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Vol. 09 No. 10

Pages 1191 - 1378

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TABLE OF CONTENTS

ARTICLES

Maria Cahill

Ireland's Constitutional Amendability and
Europe's Constitutional Ambition: the Lisbon
Referendum in Context 1191-1218

Theodor Schilling

Language Rights in the European Union 1219-1242

Winfried Brugger

Dignity, Rights and Philosophy of Law within
the Anthropological Cross of Decision-Making 1243-1266

TABLE OF CONTENTS PAGE I

TABLE OF CONTENTS

ARTICLES

Jan Oster

The Scope of Judicial Review in the German
and U.S. Administrative Legal System 1267-1296

Federico Fabbrini

Kelsen in Paris: France's Constitutional
Reform and the Introduction of *a Posteriori*
Constitutional Review of Legislation 1297-1312

DEVELOPMENTS

Oreste Pollicino

European Arrest Warrant and Constitutional
Principles of the Member States: A Case Law-
Based Outline in an Attempt to Strike the Right
Balance Between Legal Systems 1313-1354

Konstantin Meljnik and Stefan Weiss

*Conference Report - 30 Years Additional
Protocols to the 1949 Geneva Conventions:
Past, Present and Future - 18th Conference of
the Legal Advisors to the German Army and of
the Representatives of the German Red Cross,
7 and 8 March 2008, Bad Mergentheim
(Germany)* 1355-1368

TABLE OF CONTENTS

DEVELOPMENTS

Stefan Seidendorf

Book Review - Building a Polity, Creating a Memory? EU-rope's Constitutionalization and Europe's Past 1369-1374

Conference Announcement

The Genocide Convention: International Conference Commemorating its 60th Anniversary. 1375-1376
4 - 6 December 2008
Philipps-University Marburg, Germany
International Research and Documentation Center for War Crimes Trials

Conference Announcement

Tilting Perspectives on Regulating Technologies 1377
10 - 11 December 2008
Tilburg University, Tilburg, The Netherlands

Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context

*Maria Cahill**

A. Introduction

For some of those who support the Lisbon Treaty, it is difficult to accept that a 53% majority of the 53% voting electorate of a country of a population of 4.4 million should, by voting to reject ratification of the Treaty, single-handedly bring to a halt a process which involves 27 countries with a combined population of almost 500 million.¹ Their point is that there are undemocratic consequences for the whole of Europe if the Lisbon Treaty does not enter into force as a result of the referendum defeat in Ireland, and therefore they argue that there are democratic reasons for objecting to the agreed legal consequences of the result of the Irish referendum. This only holds if we manage to forget, for a moment, that the decision to make the implementation of the Treaty conditional on the unanimous support of all Member States was never something that was at the whim of the Irish electorate, and if we manage to endorse, for a moment, the argument that respecting the effect that an individual Member State's national constitutional and democratic procedures have on the other Member States is only important if lots of people live there. Furthermore, the credibility of the argument depends, in significant part, on the credibility of its three (dubious) assumptions: that Europe has one unified 'demos'; that democracy means majoritarianism by reference to that single demos; and that, even though the peoples of the other 26 Member States were not consulted prior to the ratification of the Lisbon Treaty in their countries, they were accurately represented by their governments who approved ratification. It is noteworthy,

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¹ This view was put forward most directly by the Italian President, Giorgio Napolitano, and Foreign Minister, Franco Frattini. See, *Il no dell' Irlanda gela l'Europa bocciato il Trattato, l'UE nel caos*, LA REPUBBLICA, 14 June 2008; *La Lega esulta e imbarazza il Governo*, LA REPUBBLICA, 14 June 2008; *L'Irlanda non può fermare l'Europa*, LA REPUBBLICA, 17 June 2008; *Europe's Reaction*, IRISH TIMES, 14 June 2008; Paddy Agnew, *Mixed Response from Political Elite to Irish Rejection of Treaty*, IRISH TIMES, 16 June 2008.

however, that there should be an objection to the agreed legal consequences of the Lisbon Treaty rejection which claims for itself the democratic high-ground. That claim to democratic high-ground becomes plausible because beneath the surface of this objection, and there is another more general, more important, and more understated, objection that goes along the following lines: it is more-than-vaguely ridiculous that 'ordinary' people should be trusted to read a 300-page document, to understand its jargon, to identify the salient amendments that it makes, and to have an informed opinion about their merit, and to weigh up all the various pros and cons in order to arrive at a final decision either to accept or to reject the overall package. The long, complex, technical, and obscure nature of the treaty creates circumstances in which, it is argued, direct democracy is an especially inappropriate instrument of political decision-making.² At worst, this is to put the cart before the horse, maintaining that the Lisbon Treaty can legitimately set the terms and conditions for its own ratification, rather than being subject to the terms and conditions of the politics and institutional structures that propose to ratify it. At best, it displays a lack of appreciation as to why there was a need for a referendum in the first place. It is with this more insidious objection that this article is primarily concerned.

Fundamentally, this objection misses the distinction between the use of direct democracy or popular referendum as a stand-alone procedure for political decision-making, and the use of direct democracy or popular referendum as a constitutional amendability procedure in a functioning constitutional democracy. This blindness to the significance of the referendum is perhaps most obvious after the treaty rejection, when the political emphasis is firmly focussed on the reasons for the 'no' vote and on what can be done to satisfy or to mitigate the concerns raised by those reasons in order to solve the political crisis that the referendum rejection has created.³ This analysis often seems to miss the fact that this is not just a political crisis, but rather a constitutional crisis in which both the constitutional credibility of the Irish constitutional order and the constitutional credibility of the (putative) European constitutional order are at stake.

What is needed, instead, both in terms of the effort to understand what has happened in Ireland and its significance for Europe and in terms of the effort to set the terms of engagement for any potential 'solution-finding' exercise, is a deeper understanding not only of the reasons for and the significance of the 'no' vote, but a

² Rossa Fanning, *Lisbon Vote is not Democracy but an Exercise in Buck-Passing*, IRISH TIMES, 22 April 2008; Joe Humphreys, *Ancient Ideas could rejuvenate our Sickly Democracy*, IRISH TIMES, 30 August 2008.

³ The reaction of the Irish government to the 'no' vote was to commission a report by the consultancy company, Millward Brown. The report was released on 10 September 2008 and is available at: <http://www.dfa.ie/home/index.aspx>.

deeper understanding of the reasons for and the significance of the referendum itself. Indeed, against a background where the precursor of the Lisbon Treaty had already been rejected twice in popular referendum and came before the Irish people as the compromise of compromise – which no other national government wanted to risk putting before their people for popular ratification – it is the decision to hold the referendum, rather than the decision to reject the Treaty, which is the more anomalous decision. Furthermore, it is the decision to hold the referendum, rather than the decision to reject the Treaty, which needs to be defended and vindicated with greater urgency because when we truly get to grips with the constitutional significance of the referendum itself we realise that the implications of this latest ‘referendum rejection crisis’ will endure long after something is done to ‘fix’ the Irish result.

For, as it was clear on the ground in Ireland, and as it is backed up by the statistics, what emerges most clearly from the months of campaigning, the result itself, and the national reaction to that result is that there is a growing clarity and consensus among Irish people about what it is that we do when we vote in popular referendum on the question of whether or not to ratify the Lisbon Treaty. It is increasingly obvious that, as a people, we know that we are not voting on the question of whether or not we like being part of the European Union, nor on the question of whether or not we are grateful to be part of the European Union; neither on the question of whether or not we want to co-operate in the European adventure, nor on the question of whether or not we want to leave – or be forced out of – the European Union. In the Eurobarometer polls conducted immediately after the result,⁴ the vast majority of voters endorsed Ireland’s continued membership of the European Union: 89% of all voters generally supported membership of the EU,⁵ and were equally unambiguous in their rejection of the idea that a ‘no’ vote would mean that Ireland would be on its way out of EU: 89% of all voters similarly refused to see the question of the ratification of the treaty as linked to the question of Ireland’s membership of the Union.⁶ It is these numbers which tell the most important truths of the relationship between the Irish people and their European partners and it clear from them that, at least from the

⁴ Flash Eurobarometer Polls No. 245, available at http://ec.europa.eu/public_opinion/archives/flash_arch_en.htm, last accessed 25 September 2008. The figure in the flash poll are corroborated by those in the standard Eurobarometer Poll No. 69 on Public Opinion in the European Union, conducted in spring 2008, according to which, Ireland consistently scored either highest or second highest on the questions which deal with support for membership (Q.7), the extent to which the Member State has benefited from membership (Q.8), and whether or not the EU conjures up a positive image (Q. 13). Available at http://ec.europa.eu/public_opinion/standard_en.htm, last accessed 25 September 2008.

⁵ 98% of ‘yes’ voters and 80% of ‘no’ voters.

⁶ 89% ‘yes’ voters and 88.5% ‘no’ voters.

perspective of Irish people themselves as they voted on the Lisbon Treaty, both Ireland's commitment to the European Union and the European Union's acceptance of that commitment were not in question.

This standpoint, it will be argued, not only reflects a very encouraging sociological reality, but it is also a very correct understanding of national constitutional law. The referendum was required not in order to assess the popularity of the European Union in Ireland, nor the level of support for Ireland's membership, but rather because our constitutional amendability rule provides that when there is a proposal to change the basic terms of our association, as enshrined in the Irish Constitution, that change must have the approval of the Irish people in popular referendum. The referendum was required prior to ratification of the Lisbon Treaty because the Treaty did propose changes to the basic terms of our association as enshrined in the Constitution. Thus, the issues that arise in the context of the referendum are issues that go to the heart of what our basic terms of association, as the people of Ireland, are and should be. The decision is not a decision about the objective merit of an externally-produced document but a much more personal decision about who we are and how we want to organise our living-in-common. It can happen, then, that Europe's political ambitions are at variance with the decisions taken by the people about what the basic terms of their association should be. When this happens, it is no ordinary political conflict. It is not just a conflict caused by different and opposing interests; it is not just a conflict caused by different and opposing conceptions of justice; and it is not just a conflict caused by different and opposing ideas of the kind of institutional structure that is needed in order to make the political decisions that privilege one interest over another, and one conception of justice over another. It is a conflict caused by different and opposing conceptions of what the basic terms of association are: it raises questions such as "who are the 'subjects' and what is the nature of their subjective bond to this 'felt need' to put things in common, and what is the proper 'sphere' and legitimate scope of this common enterprise ...which constituency is appropriate and apt to put things in common ... and to what extent and in what domains is it prepared to do so?"⁷

When this kind of constitutional conflict happens, as it has in the context of Ireland's rejection of the Lisbon Treaty, the first step towards its resolution must be that we try to explain and understand and vindicate, not only the immediate reasons motivating the 'no' vote, but the referendum itself as an example of Ireland's constitutional amendability procedure in action, and thereby to sustain and defend both the strength of Ireland's constitutional democracy and the credibility of the Europe's own constitutional ambitions.

⁷ Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, (2005) 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 211, at 215.

The paper distinguishes, in Part B, the concept of direct democracy from the concept of constitutional democracy so as to clarify the importance of referenda when they are used as the constitutional amendability procedure in a functioning constitutional democracy. It goes on, in Part C, to examine the place of Ireland's constitutional amendability procedure in Irish constitutional history. Part D discusses Ireland's constitutional amendability procedure vis-à-vis European treaty referenda, while Part E concludes by examining the three ways in which Europe's constitutional ambitions are intimately tied up with national constitutional amendability procedures.

B. Direct Democracy vs. Constitutional Democracy

In this communication age, with the rise both in the number of people with whom we can be in communication and the speed at which we can communicate, direct democracy becomes feasible again, for perhaps the first time since its inception as the *modus operandi* of government in ancient Athens.⁸ Indeed, in very informal ways, we do express our interests and issue preferences, and even our political views and ideologies, in blogs and online polls and surveys, etc. Furthermore, when we, in representative democracies, move towards e-voting for general elections,⁹ it becomes more conceivable to think that the people might be consulted directly with increasing frequency and on an increasing number of issues. For these reasons, direct democracy is experiencing something of a renaissance.¹⁰ Its deficiencies remain, of course:¹¹ there may not be sufficient time for the electorate to become informed as to the issues at stake in any given proposal; the electorate may lack the expertise necessary to understand the complexities of those issues; the electorate may be motivated by self-interest, rather than by principle; it may be unduly-influenced by specialist lobby groups or swayed by demagoguery; it might tend to make decisions based on the short-term perspectives rather than with a view towards its long-term goals; and, perhaps most importantly of all, direct

⁸ See MOGENS HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES AND IDEOLOGY* (1998); KURT RAAFLAUB, JOSIAH OBER, & ROBERT WALLACE, *ORIGINS OF DEMOCRACY IN ANCIENT GREECE* (2008).

⁹ The studies of the E-Democracy Centre on the theory and practice of e-democracy are available at <http://edc.unige.ch/index.php>, last accessed 25 September 2008.

¹⁰ DAVID BUTLER, & AUSTIN RAMNEY, *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* (1994).

¹¹ *Id.*, Chapter 2; THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1999).

democracy panders to majoritarianism and, of itself, contains no protection from the violence that unrestrained majoritarianism can occasion.¹² Indeed, it is partly as a response to the inadequacies of direct democracy that constitutional democracy finds its mandate, establishing as it does a system of representative government, whereby decisions are made on behalf of the people by representatives directly elected by them, and a basic set of grounds rules, usually in the form of fundamental rights provisions, that provide institutionalised protection of minorities against majorities.¹³

When a constitutional democracy includes a direct democracy procedure as its constitutional amendability rule, direct democracy then becomes one of the mechanisms for constitutional modification that contributes to the iterative achievement of the correct balance between the success of the constitution as measured by its resilience and the success of the constitution as measured by its legitimacy.¹⁴ This is because the chosen amendability procedure is not agreed in isolation from the rest of the constitutional bargain, but rather as an essential element of it; as part of the carefully-orchestrated balance established in the constitution that is designed to address the various political, institutional, and social tensions which are intrinsic and unique to the particular polity. The amendability procedure belongs, then, in the wider constitutional configuration in which it is conceived. This point is well made, in the context of American constitutionalism, by Christopher Eisgruber and Lawrence Sager.

Christopher Eisgruber begins by outlining three tensions that typically inform the choice as to which kind of constitutional amendability rule a constitutional

¹² LOREN SAMONS, *WHAT'S WRONG WITH DEMOCRACY? FROM ATHENIAN PRACTICE TO AMERICAN WORSHIP* (2004); NADIA URBINATI, *REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY* (2008); NADIA URBINATI, *MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT* (2008).

¹³ In the *Federalist Papers*, James Madison specifically argued that representative democracy was a better option than direct democracy or pure democracy, because, as he concluded that "a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole ... and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths". *Federalist No. 10, on the Union as a Safeguard against Domestic Faction and Insurrection*, available at <http://www.foundingfathers.info/federalistpapers/fed10.htm>, last accessed 25 September 2008.

¹⁴ In this sense, as Stanford Levinson puts it, the constitutional amendability procedures 'respond' to the 'imperfection' that is inherent in the constitution. STANFORD LEVINSON (ED.), *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (1995).

configuration will adopt. He suggests, first, that constitutional amendability rules must strike a reasonable balance between stability and flexibility, so that reform is possible while the institutional structures remain reasonably secure. In striving for the correct balance in this regard, he sees two possible options for constitution-makers: they can either make constitutional amendment notoriously difficult but “constitutionalise” only a very small number of decisions (thus allowing that most reforms are effected through non-constitutional channels), or they can choose to constitutionalise a wider range of decisions and make amendment slightly less difficult by establishing a “medium degree of unamendability”.¹⁵ He suggests, second, that there must be a healthy tension between political inertia and institutional quality, for the point is not that the constitution, in establishing institutions which endure through time, is problematic in direct proportion to the durability or obduracy of those institutions, but rather that it must be possible, periodically, to review the *quality* of those institutions and to affect change when necessary. Here, Eisgruber argues that inflexible amendment rules may prove to be the safer option, because while “[f]ormal constitutional rigidity forces decision-makers to acknowledge the long-term consequences of institutional reform ... by contrast, when formal constitutional barriers to change are modest, people may pursue various ‘experiments’ in the mistaken belief that subsequent majorities can painlessly terminate the experiments if they go awry”.¹⁶ He argues, thirdly, “[c]onstitution-writing is a way to insist upon, and institutionalise, the distinction between democracy and majoritarianism”,¹⁷ and that constitutional amendability rules are a mechanism by which this can be emphasised. Inflexible, i.e. supermajoritarian, amendment rules “do indeed limit democracy”, he argues, only “if by ‘democracy’, one means ‘majoritarianism’”.¹⁸ For this reason, supermajoritarian amendment procedures can avoid a situation where the amendment procedure is vulnerable to majoritarianism and can thus be used “to degrade institutions that are valuable to the people as a whole”,¹⁹ by guarding such

¹⁵ CHRISTOPHER EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001), 14. “They might search for some medium degree of unamendability, in which constitutional amendment is more difficult than ordinary law-making but not so difficult as to frustrate reform. Or, alternatively, constitution-makers might make amendment arduously difficult, but constitutionalise a minimal number of decisions. The constitution-makers might hope that the constitution’s unamendability would ensure a stable institutional foundation for democratic politics and also hope that most reforms and adjustments could be made through non-constitutional channels.”

¹⁶ EISGRUBER, *supra*, note 15, 16-7.

¹⁷ EISGRUBER, *supra*, note 15, 18.

¹⁸ EISGRUBER, *supra*, note 18-9.

¹⁹ EISGRUBER, *supra*, note 15, 20. “If so, then any increase in democratic freedom brought about by more flexible amendment rules would be nullified by the destabilisation and corruption of other institutions that make democracy possible”.

institutions against encroachment by majority will.²⁰ Eisgruber's purpose, in all of this, is to mount a double defence of the supermajoritarian amendment rule prescribed by Article V of the US Constitution.²¹ He insists, first of all, that "it is an error to look at constitutional amendment rules in isolation from the other democratic institutions that compose a political system".²² Further, and against those who loosely make the point that Article V is "undemocratic, mediocre, or even stupid",²³ he concludes that there are "democratic functions of inflexible constitutions".²⁴

Lawrence Sager takes a complementary approach, arguing that, because it limits popular constitutional amendment to certain specific and controlled occasions, Article V "promotes a generosity of perspective, an impartiality born of the awareness of one's own possible future circumstance and the circumstances of one's children and children's children", and that because it insists on "a geographically broad and numerically deep consensus, article V looks directly for agreement among the diverse circumstances of our nation".²⁵ In this way, Sager reasons, the amendability procedure is part of a whole, contributing to the promotion of an ongoing dialogue about constitutional purpose:

The process over time is one of dialogic collaboration, with the judiciary charged with carrying forward the project of constitutional justice upon which popular installation and periodic

²⁰ EISGRUBER, *supra*, note 15, 20.

²¹ Article V of the US Constitution reads as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

²² EISGRUBER, *supra*, note 15, 22.

²³ EISGRUBER, *supra*, note 15, 22. Eisgruber's principal target is Stephen Griffin and his contribution to the *Constitutional Stupidities* volume: Stephen Griffin, "The Nominee is ... Article V", in Eskridge, William and Levinson, Sanford, eds, *Constitutional Stupidities, Constitutional Tragedies* (New York University Press, 1998).

²⁴ EISGRUBER *supra*, note 15, 10.

²⁵ Lawrence Sager, *The Incurable Constitution*, 65 NEW YORK UNIVERSITY LAW REVIEW 893 (1990), 959-60.

reshaping of the Constitution has embarked us. At times, the dialogue may be adversarial: a Supreme Court that is widely perceived to have run off the rails can be redirected by the requisite Article V consensus, while a morally laggard society can be prodded into reflection and change. But collaboration, it is to be hoped, will be the more general tone.²⁶

The lesson to be drawn from the work of both of these scholars is that criticism of the particular constitutional amendability procedure chosen by a particular polity, when that criticism proceeds without reference to the wider constitutional configuration that prescribes its mandate, is indolent to the point of erroneousness. It is impossible to come to a definitive conclusion on the merits of a particular amendment rule in the absence of a wider and deeper examination of the particularities of the constitutional framework that includes that rule. Even then, the strengths or weaknesses of any particular amendment rule can only be evaluated, within that wider constitutional configuration, in a practical context, so that any broad conclusions on its merit will, in the end, as Eisgruber puts it, “be made out on the basis of an all-things-considered practical judgment about whether the ... people would be better able to govern themselves”²⁷ if the amendment procedure were changed. Essential to this perspective, first of all, is acceptance that no constitutional amendability procedure, whether existing, proposed, or hypothetical, can remove the uncertainties or conflicts that pervade our efforts at living-in-common. As Sager concludes: “[t]here is nothing crisp or tidy about this picture: it does not present a model driven by firm claims of entitlement or informed decisively by collective will; and it certainly does not promise to purge our constitutional life of conflicts of value or errors of judgment”.²⁸ Intrinsic to this argument, too, is the acknowledgment that different polities, having their own constitutional institutions that are designed to reinforce their particular strengths and to cope with their unique challenges, will have amendability rules that are unique and particular to the unique constitutional configuration of that polity.

Thus, the fact that the Irish Constitution can be amended by the majoritarian rule of direct democracy, rather than by a supermajoritarian procedure as *per* the American Constitution, does not, without more, condemn the Irish procedure. More to the point, the fact that the Irish Constitution requires that there be a referendum in Ireland prior to ratification of any European treaty that materially

²⁶ SAGER, *supra*, note 25, 895.

²⁷ EISGRUBER, *supra*, note 15, 22.

²⁸ SAGER, *supra*, note 25, 960.

alters the 'essential scope and objectives' of the previous treaties, is not ridiculous just because no other Member State has this rule. Correspondingly, the fact that the Irish Constitution requires that there be a referendum in Ireland in such a circumstance, does not, without more, condemn any other Member State of the European Union whose constitutional configuration does not require referenda in order to ratify European treaties. Each amendability procedure must be considered from a point of view that is thoughtfully attentive to the constitutional configuration in which it belongs.

