands to reshape the ‘implementation’ of Community law would have to establish an executive power that could not be effectively controlled by the legislature or the judiciary and would lose the many bonds set up by the committee system (on this see, very decidedly, Scharpf 2001). Accordingly, the expansion of the executive machinery which the White Paper calls for would have to be technocratically legitimised. But this is an undertaking which has no prospects whatsoever: the breakthrough to the Commission’s self-reform ends, at least as far as regulatory policy is concerned, in the blind alleys of a technocratic perspective that seeks to escape the demands for democratisation without making it plausible for it even to fulfil its practical promises.

### *3.3.2 Constitutionalisation from below*

This sombre prospect should be lightened up since a Constitutional Convention is now starting its work. This Convention will take its time, but nevertheless affect, albeit only indirectly, the praxis of European governance. Let us hope so. It would be fatal if the auspicious moment for European constitutionalism that can now be expected were to lead to the neglect of the objective themes of European governance. *De facto* the process of law-production (*Recht-Fertigung*) cannot pause. And this process is, fortunately enough, less uniform than the White Paper would like to see it. The same Commission that is, at present, advocating the removal of the committee system, goes on to experiment with the Open Method of Co-ordination (the White Paper itself, however, does by no means sound encouraging, Commission 2001: 4, 13).<sup>22</sup> And the new

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<sup>22</sup> My commentator David M. Trubek has good reasons to insist that any comprehensive treatment of EU governance strategies should include a discussion of the Open Method of Co-ordination. I would even add that my own own perspectives on the primarily co-ordinative role of European law have much in common with the normative premises of many OMC proponents. However, my objective here is primarily re-constructive; it would seem simply premature to include OMC in such an analysis.

European Foodstuffs Authority reveals that the very ideas developed in the White Paper must not be taken too seriously.<sup>23</sup>

This tenacity of the European polity is reassuring, but no more than that. It does not, after all, guarantee that the incrementalist searching and learning process whereby Europe has ‘constituted’ itself can successfully continue. Indeed, academic observers can guide the process here only to the limited extent of illuminating the possibilities of this alternative as clearly as possible. Here, they must go into the complex factual position regarding the discovery procedure of European law and, at the same time, convey a normative direction. The label under which I have made such attempts is ‘deliberative supranationalism’ (from more details, see Joerges/Neyer 1998; Joerges 2000; Joerges/Sand 2001). This is an oxymoron, for it confronts the orthodox understanding of legal supranationality with its opposite, a heterarchically structured polity dependent on agreements. It is also confusing, to the extent that it does not express the social embeddedness of the law-finding process. It may, then, be appropriate to add another oxymoron to this one: ‘economy as polity’, or perhaps ‘societal constitutionalism’.<sup>24</sup>

What is meant is that the constitution should come about within society, and that the essential point is to promote the constitutionalisation of these incrementalist processes in which the integration project seeks its Third Way between constitutionalisation ‘from above’ and blind pragmatism. ‘Constitutionalisation’, here, denotes the idea of a legal binding of governance based on being able to structure the processes of political opinion-formation and decision-making ‘deliberatively’ using law, thereby securing their legitimacy (Eriksen/Fossum 1999; Joerges 2001).<sup>25</sup> For this sort of programmatic re-attachment of the European project to the ideals of deliberative democracy, a formal constitutional text would be neither sufficient nor indispensable.

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<sup>23</sup> The Council Directive on the European Food Safety Authority was adopted on 21 January 2001; the press statement presents this as a measure in the sense of the Governance White Paper. Yet, this new institution is anything but an executive agency.

<sup>24</sup> A term coined by Gunther Teubner (2001) (admittedly, already to be found in Johannes Althusius, though).

<sup>25</sup> All this is very largely in line with the concept developed by Pernoc (1996;1999) of a ‘constitutional association’, to the extent that it starts from both the *de jure* and the *de facto* inter-dependency in the European multi-level system and seeks to overcome the dichotomies between national and European law. ‘Deliberative’ supranationalism, however, seeks to set out these functions more precisely.

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