This is because a constitutional amendability procedure *belongs* in its constitutional configuration. It does not sit above or outside the constitution, and so it cannot be judged on its own merits, but only as part of the overall package. This means, to conclude this section, that even when the amendability procedure is a majoritarian amendability procedure, as is the case in Ireland, it cannot be entirely dismissed merely by re-statement of the general objections to direct democracy. It is not enough anymore to say that there are weaknesses in the manner in which the electorate approaches the task of making decisions by popular referendum. This is because the very holding of a referendum on a proposal to amend the constitution, is an instance where all the gravitas and power of constitutional democracy is brought to bear on a single decision taken by the people themselves, thereby requiring that that decision becomes worthy of the constitutional tradition which it then becomes part of. The very holding of a referendum on a proposal to amend the constitution is testament to the fact that what is at stake in the proposal is not something about which we can be casual; not something that costs us nothing; not something about which we can delegate our decision-making role, but rather something that goes to the heart of who we are, something that changes fundamentally those things that we take most seriously, something that has deep and enduring ramifications for our project of living-in-common.

C. Ireland's Constitutional Amendability Procedure

Ideally, of course, when a referendum is to take place, the electorate of that country will take the time to inform itself on the issues in question, will come to grips with the complexities of those issues, and will consider the proposal in a fair, principled, and un-self-interested way and reach a decision, which will reflect, as best it can, the most enlightened principles for living happily in common. In such a case, the decision, taken on the basis of the constitutional amendability procedure, supports an all-things-considered conclusion that the constitutional democracy in which the constitutional amendability procedure belongs is a healthy one. At times, however, this does not happen; people make up their minds without fully informing themselves, or fully understanding the issues, they are prejudiced or deceived or

unprincipled, and thus the decision, taken by means of the constitutional amendability procedure, tends to indicate that the constitutional democracy in question is not a healthy one. We must be careful, however, not to draw too-hasty conclusions. The point is that the weakness of any particular constitutional amendability procedure may be compensated for, or balanced out – or at least partly so – by the constitutional configuration as a whole to such an extent that it would be fallacious to say that they undermine the constitutional configuration as a whole. Since it is true to say, however, that the strengths and the weaknesses of the constitutional amendability rule have the potential to become the strengths and weaknesses of the constitutional democracy in which it operates, it follows, then, that the entire constitutional infrastructure – and in particular the legislative, executive, and judicial organs of government – has a vested interest in creating the conditions in which the constitutional amendability procedure is as robust as possible.

This section of the paper does not seek to defend the levels of knowledge, understanding, and engagement of ‘ordinary’ Irish people during referendum campaigns; nor does it propose to make a final judgment on the health or otherwise of our constitutional democracy. Instead, it provides an account of how constitutional amendability procedures have been dealt with throughout Irish constitutional history. The claim is that the entirety of Irish constitutional infrastructure and the manner in which that infrastructure has been employed throughout Irish constitutional history has brought us, through turbulent waters, to the point where, when we are asked to make a decision by popular referendum on a proposal to amend the constitution, we are in a good position to take that decision seriously.

The story of the place of constitutional amendability procedures in the overall constitutional configuration begins with the 1922 Constitution of the Saorstát Eireann (the Irish Free State). The 1922 Constitution was enacted on the basis of the Anglo-Irish Treaty, which marked the end of the Irish War of Independence, and gave Ireland limited sovereignty as a dominion state within the British Commonwealth. Article 50 of the 1922 Constitution provided that, for a period of eight years, the Constitution could be amended by ordinary legislation; that is, by the Houses of Parliament.²⁹ The political climate was still very tense at the

²⁹ Article 50 of the 1922 Constitution provided that: “Amendments of this constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their

foundation of the Free State, and a bloody Civil War absorbed the first two years of its life, because the country was torn in two over the question of whether or not to accept the limited sovereignty offered by the British or to continue to fight for full independence. Hence, the government of the day found that the Article 50 procedure was quite an expedient method of constitutional amendment, and, in due course, by means of the Constitution (Amendment No. 16) Act of 1929, made an amendment to Article 50 itself, extending the time period during which constitutional amendments could be made by ordinary legislation by another eight years. Pursuant to this, the Oireachtas then passed the Constitution (Amendment No. 17) Act of 1931, which, under the infamous Article 2A, allowed for a wide range of supplementary powers for the State in the repression of political violence and subversion. It established of a Special Powers Tribunal – a court martial consisting of officer judges appointed by the government – that could impose penalties, including the death penalty, above and beyond those prescribed by ordinary law, for a host of offences relating to subversion or attempted subversion, but also, quite extraordinarily, for any offence “in respect of which an Executive Minister certifies in writing under his hand that to the best of his belief the act constituting such offence was done with the object of impairing or impeding the machinery of government or the administration of justice”.³⁰

Both the Constitution (Amendment No. 16) Act of 1929 and the Constitution (Amendment No. 17) Act of 1931 were challenged in judicial review proceedings in the case of *The State (Ryan) v. Lennon*.³¹ The sixteenth amendment was challenged on the basis that the Oireachtas could not accrue extra power unto itself (meaning that the seventeenth amendment was also invalid for being *ultra vires*) and the seventeenth amendment was challenged for being so radical and so draconian a piece of legislation as to amount to a *de facto* repeal of the entire Constitution. In the divisional High Court, the judges concluded that:

Art. 50 conferred upon the Oireachtas the power to amend and alter the Constitution by way of ordinary legislation passed within a period of eight years from the date when the Constitution came into operation, and that, in the absence of any indication in the statute of an intention of the contrary, the power so conferred is

votes on such Referendum, and either the votes of a majority of the voters on the register, or two thirds of the votes recorded, shall have been cast in favour of such amendment...”

³⁰ Appendix, Constitution (Amendment No. 17) Act, 1931.

³¹ *The State (Ryan) v. Lennon* [1935] IR 170.

unrestricted, and authorises the alteration of any Article of the Constitution, including Art. 50 itself.³²

The majority of the Supreme Court judges upheld the High Court decision, holding that, drastic though the provisions were, they were within the scope of the Oireachtas to enact. Despite finding the Act valid, Mr. Justice Murnaghan made his objections clear when he stated that “the extreme rigour of the Act is such that its provisions pass far beyond anything having the semblance of legal procedure, and the judicial mind is staggered at the very complete departure from legal methods in use in these courts”.³³ The sole dissenting judgment came from the Chief Justice, Mr. Justice Kennedy, who argued that:

[T]he new Article 2A is no mere amendment in, but effects a radical alteration of, the basic scheme and principles of the Constitution enacted for the Saorstát by the Constituent Assembly. ... The net effect ... is that the Oireachtas has taken judicial power from the Judiciary and handed it to the Executive and has surrendered its own trust as a Legislature to the Executive Council, in respect of the extensive area of matters ...³⁴

On foot of this decision, successive governments used the ordinary legislation amendment procedure to whittle away at the residual power of British over Irish domestic affairs: removing the Oath of Allegiance to the British monarch and the requirement that the Free State Constitution be compatible with the Anglo-Irish Treaty,³⁵ abolishing the right of appeal to the Privy Council in London,³⁶ and eventually removing all references to the King and abolishing the office of the Governor-General, the King’s representative in Ireland.³⁷ Thus, by means of ingenious – or disingenuous – use the amendability procedure, the entire basis for the 1922 Constitution was undermined and eroded, to the point where the Constitution itself was no longer worth the paper that it was written on.

³² *Id.*, 178. (‘Oireachtas’ is the Irish word for Legislature.)

³³ *The State (Ryan) v. Lennon*, *supra* note 31, 237.

³⁴ *The State (Ryan) v. Lennon*, *supra* note 31, 200-2. Mr. Justice Kennedy used canons of natural law to declare the provisions of Article 2A void and inoperative.

³⁵ Constitution (Removal of Oath) Act, 1933.

³⁶ Constitution (Amendment No. 22) Act, 1933.

³⁷ Constitution (Amendment No. 27) Act, 1936.

When it came to enacting *Bunreacht na hÉireann* – the Constitution of the Irish Republic – in 1937, and no doubt as a reaction to the constructed failure of the 1922 Constitution, Dáil debates reveal that there was unambiguous support for “the general principle that once the Constitution is adopted by the people as a whole it ought to be changed only by their direct and immediate will”.³⁸ The Constitution under-scored this notion in the general principle, written into Article 6, that:

All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.³⁹

Article 46, section 2 established that constitutional amendments should take place in the following way: “Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed ... by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law...”. Although the Article also provided that, during a transitional period of three years, constitutional amendments could be effected by means of ordinary legislation, on this occasion, the time limit on that transitional period was expressly stated to be beyond the power of the Oireachtas to amend.

There have been twenty-three successful amendments of the 1937 Constitution during its seventy-one years as the fundamental law of Ireland. (For the sake of bald comparison it is worth noting in passing that there have been only twenty-seven amendments of the American Constitution during its two hundred and twenty-one year history.) Nine other proposals to amend the 1937 Constitution were rejected. Thus, despite the relatively short tenure of the constitution, we have already had quite a wealth of experience of holding referenda, and, there have been many occasions when those referenda have been so contentious that the country is split down the middle, particularly when the proposals deal with sensitive social issues in the area of family law. In 1996, divorce was introduced on the basis of a tiny majority of 50.3% in favour to 49.7% against. There have been three referenda on the right to life of unborn children, in 1983, 1992 and 2001, the first of which successfully included a clause in the constitution which states that the right to life of the unborn has equal status with the right to life of the mother, and the latter two

³⁸ Dáil Éireann is the lower House of Parliament. Dáil Debate of 4 June 1937. Available at <http://historical-debates.oireachtas.ie/D/0067/D.0067.193706040007.html>, last accessed 25 September 2008.

³⁹ Article 6 (1) of the Constitution.

which failed to introduce restrictions on the constitutional ban on abortion. In the 2001 referendum, the margin was similarly tight, with 50.42% of voters voting 'no' and 49.58% of voters voting 'yes'. Both sides of the 'social divide' know what it is to win and know what it is to lose these important and close-run decisions. Nonetheless, the Supreme Court insists,⁴⁰ and it is accepted in the popular imagination, that even when the decisions are won and lost on a knife-edge, the decisions are final.

Referenda on proposals to amend the Constitution are to be taken so seriously, according to the Supreme Court in, *inter alia*, the case of *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995*,⁴¹ because it is nothing less than the 'fundamental and supreme law of the State' that is at stake. The Court ruled that "[t]he People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended ... is the fundamental and supreme law of the State representing as it does the will of the People".⁴² As well as taking this strong line – and enforcing it in the *Hanafin* decision by refusing to strike down the result of a referendum⁴³ – the courts have also begun to insist that pre-referendum conditions should enable and justify the fact referendum decisions are taken so seriously. In other words, the courts require that pre-referendum conditions (specifically, the use of public funds and the allocation of air-time for public broadcasts) be tightly controlled in order that the basic requirements of fairness and transparency, breeding legitimacy, can be imputed to the referendum results. As noted above, Article 46, section 2 provides that all proposals to change the Constitution must go before the two Houses of Parliament before being submitted to the people for their approval, meaning that in order for a proposal to amend the Constitution to reach the people in the first place, it must necessarily already have the support of the government of the day. However, a series of judgments in the 1990s restricted the powers of the governments in relation to the promotion of a 'yes' vote to a referendum. In *McKenna v. An Taoiseach (No. 2)*,⁴⁴ the Supreme Court ruled that it was unconstitutional for the government to use state monies for the promotion of a particular result. The argument was that if the issue was important enough to warrant a referendum, then it was a breach of fair procedures for the government

⁴⁰ *Hanafin v. Minister for the Environment* [1996] 2 IR 321.

⁴¹ *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

⁴² *Id.*, 43.

⁴³ See, *supra*, note 40.

⁴⁴ *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10.

to use public monies to tip the balance in favour of amendment. The Chief Justice, Mr. Justice Hamilton stated that:

“The use by the Government of public funds in a campaign designed to influence the voters in favour of a ‘yes’ vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.”⁴⁵

(The government party or parties can, of course, use their own private funds for the promotion of their preferred outcome.) Following from the *McKenna* decision, the Oireachtas passed the Referendum Act in 1998, which established a Referendum Commission whose statutory role was to put the arguments for and against each referendum proposal. The Commission itself, on the occasion of the referendum to ratify the Amsterdam Treaty, shied away from such an arduous task, defining its mission as being rather “to explain the subject matter of the referendum to the public at large, as simply and effectively as possible, while ensuring that the arguments of those against the proposed amendment to the Constitution and those in favour are put forward in a manner that is fair to all interests involved”.⁴⁶ Subsequently, the Referendum Act 2001 removed the Commission’s statutory functions of putting arguments for and against the referendum proposals, and fostering and promoting public debate on referendum proposals. Now, its statutory function is to explain the subject-matter of the referendum, to promote public awareness of the referendum, and to encourage the electorate to vote. In a decision of 2000, *Coughlan v. The Broadcasting Complaints Commission*,⁴⁷ the Supreme Court ruled on the allocation of airtime for broadcasting of promotional messages for and against referendum proposals. Until then, airtime was being allocated on the basis of number of seats in the lower House of Parliament, but in the *Coughlan* decision, the Court applied the *McKenna* principles in order to rule that it was unconstitutional for there to be an imbalance in the number of broadcast messages between those in favour of the referendum proposal and those against the proposal.

It is this history and experience that we bring to each proposal to change the constitution by means of popular referendum. It is this history and experience that means that we are clear about what the basic rules of the game regarding referenda

⁴⁵ *Id.*, 42.

⁴⁶ Referendum Commission, Report on the Eighteenth Amendment of the Constitution – Consequential on the Amsterdam Treaty 1998, Dublin.

⁴⁷ *Coughlan v. The Broadcasting Complaints Commission* [2000] 3 IR 1.

are: those rules being that the pre-referendum conditions have to be fair; that each referendum proposal is a proposal, and can therefore be either accepted or rejected; that each proposal is accepted or rejected according to the option favoured by a majority of voters, even if that majority is a tiny majority; that the decision of the majority stands and cannot be reviewed; and, finally, that, no matter how sensitive the issue, no matter how divisive the campaign, and no matter how close-run the outcome, there is still room for everybody at the table and constitutional democracy continues. It is this history and experience that means that, even though our constitutional democracy is not perfect, and even though the constitutional amendability procedure that we use has some significant drawbacks, we do see the referendum as part of the constitutional bargain and we are in a good position to take it seriously as such. It is this history and experience, too, that we take with us to the question of the ratification of the treaties negotiated by the Council of Ministers of the European Union.

D. Ireland's Constitutional Amendability and European Treaties

Patricia Roberts-Thomson makes the point that the “unique characteristics” of European treaty referenda are so idiosyncratic that they “query conventional understandings of referendums”.⁴⁸ She outlines their four distinctive characteristics and drawbacks as follows: “first, the purpose of treaty referendums in re-affirming what is essentially a previous decision and the consequences of this; secondly, the lessening of governmental control over the holding and timing of these referendums; thirdly, the loss of the sense of fairness as the *status quo* position ‘moves’ with the ratification or rejection of the treaties by other members; and fourthly, the conventional actors in referendums are changing”. For the purposes of this discussion, these four characteristics are treated as two pairs, since the first and third features are concerned with the purpose and legitimacy of the referendum itself, and the second and fourth features are concerned with the role of national governments in the referendum campaigns.

Concerning the purpose and legitimacy of the referenda, and in relation to the first feature, Thomson argues that the use of treaty referenda as a mechanism for re-affirming what has already been agreed means that “treaty referendums mark a change in the use of referendums; from one-off affairs – at least when the outcome is positive, to periodic events where essentially the same decision is re-visited both with hindsight and present knowledge”.⁴⁹ In relation to the third feature, she makes

⁴⁸ Patricia Roberts-Thomson, *EU Treaty Referendums and the European Union*, 23 JOURNAL OF EUROPEAN INTEGRATION 105 (2001), 119.

⁴⁹ ROBERTS-THOMSON, *supra* note 48, 125.

the incisive point that the inherent sense of fairness which governs referenda is lost, when, as other member states ratify a treaty, the balance of expectations shifts for those member states which have not. This point cannot be over-estimated, she argues, because it is the inherent sense of fairness that is “one of the major attributes of referendums and a crucial component of their ability to confer political legitimacy. The assumption has always been that referenda were a very fair way of resolving issues – strictly majoritarian in nature so that a ‘yes’ result would give the authority to change, while a ‘no’ result would mean maintenance of the *status quo*. But, due to the underlying implications of a possible negative outcome, EU treaty referendums have lost this inherent sense of fairness. While the decisiveness remains, the consequences of the outcome have changed as the parallel actions of other members of the Union mean that there is no acceptable *status quo* position left which would respect a negative vote. This really changes treaty referendums into asymmetrical political instruments.”⁵⁰ The reality, she recognises, is that the fact that the other Member States have ratified the treaty means that the one remaining Member State is under considerable pressure from them to also do so; making a negative outcome in the referendum an “unacceptable” result,⁵¹ and thereby undermining the purpose and importance of the referendum in the first place.

As regards the role of national governments and their capacity to act as “agenda-setters” for referenda, and in relation to the second feature, she makes the valid point that treaty referenda expose the fact that the national government has less control over the decision to hold a referendum, the timing of the referendum, as well as the content of the proposal put before the people. This ties with the fourth characteristic, which is that conventional actors in the referendum process are changing. This point is corroborated by the studies of Min Shu who argues that “national governments are less competent to control the agenda of treaty referendums. Nor does the national party system function well. Instead, *ad hoc* social movements and interest groups are ready to align themselves with the yes/no camps. As a consequence, the voting campaigns of treaty referendums often draw a chaotic picture of campaign argumentation and political mobilization”.⁵²

In sum, her argument is that the unique circumstances in which European treaty referenda take place conspire to undermine both the meaning and legitimacy of the referendum itself and the role of the national government as agenda-setter for the referendum campaign. The overall effect of the conspiracy, ironically, is that treaty

⁵⁰ ROBERTS-THOMSON, *supra* note 48, 122.

⁵¹ ROBERTS-THOMSON, *supra* note 48, 125.

⁵² Min Shu, *Referendums and the Political Constitution of the EU*, 14 EUROPEAN LAW JOURNAL 423 (2008), 441.

referenda are very difficult for governments to 'win'.⁵³ I do not doubt that all of this is extremely plausible, nor would I dispute the fact that we need to become more conscious of the negative impact that the "unique characteristics" of European treaty referenda can have, but again, this analysis treats European treaty referenda as if they have nothing to do with the national constitutional commitments of Member States. In Ireland, at least, this kind of reasoning has been emphatically rejected by the Supreme Court.

In the case of *Crotty v. An Taoiseach*,⁵⁴ the Supreme Court established the rule that the government must arrange for a referendum when it proposes to ratify a European treaty that entails an amendment to the Irish Constitution. The case concerned the ratification of the Single European Act and although the decision is well-known, the reasoning for the decision is rarely discussed. The Chief Justice, Mr. Justice Finlay, opened the discussion by holding that the Irish people had signed up to a particular vision of the European Economic Communities in 1973, when they voted in a referendum to add the first sentence of Article 29.4.3 (as it was then) to the Constitution.⁵⁵ He ruled that this provision must be construed as:

[A]n authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29.4.3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad.⁵⁶

⁵³ Shu, *supra* note 52, 441.

⁵⁴ *Crotty v. An Taoiseach* [1987] IR 713.

⁵⁵ Article 29.4.3 was inserted into the Constitution by the Third Amendment of the Constitution Bill, 1971 the purpose of which was to allow the State to become a member of the European Communities. Article 29.4.3 read as follows: "The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State".

⁵⁶ *Crotty v. An Taoiseach*, *supra* note 54, 767.

The question then was whether the Single European Act constituted an amendment in the “essential scope and objectives” of the European project as envisaged in 1973:

In discharging its duty to interpret and uphold the Constitution the Court must consider the essential nature of the scope and objectives of the Communities as they must be deemed to have been envisaged by the people in enacting Article 29, section 4 subsection 3. It is in the light of that scope and those objectives that the amendments proposed by the Single European Act fall to be considered.⁵⁷

The Court went on to determine that the Single European Act had an aim, which if it “were ever achieved it would constitute an alteration in the essential scope and objectives of the Communities to which Ireland could not agree without an amendment of the Constitution.”

The reason that the people must be consulted when the government wishes to transfer certain of its powers to the European institutions is because the powers invested in the government do not belong to the government, but belong rather, in the first instance and in the final analysis, to the people. It is not possible, then, for the government to divest itself of those powers without the approval of the people in accordance with the Constitution. In the words of Mr. Justice Walsh:

It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution.⁵⁸ ...

The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people, the contemplated restrictions upon freedom of action. To acquire the power to do so would ... require a recourse to the people “whose right it is ... in final appeal, to decide all questions of national policy, according to the requirements of the common good” ... In the last analysis it is the people themselves who are the

⁵⁷ *Crotty v. An Taoiseach*, *supra* note 54, 768.

⁵⁸ *Crotty v. An Taoiseach*, *supra* note 54, 778.

guardians of the Constitution ... the assent of the people is a necessary prerequisite to ... ratification.⁵⁹

Mr. Justice Hederman concurred, providing succinct summary of the ruling:

[T]he essential point at issue is whether the State can by any act on the part of its various organs of government enter into binding agreements with other states, or groups of states, to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states ... The State's organs cannot contract ... in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers – not the disposers of them.⁶⁰

It is this basic proposition that is at play every time that the Irish government negotiates a treaty with other countries: the government, as a whole, and the Minister for Foreign Affairs, in particular, do have plenipotentiary status in the sense that they are the rightful representatives of the Irish people at such negotiations and they negotiate on behalf of and with the authority of the Irish people, but they cannot give away their powers, because those powers do not belong to them, but belong, rather, and ultimately, to the Irish people.

It goes without saying, then, that we do not have referenda on European treaties in Ireland because the Irish people are fixated with the minutiae of European policies. Any treaty that proposes to transfer the power to develop European policies from our national organs of government to the European institutions necessarily entails an amendment to our Constitution, and therefore requires a popular referendum. Fundamentally, then, the popular referenda held in the context of European treaties do not presume to exalt the role of the Irish people beyond that of the peoples of the other Member States, but rather to honour the rightful place, in constitutional law, of the Irish Constitution itself. From the perspective of Irish constitutional law, a European treaty referendum is not about choosing to sanction or to refuse to sanction the projects and policy plans of the European Union, but rather about the decision of whether or not to change the Irish Constitution, in order to delegate to the European Union certain capacities for government which, under the Constitution, belong to the Irish Oireachtas.

⁵⁹ *Crotty v. An Taoiseach*, *supra* note 54, 783-4. Here Mr. Justice Walsh is quoting from Article 6 of the Constitution, mentioned *supra* note 39.

⁶⁰ *Crotty v. An Taoiseach*, *supra* note 54, 794.

If we look at the Thomson characteristics in tandem with Irish constitutional law regarding the amendability procedure, and the *Crotty* decision in particular, the significance of these 'unique characteristics' of European treaty referenda changes. Concerning the purpose and legitimacy of the referenda, and in relation to the first feature, where Thomson had argued that treaty referenda are used for re-visiting the same decision over and over, the *Crotty* judgment makes clear that it is only when and because the original decision could not have anticipated the changes which subsequently follow that a new referendum must take place.⁶¹ In relation to the third feature, Mr. Justice Finlay, Chief Justice, insists that the Irish people have sovereignty over the decision of whether or not to ratify the Single European Act, and that "[s]overeignty in this context is the unfettered right to decide: to say yes or no".⁶² More generally, as regards the role of national governments and their capacity to act as "agenda-setters" for referenda, although it is true that the government does not have a free hand as regards the timing of European referenda whereas they do with national referenda, it is already the case, at national level, that the Irish government's role is tightly circumscribed under national constitutional law, and in the name of constitutional justice, so perhaps the difference here between the national referenda and European referenda is not as great as would typically be the case.

The point is that, in Ireland, the distinctive characteristic of "European treaty referenda" is that there is a good chance that they will be treated, as they ought, from a constitutional point of view, to be treated: as national referenda, which raise questions about the basic terms of association of the Irish people. Perhaps this makes Ireland different to other Member States. Perhaps this makes us more likely to vote no, or at least less reticent about voting no. But it does not make us anti-European. Nor does it mean that we are not taking either the European treaty in question or the national constitution seriously. It is not evidence of the failure of the constitutional amendability procedure. Nor does it undermine the strength of our national constitutional democracy. And, finally, it does not systematically scupper Europe's constitutional ambition.

E. Europe's Constitutional Ambition

⁶¹ See a recent article by Benoît Keane which discusses the question of whether the ratification of the Lisbon Treaty required a referendum and concludes that it did. Benoît Keane, *The Lisbon Treaty: Does Ireland need a Referendum?*, 26 (7) IRISH LAW TIMES 108 (2008).

⁶² *Crotty v. An Taoiseach*, *supra* note 54, 769.

The general haziness surrounding the question of what exactly Europe's constitutional ambitions are means that this section of the paper is perhaps the most tentative. However, since the possibility that Europe will one day have a (big 'C') Constitution does not take away from the fact that she is already operating under a (small 'c') constitution,⁶³ the general haziness surrounding the former does not obviate the need for careful consideration of the latter. Hence that haziness does not, of itself, make this section superfluous or unimportant as it seeks to shed some light on the subject of the connection between national constitutional amendability procedures and Europe's constitutional ambition. There are at least three levels at which the credibility of the national constitutional order and the credibility of the European constitutional order are connected and they are discussed in turn.

First, and most obviously, Europe's interest in supporting the national constitutions and the democratic outcomes of their constitutional amendability procedures of its Member States is more than a passing 'by-stander' interest. While the European Union may urge third countries to respect the decisions of their people in national elections, to honour national constitutions and democratic procedures, etc.,⁶⁴ it requires its own Member States and any potential new Member States to be above reproach in this regard.⁶⁵ This is because the Union itself is "founded on the values of respect for ... democracy ... [and] the rule of law",⁶⁶ and so for the Union to be founded on respect for democracy, its Member States must be functioning democracy.

⁶³ On the question of whether or not Europe has a constitution see *inter alia* Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 (2) EUROPEAN LAW JOURNAL 125 (2002); Erik Oddvar Erikson, John Erik Fossum, & Augustín José Menéndez, *DEVELOPING A CONSTITUTION FOR EUROPE* (2004); Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUROPEAN LAW JOURNAL 282 (1995); Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REVIEW 5 (2001); Jürgen Habermas, *Comment on the Paper by Dieter Grimm: 'Does Europe Need a Constitution.'* 1 EUROPEAN LAW JOURNAL 303 (1995); Joseph Weiler, & Marlene Wind, *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* (2003); Neil Walker, *Big 'C' or Small 'c'?*, 12 EUROPEAN LAW JOURNAL 12 (2006); Neil Walker, *Europe's Constitutional Engagement*, 18 RATIO JURIS 387 (2005); Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 211 (2005).

⁶⁴ As, for example, in the case of the elections in Zimbabwe in June 2008. See statement of Javier Solana, EU High Representative for the Common Foreign and Security Policy, on the run-off presidential election in Zimbabwe, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/101547.pdf, last accessed 25 September 2008.

⁶⁵ Evidenced by the reaction, in 2000, to Jörg Haider's far right Freedom Party becoming part of the government in Austria, and by the stringent requirements imposed on acceding countries that they meet the requirements of the *acquis communautaire*.

⁶⁶ Article 1a of the Treaty on the European Union as proposed to be amended by the Treaty of Lisbon.

Second, to the extent to which Europe already has 'a constitution', the constitutional amendability procedure of that constitution is the requirement that all Member States unanimously ratify each Treaty according to the procedures prescribed by national law. Undeniably, this is an unusual constitutional amenability procedure, and indeed, as one of the basic rules of international law, we tend to think of such a procedure as evidence of the non-existence of a constitutional order. In this regard, it is a wonder that the Constitutional Treaty did not provide for a different constitutional amendability procedure, rather than seeking unanimity (albeit with the proviso that the European Council could consider the question if twenty of the twenty-five Member States were successful in its ratification). The point, however, is not whether or not the procedure is labelled a *constitutional* amenability procedure, but rather that the fact that this procedure was not accidentally chosen. This amenability procedure belongs in the (constitutional) configuration in which it was conceived. Therefore, it tells us important things about the nature of the order that was brought into being by that configuration.

As an amendability rule, unanimity of Member States is arguably much more demanding, than, for example, the Irish or American constitutional amendability rules. It is made more arduous still by the fact that the various Treaties 'constitutionalise' so many rules and procedures and policies. Eisgruber had argued, as noted above,⁶⁷ that the two most viable options for a constitutional amenability procedure were, either, to make the procedure relatively easy and to write quite a number of decisions into the constitution, or else to make the procedure relatively difficult, but to 'constitutionalise' only a small number of choices. Nobody could have been in any doubt that it would make amendment extremely difficult to achieve. Why, then, was it chosen as the amendability procedure? Why is it still being chosen as the amendability procedure? What is it that can be gained from the unanimity requirement that makes the price of that difficulty worth paying? The sheer political inefficiency of the unanimity requirement must have meant – and must continue to mean – that there is something very great to be gained by following such a procedure. Here, it is worth returning again to Eisgruber's analysis, where, discussing how a polity chooses its amendability procedure, he explains that:

When a constitution is first established, one crucial objective of its framers will be to secure widespread, durable commitment to the new political system. Rarely will that be easy. Constitutions are usually, among other things, deals among parties who distrust one

⁶⁷ See, *supra*, note 15.

another. New constitutions are therefore fragile. After the constitutional system is launched, winners in the political process will be tempted to consolidate power, and losers will be tempted to reopen questions about the legitimacy of government institutions. If a constitution is to endure, its makers must strive both to create institutions that seem fair and to provide institutional guarantees that the deal will be honoured.⁶⁸

The amenability procedure is chosen to be the warranty for the entire order – the guarantee that those who emerge strongest from the constitutional bargain will not undermine the bargain by re-configuring the constitutional order in a way that best suits their interests. In this sense, unanimity is in the European situation as Article V was in the US situation, the insurance against the fear that “states could collude after ratification to unravel the constitutional bargain”. Of course, a more flexible amenability procedure would make it easier, in both polities, to affect change more efficiently and to produce a more energetic pattern of reform, but, as Eisgruber neatly puts it, “that fact would carry no weight if the rule made it impossible to establish a stable system of government in the first place”.⁶⁹ The inflexible and arduous amendability procedure of unanimity is a price worth paying because it makes the political enterprise of the European Union viable in the first place, by providing the conditions that enable the constituent Member States to trust each other enough to put and to hold in common the good that they all strive for.

That is to say: if the constitutional ambition of the European Union is ‘ever closer union between the peoples of Europe’, unanimity on the basis of national constitutional amendability rules is the mechanism by which this ‘ever closer union’ has been made uniquely possible and upon which this ‘ever closer union’ continues to depend. Unanimity has been chosen – and continues to be chosen – as the amendability procedure for the European polity because it is the procedure that best guarantees the stability and endurance and continuing legitimacy of the entire (constitutional) bargain; that best ensures widespread durable commitment to that bargain; that best guarantees that those who are stronger do not undermine that bargain at the expense of those who are weaker. When we honour the unanimity requirement, then, we honour the basic bargain of the Member States of the European Union. We say that this basic bargain is more important than political expediency, or bureaucratic efficiency. We say that this basic bargain is more important than any policy reforms or institutional reforms that we might want to introduce. We say that, even when it costs and even when it hurts, the basic bargain

⁶⁸ EISGRUBER, *supra* note 15, 23.

⁶⁹ EISGRUBER, *supra* note 15, 24.

must be upheld for the sake of and in the name of the European Union itself. On the other hand, when we do not honour the unanimity requirement, then no matter how great the reforms we effect and no matter how efficiently we implement them, we have sacrificed the basic bargain of the Member States and we have disappointed the trust of the Member States who committed themselves, on the basis of the basic bargain, to the European order.

Finally, there is an even more intimate connection between the credibility of the national constitutional order and the credibility of the European (constitutional) order. That is that the European Union exists because of, and on the basis of the mandate provided by, the constitutions of its Member States. This is part of the reason why ratification of European treaties takes place according to the requirements of national law. There can be no canonical uniform method that provides for the insertion of European law into national law because it is the national constitution – unique to each Member States – that governs the conditions under which that insertion is possible. This argument is developed very capably, *inter alia*, by the judgments of the German *Bundesverfassungsgericht*, the Spanish *Tribunal Constitucional*, and the Polish *Trybunał Konstytucyjny* in their famous rulings on the relationship between national constitutional law and European law. The *Bundesverfassungsgericht* recognised in the German ‘Maastricht’ decision, *Brunner v. the European Union Treaty*,⁷⁰ that, it must itself be the final arbiter of all laws applicable in Germany as well as the extent of their application, because that is what the German Constitution provides. Extra-judicially, one of the judges used the metaphor of a “bridge”⁷¹ to convey the meaning and importance of the point of connection. The Spanish *Tribunal Constitucional*, ruling on the compatibility of the Spanish Constitution with the Treaty establishing a European Constitution,⁷² that Article 93 of the Spanish Constitution⁷³ was more than merely a formality that provided for Spain’s accession to the European Union. Instead, the Court ruled, Article 93 is “a basic constitutional means of integrating other sets of laws into our own, by the transfer of the exercise of powers derived from the Constitution”. The *Tribunal Constitucional* metaphorically describes it “as a hinge by means of which the Constitution itself admits other legal systems into our constitutional system

⁷⁰ Cases 2 BvR 2134/92 & 2159/92, *Brunner v. the European Union Treaty* [1994] 1 CMLR 57.

⁷¹ Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUROPEAN LAW JOURNAL 225 (1999), 226.

⁷² Declaration 1/2004, Case 6603-2004, *Re the EU Constitutional Treaty and the Spanish Constitution*, 13 December 2004, reported in [2005] 1 CMLR 981.

⁷³ Article 93 of the Spanish Constitution reads: “By means of an organic law, authorisation may be granted for concluding treaties by which the exercise of powers derived from the Constitution shall be vested in an international organisation or institution”.

through the transfer of the exercise of powers".⁷⁴ The Polish *Trybunał Konstytucyjny*, similarly, ruled, in the judgment of 11th May 2005 on the compatibility of the Accession Treaty with the Polish Constitution,⁷⁵ that the Polish Constitution cannot be taken to have delegated to the EU "the competence to issue legal acts or take decisions contrary to the Constitution, being the 'supreme law of the Republic of Poland'.⁷⁶ In fact, according to the Court, "the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable *threshold* which may not be lowered or questioned as a result of the introduction of Community provisions".⁷⁷

The three metaphors used by the Courts – bridge, hinge, and threshold – express that the national constitutional amendability procedure is the point of connection between national constitutional law and European law. All three judgments clearly make the point that it is only by means of the national constitution that European law enters the national legal order at all. That is, as well as being the final touchstone for the validity in national law of European law, the national constitution provides the point of connection through which European law is, actually, *law* in the national order. They expressly state that Europe's constitutional pedigree comes exclusively through national constitutional law and the national constitutional amendability procedures. They thereby expressly make the credibility and strength of the European order contingent on the credibility and strength of the national constitutional order. The implication, then, is that when we undermine national constitutional law, we undermine the fundamental basis of *existing* European law in the national legal and constitutional order.

To briefly summarise this final section: the interest that the European Union has in upholding and defending national constitutional amendability procedures, even when those procedures produce 'unpleasant' results is threefold. It is the interest that arises because the EU is founded on respect for democracy and the rule of law; the interest in defending the basic bargain of the Member States by upholding the amendability procedure inherent in that basic bargain; and the interest in protecting the legal basis, in national law, by which European law is deemed valid law for the national order. Perhaps it is over-stating things to claim that these three aspects alone comprise Europe's constitutional ambition, but they certainly are

⁷⁴ Declaration 1/2004, Case 6603-2004, *Re the EU Constitutional Treaty and the Spanish Constitution*, 13 December 2004, reported in [2005] 1 CMLR 981, 993; para. 34

⁷⁵ Judgement of 11 May 2005 r. in the case K 18/04.

⁷⁶ Article 8(1) of the Polish Constitution.

⁷⁷ Judgement of 11 May 2005 r. in the case K 18/04, para. 14 of the official summary. Emphasis added.

crucial aspects of that ambition. Those who are interested in pursuing that ambition should be clear, then, that they must also uphold the constitutional amendability procedures that make their ambition possible. Or, to put the matter in a slightly different way, the extent to which Europe's constitutional ambitions are premised on the necessity of overwhelming national constitutional amendability procedures, is the extent to which Europe's constitutional ambitions themselves undercut Europe's constitutional ambitions. This is why the problem created by the rejection of the Lisbon Treaty in Ireland is primarily not an Irish problem. This is why the reasons that induced the Irish people to vote 'no' are not nearly as interesting as the reasons that induced a hostile reaction to the 'no' vote.

F. Conclusion

The Open Europe survey conducted in Ireland after the visit of Nicolas Sarkozy, President of France and incumbent President of the European Union, on 21 July revealed that, by that stage, 71% of voters were against the idea of a re-vote on the Lisbon Treaty; 62% of them saying that they would reject the Treaty the second time around.⁷⁸ Whether or not a re-vote occurs, and whether or not the Lisbon Treaty will find acceptance, as the Nice Treaty did, at the second time of asking,⁷⁹ what matters most is that we re-awaken our sensibilities to the constitutional meaning of the results of European treaty referenda, not only for Ireland, or for any individual Member State, but for the entire European project. Our constitutional amendability procedures are delicate at the best of times, just as our constitutional democracies are delicate at the best of times, and the European project is delicate all the time. When they produce results that we do not like, they can be overwhelmed and overborne. If that happens, and even if it is hailed as a political victory, it is not won without enormous constitutional cost.

⁷⁸ Available at <http://www.open-europe.org.uk/media-centre/pressrelease.aspx?pressreleaseid=81>, last accessed 25 September 2008.

⁷⁹ Cathryn Costello, *Ireland's Nice Referenda*, 1 *EUCONST* 357 (2005); Katy Hayward, 'If at first you don't succeed...' *The Second Referendum on the Treaty of Nice, 2002*, 18(1) *IRISH POLITICAL STUDIES* 120 (2003); Gerard Hogan, *The Nice Treaty and the Irish Constitution*, 7 (4) *EUROPEAN PUBLIC LAW* 565 (2001).

Language Rights in the European Union

By Theodor Schilling*

A. Introduction

The destruction of the tower of Babylon led, or so we are told¹, to the emergence of different linguistic groups. Meant to be a punishment to mankind for having had the audacity to try to erect that tower, mankind has fervently embraced that punishment *i.e.* the resulting linguistic differences. Indeed, there is a body of legal scholarship promoting linguistic rights as constituting essential human rights. But there is another side to that story: it may well be considered that not so much the linguistic differences as such but the fervency of their embrace has been the real punishment².

An article published recently in these pages appears to be a case in point³. There, the authors claim that the European Union (EU) is still lacking in the protection and promotion of minority languages, especially those which are official languages of a part of a Member State but not of the EU. Traditionally, though not necessarily, the status of official languages is three-fold; they are the languages the citizens may use in their communications with public authorities and *vice versa*, they are the languages accepted in parliamentary debates and they are the languages in which legal texts are published, the different language versions generally being equally authentic. It appears⁴ to be the authors' claim that the EU is falling short of a supposedly required respect of language rights under all three headings. The legal vehicle which is deemed to allow those shortcomings to be remedied is the idea

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¹Genesis 11:7.

²Indeed, this theme is clearly in sight in Genesis 11:6.

³Iñigo Urrutia & Iñaki Lasagabaster, *Language Rights as a General Principle of Community Law*, 8 GERMAN LAW JOURNAL 479 (2007).

⁴It never becomes quite clear which exactly are the claims being made.

that language rights are fundamental rights, and the respect of language rights therefore is a general principle of Community law⁵ which binds not only the EU but also its Member States. This principle, the authors further appear to claim, requires additional efforts of the EU and its Member States to protect and promote certain languages, beyond the level presently achieved.

In trying to answer their analysis which I see as deeply flawed, for reasons that will become apparent, I shall first put the present language regime of the EU in a comparative context. I shall go on to dispute the claim that the respect of language rights is a general principle of Community law. This claim concerns different levels of multilingualism in the EU. Its discussion requires the application of different criteria⁶. The first such level, the discussion of which will form the bulk of the article, are administrative and court proceedings involving citizens and EU institutions; here, the most relevant criterion is the human rights character of language rights. Other levels merely to be touched upon are parliamentary and inter-governmental proceedings with the corresponding criterion of the equality of Member States and their official languages⁷, and the multilingual publication of authentic legal texts with the corresponding partly contradictory criteria of legitimate expectations and non-discrimination. Further levels which will not be discussed specifically in this article would include education and the maintenance of linguistic diversity.

B. The EU Language Regime in Comparative Context

To gauge the degree of respect granted by Community law to Member State languages, the linguistic performance of the EU should be put into context. The EU as an organism somewhere between a traditional International Organisation and a traditional State should be compared with both. It therefore appears advisable to compare the EU language regime with other national and international

⁵Urrutia & Lasagabaster, *supra* note 3, 489.

⁶See further T. Oppermann, *Das Sprachenregime der Europäischen Union – reformbedürftig? Ein Thema für den Post-Nizza-Prozeß*, 4 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 1, 17 (2001).

⁷Also see further Proposals from the Group of Intellectuals for Intercultural Dialogue set up at the initiative of the European Commission, A REWARDING CHALLENGE. HOW THE MULTIPLICITY OF LANGUAGES COULD STRENGTHEN EUROPE 9 (2008), available at: http://ec.europa.eu/education/policies/lang/doc/maalouf/report_en.pdf, last accessed 25 September 2008: “The bilateral relations between the peoples of the European Union should hinge by way of priority on the languages of the two peoples involved rather than on another language.”

multilingual regimes. But I shall start with the simpler case of the monolingual State. In such a State, the common language of its citizens is at the same time regularly the language in which the law in force is published, and applied by the executive and the judiciary. While in some States this is expressly provided for⁸, in other States it goes literally without saying. In such States, a language question generally does not arise for its citizens because the sender and the receiver of a communication use the same common language⁹.

Under some aspects similar to a monolingual State is a plurilingual State with a *lingua franca*, which has been regularly created by that State. If there is a State where the *lingua franca* is accepted as a language which everybody understands and is able to use, irrespective of her mother tongue, such a State appears to be quite rare. A prime example is Spain where, according to Art. 3 (1) of the Constitution¹⁰, Castilian is the official language of the State, and officially proclaimed to be the *lingua franca*: “All Spaniards have the duty to know it and the right to use it”. Therefore, national laws are published only in Castilian. However, according to Art. 3 (2) of the Constitution, “[t]he other languages of Spain will also be official in the respective autonomous communities, in accordance with their Statutes”. A borderline case is Namibia – it is not quite clear how well English is mastered by all the citizens¹¹ –, which has chosen the most radical solution: after independence, it has decreed English to be its only official language¹², although at the time of independence English was the mother tongue of only 3 % of its population¹³. In

⁸For instance in Germany; see further, for judicial proceedings, § 184 *Gerichtsverfassungsgesetz* (Code of court constitutions), *Bundesgesetzblatt* (Federal Gazette) 1975 I p. 1077, and in France; see further Art. 2 of the French Constitution (English translation available at: <http://www.assemblee-nationale.fr/english/8ab.asp>, last accessed 25 September 2008).

⁹But there are exceptions: in the Grand Duchy of Luxembourg laws are published, according to Art. 2 – *Langue de la législation* (language of legislation) – of the *Loi du 24 février 1984 sur le régime des langues* (law of 24 February 1984 on the language regime), available at: <http://www.tlfq.ulaval.ca/axl/Europe/luxembourgloi.htm>, exclusively in French, although according to Art. 1 of the same law “*La langue nationale des Luxembourgeois est le luxembourgeois*” (The national language of the Luxemburgers is the Luxemburgish).

¹⁰English translation available at: <http://www.vescc.com/constitution/spain-constitution-eng.html>, last accessed 25 September 2008.

¹¹See further Human Rights Committee (HRC), comm. No. 760/1997, *Diergaardt et al. v. Namibia*, views of 6 September 2000, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.81.NAM.En?OpenDocument&Click](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.81.NAM.En?OpenDocument&Click), last accessed 25 September 2008.

¹²See further Art. 3 of the 1990 Constitution, available at: <http://www.grnnet.gov.na/aboutnam.html>, last accessed 25 September 2008.

¹³There are 28 living languages listed for Namibia; see further *Languages of Namibia*, available at:

such a State, while language questions may arise¹⁴, in communications between citizens and public authorities both sides are expected to use the same language.

More common are multilingual States without a *lingua franca*. In bilingual Canada, all federal laws are published in both official languages, and the citizens may correspond with the federal authorities in either of those languages¹⁵. In quadrilingual Switzerland, some restrictions to the use of the languages apply: of the four State languages listed in Art. 4 of the Constitution¹⁶, according to Art. 70 (1) of the same Constitution only three are general official languages of the federation. Also, the decisions of the Federal Tribunal are published in full only in the language of the respective procedure¹⁷, which means in practical terms that the large majority of judgments is published in German only. In trilingual Belgium, the publication of legal texts in German, which is spoken there only by a tiny minority, is not systematic¹⁸. In multilingual¹⁹ South Africa, the constitution recognises 11 official languages of which it obligates the government to use only two²⁰. In those

http://www.ethnologue.com/show_country.asp?name=NA, last accessed 25 September 2008.

¹⁴See further HRC, *Diergaardt*, *supra* note 11.

¹⁵Section 16 (1) of the Canadian Charter of Rights and Freedoms, available at: <http://laws.justice.gc.ca/en/charter/>, last accessed 25 September 2008.

¹⁶English translation available at <http://www.admin.ch/org/polit/00083/index.html?lang=en>, last accessed 25 September 2008.

¹⁷See further the official website of the Federal Tribunal at: <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht.htm> (last accessed 25 September 2008): “*Die Urteile werden in der Sprache des kantonalen Verfahrens verfasst und werden nicht übersetzt*” (The judgments are drafted in the language of the procedure in the *Kanton*, and are not translated).

¹⁸According to Art. 76 of the *Gesetz über institutionelle Reformen für die deutschsprachige Gemeinschaft vom 31.12.1983. Inoffizielle koordinierte Übersetzung des Gesetzes* (Law on Institutional Reforms for the German Language Community of 31 December 1983. Unofficial coordinated translation of the law), *Belgisches Staatsblatt* (Belgian Gazette) of 18 January 1984, an official German translation of legal texts is provided in accordance with the available budgetary means. While those translations are promulgated by the King, they do not appear to be authentic versions of the law translated.

¹⁹There are 24 living languages are listed for South Africa; see further Languages of South Africa, available at: http://www.ethnologue.com/show_country.asp?name=ZA, last accessed 25 September 2008.

²⁰See further Constitution of the Republic of South Africa 1996, adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Act 108 of 1996, ISBN 0-620-20214-9, available at: http://www.polity.org.za/article.php?a_id=130703, last accessed 25 September 2008.

Languages Section 6.

States, it cannot be guaranteed that in communications between the government and the citizen both sides use the same language. Insofar as the government is obligated to use the language chosen by the citizen, it may be forced to rely on the services of a translator or an interpreter.

The language regimes of traditional International Organisations are quite different. To give but a few examples, the United Nations with 192 Members has only five Charter languages²¹, the Arabic being an additional official language²². The World Trade Organization with 151 Member States makes do with the three official languages English, French and Spanish²³. The Council of Europe with 47 Member States contents itself with the two official languages English and French²⁴ although a citizen's first access to the European Court of Human Rights (Eur. Court H.R.) may be made in any official language of a Member State²⁵. Here, insofar as direct communications between the International Organisation and the citizen are

“(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.”

²¹See further Art. 111 of the UN Charter, YEARBOOK OF THE UNITED NATIONS 953 (1969).

²²According to the rules of procedure of the main UN organs: see further *e.g.* Rule 41 of the Provisional Rules of Procedure of the Security Council, available at: <http://www.un.org/docs/sc/scrules.htm>; Rule 51 of the Rules of Procedure of the General Assembly, available at: <http://www.un.org/ga/ropga.shtml>, last accessed 25 September 2008; this version originates in Res. 3190 (XXVIII) of 1973.

²³See further Art. XVI (6) of the Agreement Establishing the World Trade Organization, UNTS vol. 1867 p. 3; no. 2 (c) (i) GATT 1994.

²⁴See further Art. 12 of the Statute of the Council of Europe, UNTS vol. 87 p. 103, ETS No. 1.

²⁵Rule 34 (2) of the Rules of Court (July 2007) of the Eur. Court H.R., available at: <http://www.echr.coe.int>, last accessed 25 September 2008.

provided for, the citizen who does not understand one of the International Organisation's official languages will have to rely on the services of a translator.

Comparative law therefore shows, it is submitted, that multilingual States with a *lingua franca* deem it sufficient to install the *lingua franca* – which they regularly have created themselves – as the only nationwide official language. In contrast, in States without a *lingua franca*, generally all major languages are nationwide official languages, certain restrictions being deemed acceptable for languages of very small minorities like Romansh in Switzerland or German in Belgium or the 13 languages not made into official languages in South Africa. In International Organisations, generally only a small number of languages is made into official languages, English and French being generally among them. In the case of both multilingual States without a *lingua franca* and International Organisations, the services of a translator/interpreter are indispensable for communications between public authorities and citizens while the responsibility for securing such services depends on the respective situation.

While the law and practice of the EU are similar, in their approach, to those of a multilingual State without a *lingua franca*, which the EU resembles most closely under linguistic aspects – multilingualism is part of the Union's self-portrayal²⁶ –, the resulting language regime is, from a comparative point of view, wholly exceptional. It provides for a two-pronged concept. On the one hand, by a soft-law approach, the EU promotes language-learning by its citizens²⁷, true to the beautiful Slovakian proverb, quoted by the European Commission as motto of its multilingualism communication²⁸, according to which “[t]he more languages you know, the more of a person you are”²⁹. On the other hand, one could claim that it strives to make language-learning by its citizens superfluous, aiming “to give citizens access to European Union legislation, procedures and information in their own languages”³⁰. This aim is pursued by a hard-law approach: indeed, similar to

²⁶Alexander von Bogdandy, *Die Europäische Union und das Völkerrecht kultureller Vielfalt – Aspekte einer wunderbaren Freundschaft*, in PLURALISTISCHE GESELLSCHAFTEN UND INTERNATIONALES RECHT (Georg Nolte et al. eds), 43 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 69 (2008).

²⁷Art. 165 (2) of the Treaty Establishing the European Community (EC), OJ 2006, C 321E, p. 37.

²⁸Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A NEW FRAMEWORK STRATEGY FOR MULTILINGUALISM, Doc. COM(2005) 596 final of 22 November 2005, available at: <http://europa.eu/languages/servlets/Doc?id=913>.

²⁹“Kol’ko jazykov vieš, toľkokrát si človekom”.

³⁰See, *supra*, note 28, pt. I.2 “What is Multilingualism?”.

the situation in a multilingual State without a *lingua franca*, many of the languages spoken within the EU are made official languages of the EU. As of 1st January 2007, the EU has 23 official languages, Luxembourgish being the only nation-wide official language which is not, at the same time, an official language of the EU. In contrast to what normally applies in multilingual States, but reflecting the international character of the EU, the selection criterion for EU official languages is not so much the number of speakers of a language within the EU, but rather the fact that it is, or is not, a State-wide official language of a Member State³¹.

It is also apparent that the number of official languages of the EU is more than double the number of those of the likely runner-up, the Republic of South Africa, having 11 official languages. By having so many official languages, the EU differs also from traditional International Organisations. While this difference is easily explained by the fact that the EU – in contrast to traditional International Organisations – is in constant and multiple direct contact with its citizens³², the fact remains that, whereas the United Nations communicate with everybody, including, as the case may be, the world's citizens, in just six languages, and the Republic of South Africa with its citizens in only two, the EU does it in 23. On the face of it, therefore, and looking at the matter purely under a comparative aspect, the EU has largely done its due as concerns paying respect to language rights. Indeed, an obvious question that should raise is whether the EU has done too much of what is in principle a good thing, *i.e.* whether the very effort to communicate with its citizens in 23 languages is self-defeating, by necessity or at least as practiced by the EU³³. However, this is not the main line of enquiry pursued in this article³⁴. Rather, as indicated in the introduction, this article will mainly try to answer the claim that there is a general principle of Community law commanding the respect of language rights.

C. Language Rights as an Aspect of Human Rights

The starting point for the claim that the respect of language rights is a general principle of Community law is the claim that those rights are human rights. More

³¹Critical Urrutia & Lasagabaster, *supra* note 3, 482-483.

³²See further also text at *supra* note 25.

³³Also see further Group of Intellectuals, *supra* note 7, 3: “[I]n any human society linguistic ... diversity has both advantages and drawbacks, and is a source of enrichment but also a source of tension”.

³⁴It is the main line in Theodor Schilling, *Beyond Multilingualism*, forthcoming.

specifically, it has been claimed that languages “are now dealt with as part of the EU's commitment to human rights, which includes the rights of linguistic minorities”³⁵ even if it is admitted that “the specific extent of those rights might be open to argument”³⁶. This is a dubious approach to any human rights discussion, which rarely should center on the existence of a certain right but rather on the question whether a specific interference, or type of interferences, with such right might be justified. Indeed, it is a characteristic of human rights that they protect nearly every aspect of human activity and human choice, and it, therefore, would be surprising if language rights were not so protected.

The analysis should start with written texts. It appears that in most human rights catalogues freedom of language is not mentioned by name³⁷. As the Eur. Court H.R. expressly held, no provision of the ECHR guarantees liberty of language as such³⁸. However, the “as such” invites speculation as to the form in which liberty of language might be protected all the same. Indeed, there can be no serious doubt that a person's language, which may or may not be her mother tongue, is a defining aspect of her human identity³⁹. As such, the freedom to use one's own language has been considered as an individual human right forming part of the right to respect one's private life⁴⁰ which is protected under Article 8 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms⁴¹ (ECHR) or even an essential part of human dignity⁴² which is protected expressly under Article 1 of

³⁵ Urrutia & Lasagabaster, *supra* note 3, 486.

³⁶*Id.*, 500.

³⁷One exception is Art. 30 of the Belgian Constitution, English translation available at http://www.fed-parl.be/constitution_uk.html, last accessed 25 September 2008.

³⁸Eur. Court H.R., *Igors Dmitrijevs v. Latvia*, Judgment of 30 November 2006, not published, available at: <http://echr.coe.int/echr/en/hudoc>, last accessed 25 September 2008, para. 85, with further references. The judgment is available only in French.

³⁹This may also apply, with less force, to the “personal adoptive language” whose idea the Group of Intellectuals (note 7), 10, recommends the EU to advocate.

⁴⁰Rainer J. Schweizer, *Sprache als Kultur- und Rechtsgut*, 65 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 371-372 (2006). A human rights dimension of language is also discussed by Franz C. Mayer, *Europäisches Sprachenverfassungsrecht*, 44 DER STAAT 367, 393 (2005), who sees language as a constituent characteristic of individual identity. In contrast, for Peter Häberle, “Werkstatt Schweiz”: *Verfassungspolitik im Blick auf das künftige Gesamt Europa*, in *id.*, EUROPÄISCHE RECHTSKULTUR 355, 360 (1997), language is a cultural group right that forms part of the protection of minorities.

⁴¹Of 4 November 1950, UNTS vol. 213, 221; ETS No. 5.

the Charter of Fundamental Rights of the European Union⁴³ (EU Fundamental Rights Charter), but also under the ECHR the “very essence [of which]... is respect for human dignity”⁴⁴. While those claims appear to be correct in principle, they are far too general. Rather, it is necessary to be quite specific and to make distinctions according to the respective circumstances. Not every claim which may be packaged under the label of freedom of language can be subsumed under the right to privacy or the protection of human dignity, and even claims which can be so subsumed will be protected against interferences only within the limits provided for in the respective human rights provisions.

I. Human Dignity

To start with human dignity, it is conceived as covering and protecting the very core of a person's humanity. In the discussion of Art. 1 (1) of the German Basic Law⁴⁵, which contains what is probably the first written guarantee of human dignity, the latter is often defined by the so-called object formula according to which human dignity is violated whenever a person is treated not as an end in herself but as an object, *i.e.* as a means to achieve some ulterior end⁴⁶. But as there are many innocuous situations in which a citizen reasonably can conceive of herself as a mere object of the State action⁴⁷, this definition is still too wide. To narrow it down, it is important to realise that human dignity is meant to protect a person's autonomy⁴⁸ which refers to her relationship to others⁴⁹: autonomy means a person's

⁴² Wolfgang Kahl, *Sprache als Kultur- und Rechtsgut*, 65 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 386, 395 (2006).

⁴³OJ 2007, C 303, p. 1.

⁴⁴Eur. Court H.R., *Pretty v. United Kingdom*, Judgment of 29 April 2002, Reports of Judgments and Decisions 2002-III, para. 65.

⁴⁵German *Bundesgesetzblatt* 1949, 1.

⁴⁶This formula goes back to Immanuel Kant and has been developed by Günther Dürig; see further *e.g.* Peter Häberle, *Aspekte einer kulturwissenschaftlich-rechtsvergleichenden Verfassungslehre in weltbürgerlicher Absicht*, 45 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 555, 557 (1997), and the decision of the German Federal Constitutional Court in ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, vol. 87, 209, 228.

⁴⁷See further the examples given by Hasso Hofmann, *Die versprochene Menschenwürde*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS 353, 360 (1993).

⁴⁸See further Reinhold Zippelius in: KOMMENTAR ZUM BONNER GRUNDGESETZ (*Drittbearbeitung* [third adaptation] December 1989), Art. 1 Abs. 1 und 2, para. 79-80.

⁴⁹According to Hofmann (note 47), 364, dignity in the legal sense is a concept concerning relations or

authority to dispose of her own legal sphere, especially the ability to protect her interests by speech acts⁵⁰. This, then, is the deepest meaning of language rights being protected as an aspect of human dignity: it must be considered an inadmissible violation of a person's human dignity to forbid her to use the language(s) she knows, being equivalent to forbid her to communicate at all and thereby reducing her to a subhuman level by incapacitating her to protect her interests other than by raw force.

Human dignity, because it protects the core of a person's humanity, must be inviolable⁵¹ and therefore does not allow for any balancing of other human or other rights against it. For this very reason, the protection granted under the heading of human dignity must not be over-extended but rather restricted; human dignity must not be trivialised. Freedom of language claims, beyond the one discussed above may only rarely and exceptionally be subsumed under this concept. As a possible example of a claim which may be so subsumed, one could think of a poet's right to use whatever language she feels is best suited to express her innermost feelings in her poetry. Beyond those rather theoretical and extreme cases, it is hard to see that freedom of language claims would be protected under the heading of human dignity.

II. A Person's Private Life

Turning then to a person's right to respect of her private life protected under Art. 8 (1) ECHR, it "is a broad term not susceptible to exhaustive definition"⁵² which undoubtedly covers also a person's freedom to use her own language as part of her "social identity"⁵³. In principle, therefore, as part of a wider human right, freedom of language is a subjective right⁵⁴. However, interferences with that right can be justified, according to Article 8 (2) ECHR, for a vast variety of reasons. The upshot being that, in practical terms, all interferences which are provided by law and, more

communications.

⁵⁰See further Hans Schultz, *Gewaltdelikte als Schutz der Menschenwürde im Strafrecht*, in RECHTSSTAAT UND MENSCHENWÜRDE. FESTSCHRIFT FÜR WERNER MAIHOFER ZUM 70. GEBURTSTAG, 517, 524 (Arthur Kaufmann *et al.* eds., 1988).

⁵¹Art. 1 of the EU Fundamental Rights Charter.

⁵²Eur. Court H.R., *Pretty*, *supra* note 44, para. 61.

⁵³*Id.*

⁵⁴But see further Urrutia & Lasagabaster, *supra* note 3, 488, who claim for the EU that "[n]o subjective right of use of languages is configured".

importantly, are proportionate to a legitimate aim which the interference is meant to achieve⁵⁵ are justified. As aims are more likely to be legitimate when their pursuit interferes with the penumbra rather than the core of a person's private life, *i.e.* when they concern her social and especially her official rather than her private contacts, it appears that interferences are the more difficult to justify the more they concern the inner core of a person's private life. Interferences with a completely private use of language therefore regularly will not be apt to be justified. It is difficult to perceive of any legitimate reason to proscribe *e.g.* the use of a specific language between lovers.

The more public the use of language becomes, the more interferences are apt to be justified by legitimate aims. To give an example, the prescription of the use of (a) certain language(s) in commercial transactions might conceivably be justified by a governmental interest in controlling such transactions. Even clearer is the interest of every public authority to choose the language in which it deals with the public. This is reflected in the Eur. Court H.R.'s jurisprudence, which has held that the ECHR does not guarantee the right to communicate with public authorities in the language of one's own choice and to receive an answer in that language⁵⁶, and in Article 30 of the Belgian Constitution⁵⁷ according to which "[t]he use of languages current [*i.e.* spoken] in Belgium is optional [*i.e.* free], only the law can rule on this matter, and only for acts of the public authorities and for legal matters". For dealings with public authorities therefore freedom of language may be restricted by law⁵⁸. Here, the counterweighing interest of private persons in using their own language is, under the aspect of the right to respect of their private lives, generally not very strong: it commonly does not concern a central aspect of their personality, obvious exceptions being status and criminal proceedings against a person. In any event, as it clearly would be absurd to claim that a person may use her own language *vis-à-vis* public authorities throughout the world⁵⁹, whatever their

⁵⁵See further *e.g.* Theodor Schilling, *INTERNATIONALER MENSCHENRECHTSSCHUTZ* 89, (2004), para. 169, with further references.

⁵⁶Eur. Court H.R., *Igors Dmitrijevs*, *supra* note 38, para. 85, with further references.

⁵⁷See, *supra*, note 37.

⁵⁸See further also Court of First Instance, Case T-120/99, *Kik v. OHIM* 2001 E.C.R. II-2235, para. 58: "the rules governing languages laid down by Regulation No. 1 cannot be deemed to amount to a principle of Community law", upheld by ECJ, Case C-361/01 P, *Kik v. OHIM* 2003 E.C.R. I-8283, para. 82. *Contra* Urrutia & Lasagabaster (note 3), 489, who try to make the case for language rights as a general principle of Community law.

⁵⁹*Contra* apparently Mayer, *supra* note 40, 394, who postulates the fundamental right of a person to communicate in her own language with the public authorities that refer to her.

language, without the intervention of a translator or interpreter, the question of the protection of language rights in communications with public authorities boils down to the rather pedestrian question of which party is responsible for securing and paying for the services of a translator or interpreter⁶⁰. An express international regulation on this matter can be found only with respect to one of the exceptions mentioned above: the treaty law of human rights provides for the right to free interpretation and translation in criminal proceedings against a person who does not understand the language of the police or the court⁶¹. All this applies to aliens, obviously, but also to the citizen whose language is not an official language of her State⁶².

This far, what has been described is rather hard and clear law. The very core of the private use of a language, including the use in criminal proceedings, if needed with the assistance of a translator or interpreter, is protected by human rights law and must not be interfered with by legislative measures. Beyond that core, the State is largely free to regulate the use of languages. Especially, the State is free to determine its official language(s) and to require private persons to use it (one of them) in communicating with the State authorities. The EU, as stated above, has chosen to have 23 official languages. It appears not to be arguable that the core content of the freedom of language just mentioned goes beyond what is guaranteed by the present state of Community law.

D. The Case for a General Principle of Community Law Protecting the Respect of Language Rights

There is a further body of treaty law, supplementing human rights law in this area⁶³, *i.e.* treaties for the protection of minorities, much of which has been made in

⁶⁰See further Eur. Court H.R., *Çiçek v. Turkey*, Judgment of 27 February 2001, not published, available at: <http://echr.coe.int/echr/en/hudoc>, para. 187. — As ignorance of the law is no defence, clearly a person in foreign parts must also obey laws and other official texts drafted in another than her own language.

⁶¹See further Art. 5(2), 6(3)(a) and (e) of the ECHR, Art. 14 (3)(a) and (f) of the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, Art. 8 (2) (a) of the American Convention on Human Rights, 1144 UNTS 123, and also Art. 10 (3) of the Framework Convention for the Protection of National Minorities of 1st Feb. 1995, ETS No. 157 (Framework Convention).

⁶²However, if there is an official capable of speaking a citizen's language, it may be an infringement of human rights to prevent her from doing so; see further HRC, *Diergaardt* (note 11): infringement of Art. 26 ICCPR.

⁶³See further Art. 1 of the Framework Convention.

this context⁶⁴. These are especially the Framework Convention⁶⁵ which provides in Articles 5 (1), 9 (1) and in particular 10 (1) for the “right to use freely and without interference his or her minority language, in private and in public, orally and in writing”, and the European Charter for Regional or Minority Languages⁶⁶ (ECRML). These minority protection treaties, combined with Art. 1a of the EU Treaty as to be amended by the Lisbon Treaty⁶⁷, have been seen as the basis of what appears to amount to a duty of the Court of Justice of the European Communities (ECJ) to develop a general principle of Community law protecting language rights⁶⁸.

I. Under Community Law

According to the said Art. 1a, yet to enter into force, “[t]he Union is founded on the value[.] of ... respect for human rights, including the rights of persons belonging to minorities”. It has been claimed that “[t]his express mention of minority rights means that respect for linguistic rights is unequivocally a principle of Community law, and is defined as common to Member States”⁶⁹. There is a strong systematic argument against this view: human rights as protected by the ECHR will be general principles of the Union's law, under the Lisbon Treaty, not on the basis of Art. 1a of the EU Treaty but on the express basis of Art. 6 (3). As minority rights are not mentioned in Art. 6 (3), which unequivocally refers to the ECHR alone and not to the minority protection treaties, nothing permits the conclusion that for the minority rights the same would follow from Art. 1a. In any case, founding the Union on certain values is not equivalent to making any international provisions protecting specific configurations of such values the basis of general principles of the Union's law.

⁶⁴Urrutia & Lasagabaster (note 3), 490, claim that “there are signs of emerging common European law on linguistic minorities and minority languages along the line laid down by the Framework Convention and the ECRML” [reference omitted] and without more conclude that “[i]t is the job of the Court of Justice to establish general principles of Community law by comparing the legal frameworks of Member States without requiring that all legal orders are exactly the same” [reference omitted].

⁶⁵See, *supra*, note 61.

⁶⁶Of 5 November 1992, ETS No. 148.

⁶⁷OJ 2007, C 306, p. 1, Art. 1 (3).

⁶⁸Urrutia & Lasagabaster, *supra* note 3, 490-492.

⁶⁹*Id.*, 492.

On a more general level, to found a general principle of respect of language rights on Community law alone appears to be rather difficult. The development of general principles of Community law serves in first place to fill some perceived *lacuna* of primary Community law. Well known examples are the introduction of human rights into Community law⁷⁰ and the establishment of State responsibility for breaches of Community law⁷¹. But there is no perceivable *lacuna* in the case of language rights.

Rather, the EU has a well-developed system of language rules. There are the 23 Treaty languages⁷², and most of the legal texts of the EU are published in all of them⁷³; importantly, all the language versions of legislative (as opposed to judicial and administrative) texts are equally authentic⁷⁴. Further, citizens can communicate with the EU institutions in any one of these languages, and have the right to get an answer in the language chosen by them⁷⁵. In general, the same applies to a wider range of Community bodies, but there are exceptions for which special, *i.e.* more restricted language rules apply⁷⁶. According to their respective rules of procedure, every member of the European Parliament (MEP) has the right to use any of the EU's 23 official languages⁷⁷ in parliamentary debates, and the same applies for the

⁷⁰ECJ, Case 4/73, *J. Nold Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 1974 E.C.R. 491, para. 13, stating that “fundamental rights form an integral part of the general principles of law”.

⁷¹ECJ, Joined Cases 6/90 and 9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, 1991 E.C.R. I-5357, para. 35, stating that “the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty”.

⁷²Art 314 EC and 53 of the Treaty on European Union (EU), OJ 2006, C 321 E, p. 5.

⁷³See further for secondary legislation, based on Art. 290 EC, Art. 1 (1) of the very first Council Regulation, the 1958 Regulation No. 1 determining the languages to be used by the European Economic Community (OJ, English special edition, Series 1 Chapter 1952-58, 59, with later amendments), as amended from time to time, and for the jurisprudence, the Instructions to the Registrar, adopted by the Court of Justice and the Court of First Instance, respectively, which refer to Art. 1 of Regulation No. 1 (Art. 24 of the Instructions to the Registrar of the Court of Justice, OJ 1974, L 350, p. 33, as amended from time to time, and Art 18 (3) of the Instructions to the Registrar of the Court of First Instance of the European Communities, OJ 2007, L 232, p. 1).

⁷⁴See further for the founding treaties Art. 314 EC and 53 EU, for secondary legislation see further *e.g.* ECJ, case 283/81, *CILFIT v. Ministero della Sanità*, 1982 ECR 3415, para. 18.

⁷⁵Art. 21 (3) EC, Art. 41 (4) of the EU Fundamental Rights Charter.

⁷⁶See further ECJ, *Kik*, *supra* note 58, para. 82.

⁷⁷Art. 138 (2) of the Rules of Procedure (of the European Parliament), JO 2005, L 44, p. 1.

members of the Council in the latter's deliberations⁷⁸. This is to say that the EU provides active and passive interpretation services for the official languages to MEPs and members of the Council. One can add Art. 55 (2) [ex Art. 53 (2) EU] as to be amended by the Lisbon Treaty⁷⁹ (Art. 55 (2) EU applies, according to Art. 358 (ex Art. 313a) of the EC Treaty, to be renamed the Treaty on the Functioning of the European Union, also to that Treaty) according to which "[t]his Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council". This provision thereby would recognise the existence of additional official languages in the Member States without, however, giving them any specific status in Community law. In particular, Treaty versions in those languages would not be authentic. The inspiration behind this provision appears to be the same as the one behind the recent Council Conclusion⁸⁰: in answer to the requests to enhance the role of languages which are the official languages only in a specific region of a Member State but not official languages of the EU, the Council of the EU has adopted a conclusion according to which, roughly, on the basis of an administrative arrangement to be made between the Council and a Member State⁸¹, and at the latter's costs, (a) translations into such language made by that Member State of certain legislative measures of the EU will be added to the Council's archives and published on its website, which will however clearly be stated not to have the status of law, (b) speeches in that language at Council meetings will be passively interpreted and (c) private communications to the Council and, on the basis of further administrative arrangements to be concluded with other EU institutions, to those institutions in that language can be sent to a body designated by the Member State in question to be there translated into one of the EU's official languages and then sent on, together with the translation, to the institution in question.

⁷⁸See further Council Decision of 22 March 2004 adopting the Council's Rules of Procedure, JO 2004, L 106, p. 22, Annex III, pt. 1 (h) (n 1): "The Council confirms that present practice whereby the texts serving as a basis for its deliberations are drawn up in all the languages will continue to apply."

⁷⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2008, C 115, p. 1.

⁸⁰Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union, OJ 2005, C 148, p. 1.

⁸¹To date, two such arrangements have been concluded with the Council. See further Administrative arrangement between the Kingdom of Spain and the Council of the European Union, OJ 2006, C 40, p. 2; Administrative arrangement between the United Kingdom of Great Britain and Northern Ireland and the Council of the European Union, OJ 2008, C 194, p. 7.

Importantly, “[w]here the Union Institutions or bodies have a fixed period of time in which to reply, that period will commence from the date on which the Institution or body in question receives the translation into one of the languages referred to in Council Regulation 1/1958 from the Member State”. Communications made in such languages are deemed to be received by the Council at the date the Council receives a translation into one of the 23 official languages, and the same applies *mutatis mutandis* to the Council's responses. In no case is the Council's responsibility engaged by those translations⁸².

The EU's language rules therefore are quite clear. There is no *lacuna* in the relevant primary Community law, which partly regulates the matter itself and partly authorises secondary law, nor will there be any after the Lisbon Treaty enters into force. Therefore, there is no scope for a general principle of Community law concerning the respect of language rights. In any case, as not even the use of all official languages is a general principle of Community law⁸³, it is not possible to discern in Community law any basis for a general principle giving an additional role to this second tier of additional official languages of the Member States.

II. Under the Minority Protection Treaties

Firstly, to remedy this lack of basis, and irrespective of the absence of *lacuna* of primary Community law, an effort has been made by the authors to found a general principle of Community law protecting language rights on the basis of the minority protection treaties⁸⁴. However, the development of such a principle on that basis would meet horrendous difficulties on a number of levels. First, the Framework Convention contains no definition of the minorities to which it shall apply but appears to leave that definition to its State parties⁸⁵. The ECRML does contain, in its Art. 1, a definition of “regional and minority languages” but leaves it, according to its Art. 3, as a matter of Practical Arrangements, to the Contracting States to specify each language to which that charter shall apply. This specification, which is provided for in Part I of the charter, is not subject to the Contracting

⁸²Para. 1 of the Administrative arrangements.

⁸³See further ECJ, *Kik*, *supra* note 58, para. 82.

⁸⁴Especially by Urrutia & Lasagabaster, *supra* note 3, 490-491.

⁸⁵Especially clear the declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995, available at:
<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=9/30/2008&CL=ENG&VL=1>.

States" reporting duty under Art. 15 ECRML which covers only Parts II and III of the charter, and is consequently left to the good faith of the Contracting States. As a general principle of Community law, one would expect not to leave the decisive question of its field of application to the Member States; however, there would be hardly any basis in the Framework Convention to found a definition of minority, and in the ECRML a definition of regional and minority languages can be found only at the price of disrupting the connection of definition in the charter and specification left to the Contracting States.

Second, while it is true that a general principle of Community law may be established even if the Member State legal systems in the relevant area are not exactly the same⁸⁶, it is also true that a certain similarity of those systems is necessary. This is demonstrated by the fact that the ECJ's human rights jurisprudence *postdates* the acceptance of the individual application procedure under the ECHR by *all* Member States, the last one to accept it having been France⁸⁷. In spite of the existence of the minority protection treaties discussed, such a similarity, which could serve as the basis for the development of a general principle of Community law, appears to be lacking. Although both treaties have been ratified by most EU Member States, they have not been ratified by all of them. More specifically, the ECRML and the Framework Convention have not been ratified by 11 and 4 Member States respectively, including France in both cases⁸⁸. This appears hardly to constitute the required similarity, especially as a finding of a general principle of Community law protecting language rights and based in particular on the ECRML would give rights to specific groups in specific areas of a State and would thereby directly challenge central tenets of French constitutionalism, *i.e.* the concepts of the "*république indivisible*" (indivisible republic), the equality of all citizens before the law and the "*unicité du peuple français*" (unitness of the French people), which also have been clearly, and in the present context, sanctioned by the French *Conseil constitutionnel* (Constitutional Council)⁸⁹, and would also be contrary to the constitutional provision that the language of the Republic is French⁹⁰. To claim that a principle like the one

⁸⁶Urrutia & Lasagabaster, *supra* note 3, 490, with further references.

⁸⁷The first French declaration under former Art. 46 ECHR was made on 3 May 1974, the judgment of the ECJ in *Nold*, *supra*, note 70, dates from 14 May 1974.

⁸⁸Status as of 18 August 2008.

⁸⁹See further Décision no. 99-412 DC 15 juin 1999 (*Charte européenne des langues régionales et minoritaires*) Recueil p. 71, JORF 18.6.1999, p. 8974, para. 11.

⁹⁰*Id.*, para. 12.

discussed, while it cannot be shown to be part of the law of 11 Member States and is clearly incompatible with the long-standing constitutional traditions of one important Member State, all the same reflects the common constitutional traditions of the Member States stresses credulity.

Third, the regulatory content especially of the ECRML is rather ill-defined. While its preamble calls “the right to use a regional or minority language in private and public life ... an inalienable right” its operative clauses are far less decisive. Indeed, according to Art. 2 (2) ECRML “each party undertakes to apply a minimum of thirty-five paragraphs or subparagraphs chosen from any of the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13”⁹¹. As the French *Conseil constitutionnel* has noted⁹², Part III contains 98 paragraphs and subparagraphs. The parties therefore undertake to apply a minimum of only a little more than a third of the charter's operative clauses. As to the choice of those clauses, while it is meant to allow the Contracting States to “match[...] the charter as closely as possible to the particular context of each regional or minority language”⁹³, there are no parameters to gauge such a match. In any event, there exist not only, naturally, differences between the parties but even differences within certain federal parties like Austria and Germany. It is therefore difficult to divine those clauses on which a general principle of Community law could be based. To check out how many times each of them has been chosen by the parties, and to select those chosen most often – how many choices would be required to establish a common constitutional tradition? – would not only be proof of a misconception of the very reason for the existence of the Contracting States’ power to choose, but would also appear hardly compatible with the nature of a general principle. The brute fact appears to be that the regulatory technique applied by the ECRML does not lend itself to the development of a general principle of Community law.

Assuming, in spite of all the above, that a general principle of Community law protecting language rights could be developed on the basis of the minority protection treaties, here again, as indicated above, of greater practical importance than the establishment of that principle is the definition of its limitations. As the ECJ has consistently held, “rights of this nature [ownership] are protected by law

⁹¹According to the Explanatory Report, para. 42, “[i]t is possible for a contracting state ... to recognise that a particular regional or minority language exists on its territory but consider it preferable ... not to extend to that language the benefit of the provisions of Part III ...”.

⁹²*Conseil constitutionnel*, *supra* note 89, para. 3.

⁹³Explanatory Report, *supra* note 91, para. 43.

always subject to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limitations justified by the overall objectives pursued by the Community⁹⁴. What the ECJ did in this seminal decision was to look at the relevant national and international legal material and to find there limitations for the right in question; from these findings, it deduced that in the Community legal order certain limitations are justified. While these limitations are different from those found in the legal material considered by the ECJ, all of them are justified by the public interest, in the Community case “by the overall objectives pursued by the Community”. In the present context, it is therefore necessary to consider the limitations the minority protection treaties provide for the protection of minority rights.

The first set of limitations provided for in the minority protection treaties is geographical. Under the “chapeau” of Art. 7 (1) ECRML, the “objectives and principles” of that charter apply “within the territories in which [regional or minority] languages are used”. Concerning education, this is repeated in Article 8 (1) ECRML according to which the Member States of the ECRML only undertake (with further far-reaching restrictions⁹⁵) “within the territory in which [minority] languages are used” to allow those languages to play some – echeloned – role in education; in other territories, according to Article 8 (2) an even more restricted undertaking applies “if the number of users of a ... minority language justifies it”⁹⁶. This geographical limitation is repeated in all the other fields covered by that charter, *i.e.* judicial authorities (Art. 9), administrative authorities and public services (Art. 10), media (Art. 11), cultural activities and facilities (Art. 12) and economic and social life (art 13 (2)). The only provision which applies without geographical limitation is Art. 13 (1) in which the Contracting States undertake *inter alia* to eliminate from their legislation any provision restricting “without justifiable reasons the use of regional or minority languages in documents relating to economic or social life”, and “to prohibit the insertion in internal regulations of

⁹⁴ECJ, *Nold*, *supra* note 70, para. 14.

⁹⁵See further especially Art. 2 (2) ECRML, quoted in the text at note 91.

⁹⁶These restrictions appear to be compatible with the ECHR; see further Eur. Court H.R., *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (merits)*, Judgment of 9 February 1967, Series A, No. 4, B. Interpretation adopted by the Court, II. The six questions referred to the Court, No. 7. It is also worth mentioning that in some cases, members of a minority have manifested an interest not to be placed in classes taught in their language, considering that placement discriminatory; see further Eur. Court H.R., *Oršuš and others v. Croatia*, Judgment of 17 July 2008, not published, available at: <http://echr.coe.int/echr/en/hudoc>, paras. 65-59.

companies ... of any clauses excluding or restricting the use of regional or minority languages, at least between users of the same language”.

This pattern is somewhat repeated in the Framework Convention which restricts the right to use a minority language, in Article 10 (2), in relations with administrative authorities and, in Article 14 (2), for receiving instruction to “areas inhabited by persons belonging to national minorities traditionally or in substantial numbers” and, further, guarantees it only “if there is sufficient demand” and “as far as possible”. While the Framework Convention, in contrast to the ECRML, provides for an important number of rights without geographical limitation, those rights are either special forms of general human rights adapted to the situation of minorities or they provide protection against a forcible assimilation. They are not in any specific sense language rights.

A second set of limitations concerns the contexts in which minority language rights are protected. The main contexts are education (Art. 8 ECRML, Art. 14 (2) of the Framework Convention) and the communication with judicial and administrative authorities (Art. 9 and 10 ECRML, Art. 10 (2) of the Framework Convention), the other contexts dealt with in the ECRML – media (Art. 11), cultural activities and facilities (Art. 12) and economic and social life (art 13 (2)) – being only covered insofar as, or to the extent that, the public authorities are competent. In view of the geographical limitation discussed above, this raises the question whether the judicial and administrative authorities meant by those provisions are only those specifically competent for the area in question, or also nationwide, or such authorities situated in that area only accidentally. By referring to the judicial and administrative districts, respectively, in which minority languages are used, the language of Articles 9 and 10 ECRML strongly implies that the undertakings given by the Contracting States in those Articles concern only the authorities specifically competent for those districts. This interpretation is somewhat comforted by the Explanatory Report to the ECRML. According to that report, concerning judicial authorities, “[f]or higher courts ... it is then a matter for the state concerned to take account of the special nature of the judicial system ...”⁹⁷, implying that this is a matter not covered by the charter. Concerning administrative authorities, “[t]he purpose ... is to allow the speakers of regional or minority languages to exercise their rights as citizens ... in conditions that respect their mode of expression”⁹⁸. This

⁹⁷Explanatory Report to the ECRML, para. 90. The words omitted in the quotation “located outside the territory” might be taken to comfort the contrary view. However, they should be understood as referring to a higher court still specifically competent for the territory in question.

⁹⁸*Id.*, para. 100.

appears to exclude the application to public authorities situated only accidentally in an area inhabited by a minority, and, together with the geographical limitation as such, also to such authorities nationwide.

It appears to follow from this short analysis that the application of a general principle of Community law protecting language rights of persons belonging to a minority, which would be based on the minority protection treaties, would most likely be restricted to areas inhabited by minorities, and in those areas would only cover education and the communication with judicial and administrative authorities. Based on those treaties, there is especially no reason to assume a general principle of Community law that would cover communications of persons belonging to a minority with Community bodies. This applies only to those bodies situated in "territories in which [regional or minority] languages are used"⁹⁹. As the Community at present has no judicial or administrative authorities specifically competent for areas inhabited by minorities, a general principle of Community law based on the minority protection treaties simple would have no scope of application.

As far as the citizen and her position in administrative and court proceedings are concerned, there is, for a variety of reasons which all stand independent from one another, no basis for the assumption of language rights beyond those already protected under Community law at present. Especially there is no basis at all for the establishment of a general principle of Community law providing for the respect of language rights. It follows that the question of the application of such a principle within the Member States¹⁰⁰ is moot.

E. Language Rights in Parliamentary and Inter-Governmental Proceedings

There is no inherent necessity of official languages having the three-fold status of being the privileged means of communication between citizens and the government, of parliamentary and similar debates and of publication of authentic legal texts; rather, the different status can be regulated quite independently from one another. It is therefore worthwhile to consider briefly the two remaining status. The first of them concerns possible rights of MEPs and of members of national governments as such. Those rights are neither human nor minority rights but

⁹⁹Urrutia & Lasagabaster, *supra* note 3, 483, refer to "the European Agency for Safety and Health at Work, which is based in Bilbao, and the European Commission Delegation in Barcelona".

¹⁰⁰Discussed, with very disputable results, by Urrutia & Lasagabaster (note 3), 493.

institutional rights and cannot be based on human rights or minority protection treaties but only on the EU Treaties and derived Community law, especially the institutions' rules of procedure and, in a purely inter-governmental context, the free agreement of the governments involved. The governing paradigm here is not human dignity but the equality of the Member States and of their official languages. Unsurprisingly, those rules of procedure provide for the use of any of the 23 official languages¹⁰¹. But of course, it was open to the Council to allow further languages to be used in its meetings, and to define any conditions it thought fit to attach to that permission, as it has done in its Conclusion¹⁰² and the implementing administrative arrangements¹⁰³. On the basis of the principle of equality of the Member States, it is easily suggested that a Member State, requesting more than its equal linguistic due by asking for the interpretation from other than the official EU languages, should have to pay itself for the additional services. Of course, it was also open to the European Parliament to deny such permission¹⁰⁴. There is nothing more to be said about this subject.

F. Language Rights and the Publication of Legal Texts

The third and last traditional status of official languages, *i.e.* that legal texts are published in all of them, and that all those language versions are equally authentic, brings one real problem of language rights in the EU in sharp focus. As I have dealt with this aspect elsewhere¹⁰⁵ I shall here only briefly summarise the argument. The starting point is the fact that no two texts in different languages will ever have exactly the same meaning. As in EU law all language versions, regardless of how they came to be, are equally authentic, this is not a minor problem. When all 23 language versions are equally authentic, and not all of them, considered each on its own, have the same meaning, it follows that different meanings are equally authentic. This legal conundrum has three equally unappealing solutions: either all the diverging versions have somehow to be interpreted uniformly, with the possible consequence of legitimate expectations based on the citizen's own language version being frustrated, or every language version is treated on its own merits, with the necessary consequence of discriminations because of the language, or again the law is considered as null and void because it is self-contradictory.

¹⁰¹See, *supra*, notes 77 and 78.

¹⁰²See, *supra*, note 80.

¹⁰³See, *supra*, note 81.

¹⁰⁴See further Urrutia & Lasagabaster (note 3), 484, referring to a decision of the Bureau of the EP.

¹⁰⁵ See further, Schilling, *supra* note 34.

This problem which cannot be avoided *de lege lata* can be minimised by balancing the equal authenticity and the uniform interpretation solutions in this way that in principle, when a citizen has no reason to doubt the correctness of her own language version, the legitimate expectations she has based on that version must be protected, but that the uniform interpretation solution must prevail in the contrary case. While the results reached by that method largely coincide with those found by the ECJ on the basis of the uniform interpretation method alone in the typical cases which it had to decide in the past, the method here advocated allows for equitable results also in those cases when a uniform interpretation incompatible with a citizen's language version would disregard her legitimate expectations.

A solution of the conundrum that would be plainly compatible with the rule of law requirements, which is only possible *de lege ferenda*, would call for, rather than the addition of further authentic language versions, a reduction of the number of authentic languages, preferably to one, although not necessarily the same one for all legislative texts. Of course, this is not to say that there should be just one official language in the EU. It is only to say that there should be only one authentic language version of Community legal texts. In this sense, the Council Conclusion¹⁰⁶ may be seen as a first step in the right direction: while it does not reduce the number of authentic languages, it introduces for the first time quasi-official, non-authentic language versions and thereby may make the very idea of such versions respectable.

G. Conclusion

The conclusion of all this is quite clear: there is no general principle of Community law requiring the respect of language rights. Access of citizens to the EU institutions and bodies, and deliberations in the EP and the Council, are as a matter of fact obviously only possible with the assistance of translators and/or interpreters. The question which needs to be answered is who has to pay for this assistance. The answer does not need to be uniform: while there is a good case for the private citizen to be able to address the Community institutions in her own (official) language, implying that translations are to be provided and paid for by the institutions, a citizen in her economic capacity can be asked, in certain circumstances, to provide and pay for translations herself. In the case of persons belonging to a minority in a Member State, whose language is not an official

¹⁰⁶See, *supra*, note 80.

language of the EU but whom the Member State, for reasons of its own, wants to be able to communicate with the EU in their own language, it suggests itself that this Member State should pay for the required translation services. In any case, outside of status and criminal proceedings this is not a human rights question. On the basis of the principle of equality of the Member States the same applies *mutatis mutandis* to debates in parliamentary and inter-governmental bodies. All this corresponds to actual Community law and administrative practice. It is only the question of the equal authenticity of all the official language versions of legislative texts which requires a different answer: *de lege ferenda*, this authenticity should not be a status of all 23 official languages but only of one of them.

Dignity, Rights, and Legal Philosophy within the Anthropological Cross of Decision-Making

By Winfried Brugger*

A. Actions within the Anthropological Decisional Cross

The law must correspond with human nature and be based on criteria equal to all human beings. Many schools of legal philosophy agree on these points. However, many of them tend to disagree as soon as more detailed criteria for “humanity” and the “nature of man” are suggested. This is where the empirical understandings of basic needs clash with loftier concepts such as “reason” and “spirit” over what the actual indicators of humanity are. Relativistic schools point skeptically to the plurality and historicity of many legal convictions. Proceduralists look for a way out of the vagueness and controversy of appropriate indicators of humanity and human law by relying on concretization processes. Such processes are expected to exclude at least violence and in the best case include as much integration as possible of all those affected by legal provisions. This paper proposes that the most important insights into good and human law can be discovered by analyzing the character of human agency (*Handeln*). All life forms usually act in a functional manner, doing what is required to preserve themselves; many animals are able to learn and communicate to a certain extent. By contrast, humans not only “behave”, rather, they “act” - they sense, interpret, evaluate, articulate and decide. As trivial as that sounds, using “human action” as an indicator of what aspects a good legal system should represent is an illuminating starting point. This is especially true concerning hard cases in the law that, in spite of being typically contested, lead to legally binding decisions. They are burdened by the “anthropological cross of decision-making” or, as one could also say, the “decisional cross”.¹ The question we will turn to is the meaning of the decisional cross.

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¹ The following remarks are based on the author’s book, WINFRIED BRUGGER, DAS ANTHROPOLOGISCHE KREUZ DER ENTSCHEIDUNG IN POLITIK UND RECHT (2ND ED. 2008) (providing many citations and sources

Human action can be divided up roughly into two: routine actions and problematic actions. Routine behavior runs off of habits that we practice day-in and day-out in order to manage our everyday problems in a timely fashion. However, once a routine way of dealing with a particular situation does not lead to the desired results anymore, a case of disturbance or crisis arises. It transforms our habits in decisional situations, revives our attentiveness, and forces conscious considerations. Within those situations that require a conscious selection of the proper course of action to follow, one can distinguish between decisions that can be taken light-heartedly, such as “should I go to see a movie or stay at home?” and those that put a real burden on our shoulders. The latter situations remind us of the phrase “to bear our cross.” In the original and narrower religious sense, this phrase alludes to the Christian cross, labor, pain and suffering. The term, however, has undergone a kind of secularization. Colloquially, this phrase nowadays refers to all situations in which one is stressed or heavily burdened by someone or something and is swaying between various options. This colloquial understanding of the term is also present in the literary “crux.” A literary crux – probably deriving from the Latin “*crux interpretum*” – refers to a text that is difficult to interpret and resolve because of significant defects that lead the interpreter to different options of elucidation instead of to the one, self-evident meaning. When one speaks of the “crux of the decision,” one is also referring to this everyday understanding of pointing to the core of a decision that has been – or should be – influenced by several competing aspects.² We can be more precise with regard to the kind of situations that challenge human agency. Whenever we feel the “decisional cross” as a serious burden on our shoulders, we are faced either alternatively or aggregately with (1) morally contested courses of action, with (2) actions loaded with heavy consequences, and/or (3) actions that define or transform our innermost being, our

that are left out here), and the article *Würde, Rechte und Rechtsphilosophie im anthropologischen Kreuz der Entscheidung*, in *RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT*, 50-71 (Winfried Brugger & Ulfrid Neumann & Stephan Kirste eds., 2008). For discussions of the “decisional cross” from different disciplines, ranging from philosophy and law to psychology and economics, see *ÜBER DAS ANTHROPOLOGISCHE KREUZ DER ENTSCHEIDUNG* (Hans Joas & Matthias Jung eds., 2008).

² See, for example, the following formulation taken out of a court decision: “This is the crux of the decision: The arrest warrants are retained even though they are, at least in part, based on the torture declaration”, SUMMARY OF IMMIGRATION BOARD’S DECISION, available at www.peoplescommission.org/files/ivan/IvanSummaryOfDecision.pdf, last accessed 25 September 2008. Or see the article *The Crux of the Decision*, NOVATOWNHALL, 17 April 2008, available at <http://novatownhall.com/2008/04/17/the/>, last accessed 25 September 2008, on the difficulty of deciding between Hillary Clinton and Barack Obama as presidential candidate of the U.S. Democrats.

identity.³ On first inspection the “decisional cross” only reveals an awkward predicament, a problem, not a solution for decisions regarding the task of leading a good life, either individually or collectively. On closer inspection it is possible to develop a systematic anthropology of human action that helps orient the actor toward leading an individual life as well as to orient collective actions, such as those taken in politics and law. In order to develop these standards, we first have to describe and distinguish two different ways of analyzing hard cases in human decision-making.

Only human beings understand one another, communicate and interact in a timeframe of past, present, and future—including the knowledge about the finiteness of one’s life and to say nothing of the phenomenon of the subjunctive case of what one “could, should, would have done” in complex cases. This is, visually and metaphorically speaking⁴, the horizontal axis of the cross of decision-making.⁵ In the here and now of a problematic decision, the past - one’s former life experiences and biography - pushes from behind and the future pushes from in front in order to gain consideration amongst the options for a plan of action. Goals must be selected. Considerations of choosing which means or which end must be taken into account. The worth of the goal, compared to other goals, needs to be assessed, as well as the chances of achieving it, at what cost, and in light of all relevant social circumstances. Whether anything at all is decided or whatever finally is decided will have an effect on the reassurance, correction or abandonment of previous lines of continuity and biographical understandings. Further, any decision taken will have an effect on the chances of carrying out future plans within the same context.

The visual and metaphorical vertical axis of the cross of decision-making comes into play because humans are not entirely determined by their instincts. Man is “his

³ Taken to its extreme, one can see the link to existentialism that in its many forms deals with human beings having to create themselves in the face of, for example, dread that results from the fact that the decision to be taken is morally suspicious and loaded with far-reaching consequences.

⁴ As to the enlightening accomplishments of visualization and metaphorical thought, see Ralf Konersmann, *Einführung*, in *WÖRTERBUCH DER PHILOSOPHISCHEN METAPHERN*, WISSENSCHAFTLICHE BUCHGESELLSCHAFT (Ralf Konersmann ed., 2007).

⁵ In social and legal philosophy, references to “horizontal” and “vertical” arguments and reflections abound, as is demonstrated in the many citations in my book. See, BRUGGER, *supra* note 1. The “decisional cross” offers, for the first time, a systematization of these two levels of reflection for a specified area of situations.

own project—he is a being that takes stances” and “is what he makes of himself.”⁶ Although many basic needs pressure human beings, ranging from the desire for food and drink, or from sexual contentment to recognition and love, repose and activity, the exact ways and the selection of proper objects to satisfy these needs as well as their specific worth are not detailed in the genetic code of human beings. Rather, due to the influence of God, nature, and/or evolution, we humans are inevitably faced with the torment of having to make up our mind about every hard case of decision-making. We are faced, as the German language aptly puts it, with the *Qual der Wahl*, the torment of choice. In hard cases, humans are confronted with the torment of choice between means, ways, and ends in their external relations to the world of objects, with regard to fellow humans and social rules of appropriate behavior. Connected with this torment of choosing externally is the torment of inner guidance through one’s self or identity which is composed of a complex mixture of vital impulses, emotions, cognitions and ideals. All these complications find themselves on the map of human anthropology between initial impulse and ultimate execution, and they transform behavior into action. They create the characteristic of human destiny, which in every hard case of decision-making has to master interpretive tasks, even while pursuing the impulses “from below.” Think of the different ways we deal with hunger: We may dine, eat, or devour our food, and each term carries a different connotation dealing with hunger and food.

According to Kant, humans are influenced but not necessarily determined by their urges and inclinations, which is why they can and should be responsive to social and legal norms that can be scrutinized and approved of by everyone concerned, using the categorical imperative. Thus, according to Kant, humans have the task to discipline, cultivate, civilize, and moralize their empirical inclinations.⁷ Psychoanalysis is one of the disciplines that has systematized the main drift of these ideas. Sigmund Freud speaks of the configuration of the human psyche in the categories of Id, Ego, and Super-Ego. The Id is our animalistic nature pressuring the ego “from below,” representing our most basic human needs and their desire for satisfaction.⁸ The norms and ideals of what is beautiful, good, just, and transcendent, herald “from above,” visually and metaphorically speaking. These highest ideals - fostered in all individuals through their socialization and

⁶ See the German anthropologist ARNOLD GEHLEN, *DER MENSCH. SEINE NATUR UND SEINE STELLUNG IN DER WELT*, 32 (12TH ED. 1978).

⁷ For an analysis of these Kantian themes, see Gerhard Funke, “Kants Stichwort für unsere Aufgabe: Disziplinieren, Kultivieren, Zivilisieren, Moralisieren”, in *AKTEN DES VIERTEN INTERNATIONALEN KANT-KONGRESSES, MAINZ, 6 - 10 April 1974*, 1-25 (Gerhard Funke ed., 1974).

⁸ See SIGMUND FREUD, *ABRISS DER PSYCHOANALYSE*, 9-11 (paperback edition 1953/1972).

enculturation – expand or delimit the basic needs “from below” and turn the human eye “forward” toward the future. They point toward ways, objects, and goals that satisfy our basic needs. Sometimes these basic needs are even transcended. Think, for example, of the perception of a reigning God, who lets the physical needs of an individual become less important or even unimportant, as in the case of a hermit. Such imaginativeness “from above” is partly object and body oriented, ranging from asceticism to gluttony; it is partly unto itself a set of standing creative products of the human soul, which at least fractionally distances itself from the structure of human needs, or creates new realms of experience like in love or in the religious realm of the holy.

If we are crossed with a difficult decision, the ego or self stands at the crux of operating impulses coming “from below” and “from above.” The horizontal and vertical axes of consideration cross one another with two energized poles each—thus equaling four decisional perspectives in total. We have not just “two,” but “four souls in our breast.” The four factors act as informational currents and a set of motives in every problematic situation. There, they exhibit two main variants: (1) They become apparent in the conscious reflection of the actor when considering and making decisions. (2) The conscious decision is strengthened or in the borderline case supplanted by emotional impulses impinging upon the deliberation process ranging from “green lights” (Go!), and “yellow lights” (Go?) to “red lights” (Stop!).

To sum up the argument so far: The anthropological cross of decision-making allows for a first-order differentiation between behavior and action, animal and human. Aside from this classificatory or definitional level, the cross of decision-making possesses an analytical or comparative and a normative or prescriptive dimension. Analytically and comparatively, it allows for deciphering and assessing the relative weight of the input of the four perspectives in problematic human decisions; and this can be done either from the objective view of an outside observer (depending on the level of information) or from the internal perspective of the actor. The upward, downward, backward, and forward-looking views (reflections) of one’s ideals, basic needs, biographical self-conceptions and future plans taken together with comprehensive considerations of means and ends provide a roadmap to the underlying structure of human decision-making. Human decision-making does not constitute a “black box,” even if, admittedly, nowhere near enough information exists precisely elucidating the interaction between cognition, evaluation, emotion and decision, or between neurobiological processes and human decision-making. The normative or prescriptive potential of the cross of decision-making, although less rigorously developed, is nonetheless nontrivial. A “good,” “successful” or “fulfilling action” is one based at least in the long run on consideration of all four perspectives before the actor decides on a specific course of action. Bad, or at least laden with danger are the decisions that not only once or

once in a while, but more and more, structurally, phase out one or more of the perspectives and thus make themselves a slave to the tyranny of a single anchor of human existence, that is: their biographical past, their natural instincts, the maxim "the ends justifies the means," or the social standards as defined by the "*Zeitgeist*." In contrast, the four anchoring points of the decisional cross give a deeper mooring, even if it cannot lend safety in every situation.

The insight provided so far by the use of the decisional cross as a map and magnifying glass to analyze hard cases has been illustrated on the level of individual actors. But its analogical use reaches collective actors and organizations as well, be it companies, legal systems, nation states or supranational entities. These are not natural persons with identities, personalities with minds and bodies, or hearts and souls of their own. Rather, they are artificial bodies, organizational entities, and legal persons established by humans for the execution of specific purposes that are usually laid down in a specified organizational text called an "enabling act" or an "organic act." On a closer look, it is not surprising that most, if not all of these organizations deal with the task of taking care of one or several of the four perspectives. Thus, on the first glance, one could say that museums "look back," think tanks "look ahead," religious organizations deal with the "vertical" interpretation of the spiritual needs of their believers, and social services deal with the "downward perspective"; they provide food and shelter for those who are sick or poor. Every organization with a longer history of existence probably serves primarily one important "basic need" of human existence and interaction, but does so "vertically" by integrating the need for, say, the production of goods (economy), security (law), love and respect (family, religions) in a broader interpretive and legitimitative context that is provided in the reflection "from above." At the same time, the "vertical axis" of every organization is grounded in the "horizontal" temporal reflection of the historical progression of its development, betterment or worsening. We "look back" at feudalism and industrialism; we live in modernity and look forward to -or are already enmeshed in - post-modernity.

The structural relevance of all four perspectives is apparent even in the illustration of a museum, which at first glance only "looks backwards." A museum is only planned and financed if it addresses a relevant aspect of the respective community, be it an especially outstanding or depressing aspect of its history. Thus, a Holocaust museum in Germany or elsewhere addresses the violations of the bodies and minds of the Jewish people (reflection downward). It reflects upon them in the light of the ideals from above (universalism and dignity of everyone against Aryan race theory), and it puts these violations in an historical context by looking backwards (how could this happen?) in order to educate every visitor about how to prevent something similar from happening in the future (never again!).

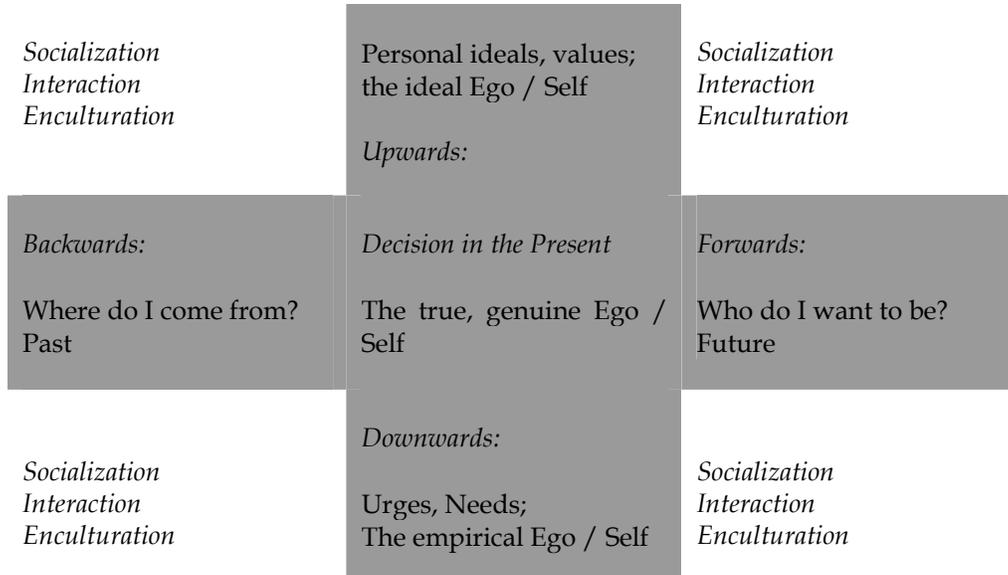
Put more abstractly, all collective actors, having been invented and established on purpose, or having developed more or less organically over time in order to serve human beings that define themselves in the “decisional cross,” act within the same cross. The differences mostly concern two aspects: Collective actors and organizations, such as legal systems and nation-states, usually “live longer” and have more or less “specific purposes,” while individuals lead shorter lives and are necessarily “all-purpose” beings who have to develop an identity that covers all kinds of needs, activities and interpretive horizons.⁹

As pointed out earlier, human action tends to be either habit-based or problem-based. The decisional cross deals with the latter category of human action. Hard cases to decide for humans are either caused by inner-tensions such as conflicting emotions or ideals, instances of becoming sick, or they occur because some envisioned course of action will lead to serious frictions with actors or organizations in the external world. In both cases, one could say that the actor either remains immobile and denies the problem,¹⁰ or attempts something that can be called ego growth through crisis resolution. Likewise, all these other persons and institutions act within their anthropological cross of decision-making. Thus, in shorthand, and as noted in the table, “action” turns to “interaction”- Max Weber would call it “social action”- which usually occurs within the framework of the “socialization” of the respective actors and the cultural ways of evaluating the envisioned courses of action on all sides - “enculturation.”

Figure 1. The actor under the Anthropological Cross of Decision-Making

⁹ Closer analysis would of course reveal that there exist more constricted types of organizations and institutions as well as multi-purpose institutions that in the extreme case, such as with a comprehensive religious body of rules for leading one’s life, can embrace all aspects of human existence.

¹⁰ Denial or suppression is a familiar example taken from psychology showing that human beings sometimes cannot act in the face of conflicting motives or options.



B. Human Dignity and Human Rights within the Anthropological Cross of Decision-Making

When one stands — with body and mind, instinct and reason — at the point where the horizontal axis, with its time and its means-and-ends reflection, and the vertical axis with its interpretive and prescriptive reflection, meet in a hard but inevitable case of decision-making, then one gains a non-exclusive yet important understanding of the concept of *human dignity*. Motives and arguments pull at us from all four directions. The four perspectives are poised against and contradict each other, but even within each perspective conflicts can arise, such as when the ideal of living up to the highest standards of a husband and father collides with the ideal of being the best professional possible who works day and night. Such situations let us feel the “*cru*x” of the decision and turn the decision-maker into a “*subject*,” because who is better suited than the actor himself to sense the weight of each choice when making a decision and interpreting possible actions? The agent carries responsibility for the decisions he makes; in most cases, those decisions are attributed to him by the social environment. The entire legal system ties into this concept of attributing responsibility to the actors that make those decisions, as long as extreme circumstances are not present where the difficulties of taking responsibility for what one does are so overwhelming (think of instances of coercion or mental illness) that the law characterizes such actions as being heteronomously caused instead of autonomously initiated or at the very least controllable by the individual.

The concept of the person is rooted deeply in the cross of decision-making, and it ties together with the human potential to reflect, select, and justify what one does. This is a potential for every human being. Under regular circumstances and as a result of socialization and enculturation, it will be present in every adult with varying degrees of conforming socially versus uniqueness and creativity. This leads to the necessary differentiation between person and personality. Whereas the characteristic of the "person" is species-oriented – as it can be applied to every human being and its potential for reflection in the horizontal and vertical axis of the decisional cross -, the characteristic of "personality" refers to the unique, varying ways in which specific actors form their identities (personalities) and present themselves in public. They do this either in more socially conforming or alternative ways. However they transform themselves from the generic human person into the particularistic individual, every one of them unconsciously or consciously will develop a personality that has the best possible fit for synthesizing basic needs, biographical inputs, ideal values and forward-looking goals for exactly this one and only human character. The dominant social and legal philosophy of "legitimatory individualism" in the West is based on this interwoven understanding of person and personality, whereas more traditionalist societies pay stronger attention to backward and upward-looking perspectives of "how one always has lead a good and productive life in our society."

If we understand human dignity's place within the four perspectives of the decisional cross, we can provide the link between dignity as the dominant social and legal value and the seminal legal concepts of person, personality, responsibility, and attribution. All of these four terms presuppose human agency in the sense explicated by the backwards, forwards, downwards and upwards oriented reflection, as centered on the decision-maker in a problematic situation giving him the impression that he has to bear a heavy cross. This insight reveals why constitutions and human rights agreements protect human freedom of action and the right to develop one's personality; it is because these rights are necessary for standards of good law – meaning a legal system that is in accordance with the basic facts of human existence. The personality is individualized, because it essentially perceives itself from the first-person perspective – even "John Doe" is unique from his own inner-perspective. Freedom of action does not suppose a causal non-determinacy of action; rather it presupposes various influences on our behavior from the inside (the four perspectives) and the outside (socialization, interaction, enculturation). With regard to the legal order, it presupposes the right

of every individual to “lead a life,” to have some leeway, flexibility or choice within his or her “quadricity” of feelings and perspectives.¹¹

The equality of mankind as expressed in the principle of and right to equality in constitutions and human rights treaties, results from the equal position of all human beings in hard cases of decision-making which challenge one’s status of person and seriously affect one’s development of personality. If this is what differentiates us from animals and the rest of the natural world rather than skin color, race, sex, or any other immutable traits, then indeed equality qualifies as a necessary component of good and just law. As already pointed out, coupled to the principle of equality or equal respect is the basic regard for dignity. With regard to both standards, one should distinguish between “basic standards” and “higher, more challenging standards of excellence.” Every human being as such, without regard to whether he acts rationally or irrationally, legally or illegally, setting a good or a bad example – should receive the basic equal respect due all human beings because of their potential for acting and reflecting and justifying their actions before themselves and others, even if this potential is not fulfilled, even violated, as in the case of a criminal act. Higher, unequal respect is paid legitimately to those members of our community that set standards of excellence, whom we can look up to and try to live up to, such as “statesmen” or “heroes” in whatever field of human action and interaction they may be positioned. The German penal law protecting one’s honor and dignity embodied in the tort of defamation in § 185 et seqq. of the Criminal Code (*Strafgesetzbuch*) encompasses both layers: One cannot be allowed to call into question a criminal’s status as a person or human-being; one may only call him a cruel person and his deeds bad or reprehensible. The good reputation of the respectable citizen may not be harmed by a third party without good cause, that is, if one utters or publishes harmful assertions about someone, they better be true!

With the exception of one’s withdrawal into the private sphere, action—that is to act—is usually interaction or, as Max Weber would put it, social action. It can be done routinely or creatively, in a smooth, problem-solving manner or in a way that is prone to conflict. In conflict-laden cases the law and the state usually come into play in order to cope with such crises in a productive manner that avoids the use of

¹¹ In other writings of mine, I have analyzed these aspects within the “Menschenbild der Menschenrechte,” the model of person as identified by modern human rights instruments. See Winfried Brugger, *Zum Verhältnis von Menschenbild und Menschenrechten*, in: “VOM RECHTE, DAS MIT UNS GEBOREN IST”. AKTUELLE PROBLEME DES NATURRECHTS, 216-246 (Wilfried Härle & Bernhard Vogel eds., 2007), and an earlier English version: Winfried Brugger, *The Image of the Person in the Human Rights Concept*, 18 HUMAN RIGHTS QUARTERLY 594 (1996).

coercion for as long as possible. In all interactions it should be presumed that every agent counts as an independent source of analysis, assessment, and action, and is thereby free, equal, and disposed to reciprocity. Therein lies the right to have one's dignity respected. Respect for dignity is tied up with respect for the four perspectives in which every human being finds the anchor for his status and person and molds his unique personality: in terms of basic needs, such as the corporeal need for food, water, sleep, propagation, and sexuality. However, this holds true also in relation to biographical self-conception in the form of a family narrative as son or daughter of parents and in relation to wanting to develop a life plan for the future, based on one's version of the ideals and values that one's family and culture have ingrained in them.

In this sort of interaction one sometimes develops common solutions; in other cases, disputed questions remain. The consensus lends itself to a basic recognition of the importance of the aspects of being a person, which present themselves in the four perspectives, and consequently the general right to develop one's personality for all human beings in action. The dividing line between consensus and dissention often lies where the action of the isolated individual meets or challenges, through interaction, the expectations and rights of other actors. Legally formulated, in view of the lone actor with his cross of decision-making, the relevant "rights to" respect and protection can be argued for persuasively. The "right to" specifies, however, not the addressee of the respective duty to provide a service or good, so much as the "right against." It also does not specify the breadth of the bilateral or multilateral duties, and says nothing about the absolute or relative character of the entitlement in question.¹² This is where the dissent and the competition of giving and taking begin (to say nothing about the contested question of what should be the reaction in cases of injuries to pertinent legal rights and duties). Neither the "decisional cross" with its four perspectives nor the principles of human dignity are specific enough to resolve such disputes in detail. Additional considerations are necessary, which positive law must provide. Nevertheless, three requirements for solving such conflicts can be formulated that should guide the establishment of legal concretization procedures:

¹² To put it in more concrete terms: Should the respective right be "absolute," inalienable, or be relativized by "limitation clauses?" In the U.S., such a discussion was led in the 1960s on the first amendment by the "absolutist" Justices Black and Douglas against the other "relativist" balancing Justices. In the German Constitution, some constitutional rights (freedom of religion, the arts, and the right of dignity) are without limitation clauses, which transforms them, at least on first glance, into absolute rights.

1. In such balancing decisions all humans that are basically affected persons and personalities should have a right to voice themselves and be heard. Politically speaking, this leads to democracy as a human right, from upfront rights of communication like the freedom of opinion, assembly, and association as well as to subsequent rights of court hearings.
2. Aside from this procedural argument, a core or essential content argument should be made¹³: In any case, a base element of each of the four perspectives of the cross should be respected and furthered by other actors to be particularly specified. Here are a few examples in the cross of decision-making that come to mind and are typically guaranteed by modern constitutions and declarations of human rights: looking downward, we see the organization safeguarding the minimal existence of every human being,¹⁴ whereas looking upward we see the safeguarding of freedom of religion and world view (*Weltanschauung*).¹⁵ Looking backwards into the past we see the respect for and facilitation of marriage and family in which we develop our biographies.¹⁶ Looking forward, we recognize the need for options around which we can plan our futures and secure purposeful choices – choices regarding activities which are dear to us, which define our personality, for example in the personal or professional area.¹⁷ One can summarize these four levels of reflection and link them to human dignity by using the concept of integrity: Respecting human dignity requires that in core areas its integrity is secured, both in regards to its physical vulnerability and neediness and the integrity of its psyche or identity, which shape humans throughout their entire life story.
3. Eventually the resolution of conflicts with regards to demanding versus delivering and taking versus giving requires a specification of “rights and responsibilities” based on the huge variety of communal spheres of

¹³ As an example, take Art. 19 II of the German Constitution: “In no case may the essence of a basic right be affected.”

¹⁴ See, for example, HENRY SHUE, *BASIC RIGHTS* (2nd ed. 1996), with regard to “subsistence.”

¹⁵ See, for example, Art. 4 I of the German Constitution: “Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.”

¹⁶ See, for example, Art. 6 I of the German Constitution: “Marriage and the family shall enjoy the special protection of the state.”

¹⁷ See Art. 2 and 12 of the German Constitution, respectively.

interaction.¹⁸ Human associations that give specificity to what we owe each other range from small to large, from face-to-face to anonymous communities, from emotion to calculation, from sectoral and specific to universal aspects of belonging, and from societal to legal organization. Some thinkers or countries advocate the primacy of the local, regional or national community. Unlike such particularists or conservative communitarians, as we can call them, universalists or egalitarian communitarians campaign for their preference of humans as being part of a universal community comprised of all human beings; then most reciprocal obligations embrace every member of mankind, and equal concern applies to all human beings. Liberal communitarianism intercedes in a meditative manner: It argues for the gradation of mutual responsibility ranging from the familial to the universal community in both their inner and outer relations, with regard for every human's autonomy which is a result of his position in the cross of decision-making. It is in concordance with the cross of decision-making (although not a direct result of it) that in modern constitutions and human rights treaties we separate spheres of spiritual and worldly power in order to avoid totalitarianism, and that we have to divide governmental authority using some method of checks and balances in order to avoid being overpowered by too much governmental regulation, while at the same time accomplishing the legitimate businesses of the government in the most effective way possible.

If we summarize the merits of the cross of decision-making by elucidating the concepts of human dignity and human rights, one notices a difference between positive and negative aspects: Concerning the positive aspect, the cross of decision-making exhibits an ensemble theory of human dignity; but it is not a haphazard, chaotic ensemble, rather, it is a systematized, architectural theory fully extrapolated in the four perspectives of analysis, valuation, and decision. Thus it becomes clear that several competing conceptions of "humanity" or "dignity" can be integrated, find their anchor or a home in the decisional cross: This is true of approaches that look "actionistically", self-regarding, downward to the necessary needs of every human being; it is true of identity-oriented approaches of dignity that primarily look backwards and upwards; it is true with regard to Kantian reason-oriented approaches that look upwards to a specific version of morality which focuses on reciprocity of liberty; and it is true concerning religious-oriented approaches that look upwards as well but with an emphasis on ways of transcending, while not

¹⁸ See the articles on "communitarianism" in WINFRIED BRUGGER, *LIBERALISMUS, PLURALISMUS, KOMMUNITARISMUS* (1999); Winfried Brugger, *Communitarianism as the social and legal theory behind the German Constitution*, 2 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 431 (2004).

necessarily forgetting, the mundane needs of humans; and this is finally true of creative-oriented approaches of dignity that are positioned at the productive crossroads between the four perspectives. A glance at the cross bespeaks the dimensions important to all humans relating to all aspects of dignity. The same holds true "interactionistically", other-regarding, in shaping relations of respect, recognition and care between humans in communities small and large, of a private, societal or legal character. All such interactions take place within the rich realm of "enculturation" that provides a well of interpreting and evaluating specific ways of organizing a social life.

The cross of decision-making also illustrates that it is possible and sensible to make progressive steps from the dignity of the human species (the general potential of agency) to the dignity of the person (the individual potential of agency) to the dignity of the irreplaceable individual (who acts from the "I" perspective). The cross of decision-making is relevant for all these aspects: It points to a generic characteristic of the species and the individual as well as to the difficulty of particular individuals to present themselves more or less creatively and uniquely as an "I" or "self." Nonetheless, one should not expect too much from this formula. It excludes some answers to the question of which policies and laws conform to human nature (agency), but leaves many others open. The exclusionary function of the decisional cross is directed against all theories of human nature and dignity that are reductive. The term, reductive, here is understood as singling out one of the four perspectives as the defining element while at the same time marginalizing or totally suppressing the other ones. If, for example, a theory such as Marxism, denies the relevance of the vertical dimension in humans by disqualifying the upward reflection towards religion as mere "opium for the masses," and it then combines this axiom with brutal repression of believers in religion, then we are faced with a reductive view of mankind that cannot come up with a legal regime that is in concordance with the nature of humankind. The cross of decision-making also excludes theories that do not accommodate for the equality in status of all human beings with their "four souls" in their breast. For this reason theories of racial superiority are rejected. It also excludes theories, which within the scope of the four perspectives, would want to omit an entire perspective, for example the physical and mental vulnerability of all humans. This vulnerability, which affects all human beings, leads to the postulate of respect for physical and mental integrity, thus excluding dire humiliation or torture.

Nonetheless, many questions remain unanswered. This does not mean to say that relevant arguments cannot be anchored to the cross of decision-making. The difficulty arises because the cross does not have just four perspectives, but allows within each perspective varying interpretations of past, future, ideality, and basic needs. What necessarily remains unsettled is the specific emphasis on individual

aspects within the four perspectives, because the task to find the right balance of and interpretation within each of the four perspectives is up to the particular human being. This is not only his “right”; it is a challenge that no human in hard cases can avoid. Every individual, apart from following well-functioning routines, is at least latently occupied with evaluating and arranging tension-filled preferences. Through this process, the individual attains his personality. This applies even more so to collisions of interpretations, valuations, and decisions between individual and collective actors, for example in cases of life against life or dignity versus dignity. Such specific disputes are not ended by reference to the cross of decision-making or by a single theory of dignity, since they are relative abstractions and initially stand for themselves, thus comprising uncontextualized valuations.

At this point the aforementioned steps toward contextualization and proceduralization have to be taken within the legal system. In every such procedure all those affected by the problem at hand should be heard and the basic elements of all rights potentially affected should be respected. The cross of decision-making cannot determine detailed results in this respect, but it can instead be viewed as helpful in searching topically for relevant aspects to troubleshoot. Here are some illustrations based on German law and decisions of the Federal Constitutional Court:

1. Should an adopted child have the basic right to know its ancestry? Within the four poles of the decisional cross it is clear that this knowledge is relevant when looking downward toward the natural basis of this child and its identity, which is formed along the horizontal axis. However, one must understand the situation of the adopting family as well. The adopting family satisfies the basic needs of the child, opens it up to the world of values, and offers it its own social instead of genetic line of identity. Thus, from its perspective, depending on the circumstances, it may have a legitimate interest in the anonymity of the genetic parents. The cross of decision-making cannot as such determine what exactly should take priority, given the fact that in such a case of complex interaction, contextualization needs to be added to the bare outline of the case. According to the *Bundesverfassungsgericht* (German Federal Constitutional Court), in volume 79 p. 256 et seqq. of its compilation of judicial decisions, as long as the appropriate pieces of information are present, an adoptive child has the fundamental right to know his genetic lineage.¹⁹ This is one

¹⁹ BVerfGE (Reports of the Federal Constitutional Court) 79, p. 256.

possible answer, although not necessarily the only correct answer that can be argued from the viewpoint of dignity as pertaining to the cross of decision-making.

2. The cross of decision-making is not specific enough to be able to say something about the consequences of a violation of rights, for example the form and length of a punishment. That would require additional theories concerning punishment and a look at the circumstances of the case. Nonetheless, the following is clear: Whoever commits a murder, who under § 211 of the German penal code²⁰ destroys the life of another human being for especially abject reasons and thereby removes the vital basis of dignity of the victim, has to expect serious sanctions for his actions. Whether such a sanction should take the form of the death penalty or compulsory life imprisonment, or just a basic life sentence that as a rule may only amount to 15 years in prison, is something the cross of decision-making cannot determine on its own merits. It can, however, on the level of the isolated mindset of the felon, call attention to the four decisional perspectives, and point out what kinds of biographical data, urges, rationalizations and goals were guiding his actions. This leads to an assessment of the perpetrator's motives, intent, and guilt. Moving from the analysis of the felon's actions to the interaction, to the victim's side, the level of injury to as well as the impact on the victim, his family, and even the public in general – its expectation of being safe in their daily activities – come into the fore. Ultimately this will bring our attention to questions of enculturation: One relevant point of discussion is the balancing of the fact that capital punishment is an effective way to prevent future criminal acts of the felon, with the fact that allowing capital punishment can or actually will lead to a brutalization of the legal system.²¹ The *Bundesverfassungsgericht* decided in BVerfGE 45 p. 187 that the compulsory life sentence for murder, provided for under § 211 of the penal code, was constitutional, however, as a general rule, a review would be required after 15 years, which often ends with an early parole.²² The cross of decision-making explains why this constitutional decision is at least one appropriate answer to the question of how to deal with murderers. Being human incorporates the choice of

²⁰ Strafgesetzbuch, 211.

²¹ As is well known, the U.S. balances this differently from Germany and Europe. While there the death penalty is constitutionally acceptable (with exceptions), here the death penalty is mostly outlawed.

²² BVerfGE (Reports of the Federal Constitutional Court) 45 p. 187.

choosing between good and evil, legal and illegal. Those who commit a serious criminal offense fail in their choices; despite this, they do not absolve themselves of the potentiality and duty to, in the future—after serving their deserved and adequate penalty for their crime—behave lawfully and to respect the lives of others. Moreover, the future-oriented dimension is one of the remarkable qualities of human life. A perpetrator, whose future is completely obstructed by a life sentence, who is consequently confined to a part of his past, ends up losing a part of his humanity and his dignity. Preventing this from happening is certainly one relevant consideration even though this argument does not always yield the deciding answer – to the extent that the perpetrator may commit more criminal offenses after his release from prison, one can expect other competing viewpoints to come into play.

3. In looking downwards in the cross of decision-making we understand that the structure of needs and desires, especially those needs that our corporeal life brings with it, falls within the territory of being human; this is especially true in cases of threats to life and limb. Yet this is a characteristic that humans share with animals, and is thus not distinguishing. Neither human nor animal should be tantalized; their physical integrity should be respected. Despite this, we eat animals but not other human-beings. This can only be explained and may be justified if one does not exclusively define dignity with regard to the physical “ability to sense suffering” and “pain.” Rather, one must add to the definition reflexivity, individuality, and identity – or in other words, one has to include a comprehensive conception of dignity or humanity in the other three dimensions of the definitional cross. In this sense, § 90a of the German Civil Code is correct in saying: “Animals are not objects. They are protected by special laws.”²³ These special laws are tied in together with the physical ability to sense suffering and pain as well as a few other approximations of “human behavior,” but they do not extend into all four dimensions of the cross of decision-making. For this reason animals share a world with humans as well as a few human characteristics, but in the end they are only “close” to us, not the “same” as us.
4. Here we can locate and to some extent assess the controversy concerning the “highest” or “most pressing” aspects of *human dignity* and the rights needed for their protection. In this conflict, one can look upwards towards

²³ Bürgerliches Gesetzbuch, 90.

transcendence, reason or “*Geist*” as being the most important part of a human being; or one can look downwards towards the integrity and protection of life and limb, upon which all living things depend. To formulate this somewhat differently: Depending on where one puts his emphasis, the human can seem “cogital” or “animal”-like²⁴; he can seem like a “creation of God” or an “accomplished ape.”²⁵ Within the analytical framework of the decisional cross, such hierarchies are not really convincing, because both aspects necessarily come with the territory of being human, including the aspects of biography and future planning, which are still missing in the vertical axis of this reflection. Depending on the circumstances, one of the dimensions may be especially endangered so that in this situation, one might tend to protect this particular human interest through a provision in the constitution.²⁶

C. Dimensions of Fundamental Rights in the Cross of Decision-Making

Now we can add another facet to the question of how rights in constitutions and human rights treaties are connected. Fundamental rights respond to past infringements of important basic needs and important values in order to guard against similar dangers in the future.²⁷ In this sense, the entire fundamental rights portion of the German constitution (just as in every international human rights agreement that was enacted after the Second World War) stands by the motto: Never again! Never again should the barbarism of the national socialist terror apparatus be allowed to prevail in our community. Due to the function of legitimation, fundamental rights cannot easily be restricted by a simple voting majority of the parliament; tightened standards for the existence and proof of heavy

²⁴ See Friedrich Nietzsche, *Vom Nutzen und Nachteil der Historie für das Leben*, in: DEUTSCHE GESCHICHTSPHILOSOPHIE VON LESSING BIS JASPERS, 360 (Kurt Rossmann ed., 1959).

²⁵ GEHLEN, *supra* note 6, 9.

²⁶ Think of the history of the U.S. Constitution. The freedom of religion in combination with (religious) censorship were especially endangered under the old English regime and even in some of the newly founded colonies. That is why we find the freedom of religion and the freedom of speech clauses in the First Amendment of the Constitution.

²⁷ Some of these infringements are extraordinary, bound to a special situation that will not repeat itself easily – one example would be the quartering of soldiers in citizens’ houses without their consent; see the Third Amendment of the U.S. Constitution. Some infringements constitute “standard threats” that in a politically organized community can easily repeat themselves and thus require constitutional prevention. As for the term “standard threat,” see the discussion in SHUE, *supra* note 11.

public interests are needed. The final check is therefore, in most countries, incumbent upon a constitutional as opposed to a non-constitutional court.

However, fundamental rights have a second dimension that fits precisely in with the four perspectives of the cross of decision-making. Do fundamental rights guard only against acts of governmental authority in the past – illustrated by infringement of a fundamental right that leads to some sort of compensation – , or do they also guard against future acts? The textual phrasing of “fundamental rights” alone does not answer this question for us: Fundamental rights are either formulated as liberties to protect oneself against the actions of public authority, which also indicate an area of life (i.e. the family sphere) or a form of action (i.e. congregating) that should be protected; or fundamental rights indicate the criterion for equal and unequal treatment within the scope of a guarantee of equality, which is either granted or forbidden by the constitution (for example the equality of all human beings under the law, the prohibition of unequal treatment based on origin or sex). If fundamental rights are so meaningful for the legitimacy of a political body, then they should operate backwards as well as forwards. This is also how it is under German law. Fundamental rights should generally guarantee the integrity of an outlined area under the scope of protection of the law, or they should protect the integrity of respective variants of action against unjustified governmental intrusion. If an inappropriate restriction has already occurred in the past in the form of an “infringement on a fundamental right,” then the bearer of fundamental rights is accorded – depending on the situation and according to the specifics of the parliamentary law – the right to a remedy, reinstatement of the law, just compensation or a claim for damages. If there does not appear to be any final harm done to a fundamental right, and instead the harm lurks on the horizon in the future, the notion of integrity turns around “from behind” to face “forward” and transforms itself into injunctive relief, which is inspired by fundamental rights and detailed mostly by law to protect against the impending injury. The notion of integrity in fundamental rights reveals a dimension of protection that is directed backwards as well as forwards; when looking downwards it diagnoses important basic needs such as property and honor, and when looking upwards it normatively ennobles them as fundamental rights to respect. Thus, by transforming the four perspectives of the cross into constitutional and parliamentary law, a good and just legal system can develop.

D. Legal Philosophies and Methods of Interpretation in the Cross of Decision-Making

Let us now shift our attention to the link between the decisional cross and the philosophy of law. As said at the outset, rivalry and diversity dominate the schools of legal philosophy. Yet only a limited number of ideal types in legal philosophy can really be found amongst the diversity of thought. Four of these are consistent with the perspectives of the anthropological cross of decision-making. Here is an example of each:

If we stand along the horizontal axis in the present and look “backwards” into the past, and if we understand the law primarily in the sense of the leading line of tradition at the present time, then we are at the core of the German “*Historische Rechtsschule*,” the historical school of law. One famous representative from the 19th century is Friedrich Carl von Savigny. His basic question is: “In what relation does the past stand with regard to the present, or becoming in regard to being?” The answer is: “Every single human-being is essential ... to think as a part of a family, a nation, a state, and every nation’s era as the continuation and development of all previous times ...” “History is ... not just a collection of examples, rather it is the only way to truly be aware of our own condition.” Thus, the main focus is on evolution and continuation of the “*Volksgeist*” (the national character).

This is different in legal doctrines that look “upwards” and thus fall under “idealism.” They understand the law to be comprised primarily of values and ideals. The “value” of a legal and political system can be determined in varying ways, like in the sense of protecting human dignity and human rights, but also in the sense of protecting the ways of acquiring power, or protecting the advancement of a certain culture, religion, class or race – to name but just a few. In the broadest sense possible, legal idealism includes every type of theory that compliments a fact (particularly a basic need) with an interpretation and a justification in the form of the argumentative “because.” If one refers to present-day criteria for legitimation that are able to draw a consensus, then one must think especially about justice or fairness being the highest virtue of a legal system. Natural law and the law of reason are two classic strands of justice theories. Modern variants of these theories distinguish themselves insofar as they assume equal rights of all citizens and/or human beings in determining their social and political organization. All of these theories represent a version of legal idealism that distinguishes itself from the Savigny-like legal historicism and evolution by emphasizing the independent character of judgments of right and wrong. Thus Kant—the most important legal philosopher in our tradition of conceptualizing justice—admits and emphasizes that man is influenced (“*affiziert*”) by his drives from below; but at the same time he points to the possibility, indeed duty, of letting the principle of the categorical imperative or the legal principles of reciprocity restrict the natural inclinations of “*Willkür*” (arbitrariness). The prevalence of will (*Wille*” over *Willkür* makes him into an idealist who primarily pays attention to the upward-oriented view.

Now let us move our legal philosopher's gaze "from above to below" to the collective Id, the anthropological constant in human drives and basic needs. In the cross of decision-making, these include not only "life and limb," "appetite" and "libido," but all specific needs that can be found spanning all personalities and cultures in most human beings and their communities, including for instance the need for respect, love, fellowship, activity, development, repose, etc. This is where legal philosophies typically make a choice. We encounter some legal philosophies that tend to conceive of human reason as the executor of the empirical drives present in human beings – thus, reason mutates into the prudential optimization between means and ends. Sometimes these drives are characterized in a less good-natured way as threatening or dangerous, which results in a relatively pessimistic view of the human being. Consequentially, this corresponds with a strong role for the coercive role of the state. The function of the state is mainly directed at ensuring the most elemental needs of human-beings: securing survival and ensuring security and order. One could call this type of theory a narrow legal anthropologism. The best example for this is Thomas Hobbes, who in the 17th century witnessed the English civil wars and in his book, "Leviathan," opined that every man is a wolf to every other man. Thus, if a strong authority does not intervene, the state of nature persists, "which is the worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."²⁸ It is no wonder that in such a situation Hobbes advises creating a social contract in which a stronger, even overpowering ruler is charged with providing life and security for all.

Now we have to look "forwards" at legal philosophies that define the role of the law primarily from the perspective of creating a successful future. Most variants of this kind of thought fall under the category of legal instrumentalism. One famous example is the school of Critical Rationalism, which was developed by Karl Popper and championed by Hans Albert in Germany. His catchphrase is: law as social technology.²⁹ Science has to enlighten the political and legal actors as to the correlations between personal, institutional and technical aspects of existing or envisioned organizations and find the best ways to achieve the desired state of social order.

²⁸ THOMAS HOBBS, *LEVIATHAN*, 84 (1998).

²⁹ See HANS ALBERT, *KRITISCHER RATIONALISMUS*, 64-76 (2000).

Those were examples of reflections of legal philosophy in all four dimensions of the anthropological cross of decision-making.³⁰ An attractive and convincing legal philosophy differentiates itself in that it articulates all four perspectives structurally and relates them to each other – with different emphases, of course. But it should not exclude one or more of the perspectives from the outset.³¹ That would be misguided, even foolish, because the four perspectives are themselves always present in us. They belong constitutively to the lifeworld (*Lebenswelt*), or in law to the legal world. They should be related to each other in practical concordance or *praktische Konkordanz*. All of the schools of philosophy of law mentioned above articulate implicitly or explicitly all four perspectives and even integrate them to a certain degree, however, with differing emphases on evolution, idealism, anthropologism, and instrumentalism.

Likewise, the cross of decision-making features an instrument for analyzing methods of interpretation. Laws do not have a natural “texture of personality” around which an individual’s identity must form and remodel itself; instead, laws possess a democratically agreed-upon “textual structure.” In place of the task of “leading one’s life” incumbent on individuals, we see the “execution of tasks” incumbent on laws according to the main purpose of the organic act or *ratio legis*. In connection and continuation with maxims espoused by Friedrich Carl von Savigny, the modern canon of interpretation is comprised of textual, systematic, historical, and teleological interpretation.³² Looking “backwards,” the interpreter sees a date lying in the past, a problematic case and the enactment of a law designed to solve it, which during the period of enactment was itself a collective decision in the purview

³⁰ For examples of these four strands of philosophy of law (and methods of interpretation) from the U.S., see Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AMERICAN JOURNAL OF COMPARATIVE LAW 395, 415–421 (1994).

³¹ See, for example, Karl Lewellyn, cited in BRUGGER, *supra* note 19, 416: “In a going life-situation, fairness, rightness, minimum decency, injustice look not only back but forward as well, and so infuse themselves not only with past practice but with good practice, right practice, right guidance of practice, i.e., with felt net values in and for the type of situation, and with policy for legal rules.” Harold Berman formulates as follows: “The essence of historical jurisprudence is not historicism but historicity, not a return to the past but a recognition that law is an ongoing historical process, developing from the past into the future ... Indeed, history without political and moral philosophy is meaningless. Yet those philosophies without history are empty. In American jurisprudence the time is ripe to restore the historicity of law to its proper role alongside political principles of legal order and moral principles of legal justice.” This citation, in BRUGGER, *supra* note 18, 416, is taken from an article of Berman on “Integrative Jurisprudence”. The decisional cross provides such a framework.

³² For a comparison between German and American methods of legal interpretation, see BRUGGER, *supra* note 19, and WINFRIED BRUGGER, *EINFÜHRUNG IN DAS ÖFFENTLICHE RECHT DER USA*, § 2 II and § 16 (2nd ed., 2001).

of the cross of decision-making. Looking further into the past, historical continuity and clarity of legal terminology helps the interpreter as far as it is relevant for solving the case.³³ Voluntative genesis and continuous development both belong to “historical interpretation” in the all encompassing sense. The interpreter, however, does not define legal rationale only as past-oriented, since the law should be “reasonable” and “appropriate” not only for yesterday, but also for today and tomorrow, and should be able to hope for the greatest possible acceptance. These measures of value reside in the cross of decision-making along the vertical axis: Laws are oriented to the satisfaction of sectoral basic needs: social welfare law is primarily oriented towards upholding standards of subsistence; criminal and criminal procedure are supposed to protect “life and limb” of the population, but, after the crime, also of the perpetrator; marital and family law are oriented to “companionship, stability, sexuality, procreation,” etc. In looking upwards, we expound the meaning and worth of these basic needs, either by reference to values explicitly mentioned in the statute or constitution, or by reference to a-legal, religious or moral ideals. At the intersection of the four perspectives, initially the lawmaker, and then later the citizen, jurist, and judge in the act of interpreting the law, all must take responsibility for the specific valuation or rather the detailed weighting and fitting of legal rules. In both stages of concretization, subjective elements of assessment cannot be avoided. An appropriate decision in a contested case cannot usually be “objectively” detected in the mere text of the pertinent provision; the specifics of the “situation” and the mindset of the “interpreter” also play a role. This stands parallel to an individual’s decision concerning personality formation or identity, which is likewise not predetermined or in any case not only predetermined but a matter for active and creative determination—at least in instances that put a heavy burden on our shoulders. If in this respect, it is said individuals are both creature and creator of their personality and culture, then this parallel also holds true for the interpretation of legal norms: For the interpreter, they are authoritative “creatures” created by constitution and lawmaker to be discovered. At the same time, the interpreter is the “creator” of the specific and situational meaning of the corresponding rule.

Figure 2. The Anthropological Cross of Decision-Making in Legal Philosophy and Methods of Interpretation

³³ Put differently, there are, in German jurisprudence, two different variants of “historical interpretation”: (1) the will of the legislature at the particular time; here voluntarism prevails, and (2) the (hopefully organic) development of a legal term or doctrine in time, such as “contract” or “constitution”; here tradition and evolution prevail.



V. Conclusion

The cross of decision-making does not offer a “model of subsumption” to deduce correct decisions either for individual or collective actors. It does not provide detailed rules of decision-making, and it is not about the maximization of the four perspectives as separate principles. Rather, in disputable actions and interactions, it is about structuring a field of interpretation, valuation, and decision, in which the

human being has always stood. The decisional cross provides a map of decision-making in hard cases; it provides binoculars with built-in crosshairs, displaying the vertical and horizontal lines within the horizon of socialization, interaction and enculturation. A “good shot” or a worthwhile decision has to find the crossing point of the four modes of reflection – only there we expect the “right fit” of the decision to be made by this person in this situation.

Having to carry the burden of the crux of decision-making is an inevitable part of the human destiny that God, nature, or evolution has chosen for us. The decisional burden affects every human being as a physical and mental, emotional and deliberative actor – it is a privilege and a curse. It is not for nothing that we sing our praises to the routine, in which, for purposes of the cross of decision-making, all four perspectives point in the same direction, and the end decision is self-evident. However, if the four perspectives cross each other at the core of the personality, and if acting in the emphatic sense is demanded, then the “cross” has to show some backbone.³⁴ In balancing competing aspects, we should not try to act as the average person does; we should not exclusively base our judgment on the input of “the skilled, the prudential or the wise,” but on our own sense of what is right for us and our fellow men. Thus, the decisional cross helps us to switch off simple-minded notions of just having to follow our “preferences” in order to live a good life. It points to the diversity of motives within ourselves and others. Every human being is a subject, a person and at least in some instances a unique personality. This is what we learn from the decisional cross, and this is what the legal order should recognize and organize as well. In the words of an old German saying: “In the cross, man comes to know himself more than ever.”

³⁴ In the German language, the back of a person is called *Kreuz*, meaning “cross.” In hard, existentialist cases, one has to show backbone, one has to act within the decisional cross.

The Scope of Judicial Review in the German and U.S. Administrative Legal System

Jan S. Oster*

A. Introduction

The scope of judicial review of administrative decisions is one of the most important issues in administrative law. The question of the scope of judicial review is a typical problem of public law. Prior to the decision of an administrative law court, there is usually a decision of a public agency. In contrast to that, civil or criminal law cases begin without a state-run decision because these courts have to judge the behavior of private persons. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹ the Supreme Court held that if it determines Congress has not addressed the question at issue, “the court does not simply impose its own construction on the statute, *as would be necessary in the absence of an administrative interpretation [emphasis added]*.”² Summarized in a simple formula, one can say that civil and criminal courts decide, while administrative and constitutional courts control.

The article focuses on the scope of judicial review in market regulation, which is a new field of administrative law in Germany, but a traditional field of state action in the U.S. The U.S. market regulation has been a role model for the European directives and hence for their domestic implementation.³ The German regulatory agencies are working based on new laws modeled on the principles of the

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¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

² *Id.*, 843.

³ Johannes Masing, *Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts*, 128 ARCHIV FÜR ÖFFENTLICHES RECHT 558 (2003).

American economic regulation. If the substantive law has been a role model for Europe and Germany, consequently the procedural law needs adaption as well. The leading case regarding agency interpretation of statutory provision in the U.S. the *Chevron* case. This article is based on two assumptions: First, the *Chevron* test finds its functional equivalence in the German normative authorization doctrine. Second, the rationales for *Chevron* fit to the German system of market regulation. Hence, reviewing German courts have to grant deference to an agency's decisions in market regulation equivalent to the *Chevron* doctrine.

This article first introduces the scope of judicial review in German law in part B. Then, in part C, it discusses the *Chevron* doctrine. Finally in part D, it elaborates how *Chevron's* rationales can be made applicable in Germany.

B. The German System of Judicial Review

The German system of judicial review is based on the structure of the statutory norms applied by the agencies. Most of the legal norms in Germany are written in conditional sentences. They consist of prerequisites on the one side and the legal consequences on the other. Examples are Section 46 of the Banking Act⁴ or Section 35 of the Industrial Act⁵. Only a few legal norms in Germany are final clauses.

⁴ Section 46 of the *Kreditwesengesetz* [KWG, Banking Act] of 9 September 1998, BGBl. I at 2776, translated by German Law Archive, available at www.iuscomp.org, last accessed 25 September 2008:

“Measures in cases of danger

(1) If the discharge of an institution's obligations to its creditors, and especially the safety of the assets entrusted to it, is endangered or if there are grounds for suspecting that effective supervision of the institution is not possible ..., the Federal Banking Supervisory Office (*Bundesanstalt für Finanzdienstleistungsaufsicht*) may take temporary measures to avert the danger. In particular, it may

1. issue instructions on the management of the institution's business,
2. prohibit the taking of deposits or funds or securities of customers and the granting of loans ...,
3. prohibit proprietors and managers from carrying out their activities, or limit such activities, and
4. appoint supervisors.”

⁵ Section 35 (1) of the *Gewerbeordnung* [GewO, Industrial Act] of 22 February 1999, BGBl. I at 202:

“The agency has to interdict the exercise of a certain industry all or part, if facts displaying the unreliability of the industrialist ... are available.”

Those rules mainly exist in planning law, especially urban or regional development.⁶

According to those statutory structures, there are three forms of judicial deference to agency actions: agency discretion (*Ermessensspielräume*), legislative authorization to the agency to interpret rules (*Beurteilungsermächtigungen*), and the freedom of planning (*planerische Gestaltungsfreiheit*).

I. Agency Discretion

Agency discretion exists when there is a conditionally structured rule which allows, but does not force the agency to take measures, if certain prerequisites are fulfilled. Section 46 of the German Banking Act includes agency discretion, because if the discharge of an institution's obligations to its creditors is endangered or if there are grounds for suspecting that effective supervision of the institution is not possible, then the Supervisory Office *may* take temporary measures to avert the danger.⁷ By contrast, Section 35 of the German Industrial Act does not include agency discretion.⁸ If an industrialist is unreliable, the agency *has to* interdict the exercise of a certain industry. Agency discretion concerns the legal consequences of a rule and is relatively easy to handle. It is triggered by words like "can" or "may" and is excluded in case of "shall", "has to", and "must".

If the legislature grants discretion to the agency, courts may only control whether the agency's decision includes discretion mistakes (*Ermessensfehler*). Courts may not substitute agency's discretion with their own preferences. Discretion mistakes are: non-use of discretion (*Ermessensnichtgebrauch*), abuse of discretion (*Ermessens Fehlgebrauch*), and exceedance of discretion (*Ermessensüberschreitung*).⁹

⁶ See, e.g., Section 1 of the *Baugesetzbuch* [BauGB, Federal Building Code] of 23 Sept 2004, BGBl. I at 2414, translated by German Law Archive, available at www.iuscomp.org, last accessed 25 September 2008:

"The Scope, Definition and Principles of Urban Land-Use Planning:

(3) It is the responsibility of municipalities to prepare land-use plans (*Bauleitpläne*) as soon as and to the extent that these are required for urban development and regional policy planning.

(7) In preparing land-use plans, public and private interests are to be duly weighed."

⁷ Henning Lindemann, § 46, in: *KREDITWESENGESETZ* (Karl-Heinz Boos, Reinfrid Fischer & Hermann Schulte-Mattler eds., 2nd ed. 2004), margin number 18.

⁸ Peter J. Tettinger, § 35, in: *GEWERBEORDNUNG* (Peter J. Tettinger & Rolf Wank eds., 7th ed. 2004), margin number 118.

⁹ See Stefan Liebetanz, § 40, in: *KOMMENTAR ZUM VERWALTUNGSVERFAHRENSGESETZ* (founded by Klaus Obermayer, ed. by Roland Fritz, 3rd ed. 1999), margin number 22. FRIEDHELM HUFEN,

II. Freedom of Planning

The agency is free to plan when there is a final-structured legal norm that sets only a purpose and a limited number of decision-making criteria to the agency.¹⁰ For example, Section 1 of the Federal Building Code authorizes the administration to plan, but does not establish requirements of, when, and how to plan. Section 1(7) only requires that public and private interests be duly weighed. Other norms require further considerations, e.g. the protection of the environment or the right balance between housing and industrial areas. Nevertheless, a subsumption of certain facts under a legal norm as a syllogism is not possible with these types of rules. This would require a conditional structure. Planning rules require only procedures of balancing between different interests, which are often led by political considerations (e.g. how much industry does a city want to have? Does a certain area have to be reserved for sports facilities, health resorts, or for educational institutions?). The Highest Administrative Court has developed a test to consider if there has been a right balancing.¹¹

Courts may review whether there was non-balancing (*Abwägungsausfall*), balancing deficit (*Abwägungsdefizit*), false estimation of relevant considerations (*Abwägungsfehleinschätzung*), or balancing disproportionality

VERWALTUNGSPROZESSRECHT § 25 margin number 30 (6th ed. 2005); FERDINAND O. KOPP & WOLFRÜDIGER SCHENKE, VERWALTUNGSGERICHTSORDNUNG § 114 margin number 5, 7 (14th ed. 2005). This test is derived from Section 40 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) and Section 114 of the German Administrative Court Procedures Code (*Verwaltungsgerichtsordnung*).

Section 40 of the German Administrative Procedure Act states: "Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers."

Section 114 sentence 1 of the Administrative Court Procedures Code states: "As far as the authority is empowered to act at its discretion, the court also reviews whether the administrative act ... is unlawful because the agency exceeds the legal limits of the discretionary power or because the agency did not use its discretion in accordance with the purpose of the empowerment."

¹⁰ Fritz Ossenbühl, *Gedanken zur Kontrolldichte in der verwaltungsgerichtlichen Rechtsprechung*, in FESTSCHRIFT FÜR KONRAD REDEKER 55, 60 (Bernd Bender ed., 1993).

¹¹ Bundesverwaltungsgericht, 12 December 1969, 34 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 301, 309; Bundesverwaltungsgericht, 5 July 1974, 45 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 309, 316; Bundesverwaltungsgericht, 7 July 1978, 56 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 110, 119; Werner Hoppe, *Die Schranken der planerischen Gestaltungsfreiheit (§ 1 Abs. 4 und 5 BBauG), Das Urteil des Bundesverwaltungsgerichts vom 12. Dezember 1969 zum Abwägungsgebot (§ 1 Abs. 4 Satz 2 BBauG) und seiner Rechtskontrolle*, 1970 BAURECHT 15.

(*Abwägungsdisproportionalität*). This test is similar to the judicial review of discretion.

III. Authorization to Interpret Rules

The authorization to interpret rules refers to the prerequisites of a legal norm in contrast to discretion, which concerns the legal consequences of a norm. For example, the requirement whether the discharge of an institution's obligations to its creditors is "endangered" according to Section 46 of the Banking Act: is the agency authorized to decide as a last instance whether there is a danger for the discharge of an institution's obligation to its creditors? Under Section 35 of the Industrial Act, may a court review an agency's assumption that an industrialist is unreliable?

Scholars and courts have developed the so-called "normative authorization doctrine" (*normative Ermächtigungslehre*).¹² This doctrine states that if the legislative grants deference to the agency's decision, courts can only review the agency's decision to a certain extent. The functional equivalence to *Chevron* is oblivious.¹³ Courts may control whether:

- the agency abided by the rules of procedure,
- the facts are correctly investigated,
- the agency did not violate the principle of equality,¹⁴
- the agency kept general standards of evaluation, and
- the agency did not consider irrelevant elements.¹⁵

¹² Otto Bachof, *Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht*, 1955 JURISTENZEITUNG 97; Eberhard Schmidt-Aßmann, *Einleitung*, in: VERWALTUNGSGERICHTSORDNUNG - KOMMENTAR (Friedrich Schoch, Eberhard Schmidt-Aßmann & Rainer Pietzner eds., 12th ed. 2005), margin number 189; JAN ZIEKOW, VERWALTUNGSVERFAHRENSGESETZ, § 40 margin number 47 (2006).

¹³ See, *infra*, C.

¹⁴ The general norm for equality is Art. 3 of the Basic Law, translated by :

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

¹⁵ HUFEN, *supra* note 9, § 25 margin number 56.

There are only a few legal rules in which the legislation explicitly has granted deference to an agency's decision concerning the interpretation of the prerequisites of a norm. The most important ones are Section 71(5) sentence 2 of the German Act against Restraints on Competition¹⁶ and, since 2004, Section 10(2) sentence 2 of the German Telecommunications Act.¹⁷ Both norms concern the definition of the relevant markets for regulation. Besides that, it has to be interpreted to which extent courts must defer to agency's decision. The normative authorization doctrine has two requirements.¹⁸ First, there has to be an indefinite legal term (see 1.). Second, the legislature must have granted deference to the agency to define the legal term (see 2.).

1. Indefinite Legal Term

Indefinite legal terms (*unbestimmte Rechtsbegriffe*) are terms that require a valuation. Mostly there is no assured scientific knowledge to conclude if a certain statutory requirement is met or not, *e.g.*, whether air pollution is dangerous for people according to Section 3 of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*) or whether an industrialist is not reliable in the sense of Section 35 of the Industrial Act. The title "indefinite legal term" is misleading. Strictly speaking, these are not legal terms, but terms from natural, economic or other sciences used in a statute. So the renaming of the term to "indefinite statutory term" would be adequate.¹⁹ However, German jurisprudence institutionalized this problem under the name "indefinite legal term".

¹⁶ "The appraisal by the cartel authority of the general economic situation and trends shall not be subject to review by the court."

¹⁷ "Warranting regulation in accordance with the provisions of this Part are markets with high, non-transitory entry barriers of a structural or legal nature, markets which do not tend towards effective competition within the relevant time horizon and markets in respect of which the application of competition law alone would not adequately address the market failure(s) concerned. Such markets shall be identified by the Regulatory Authority within the limits of its power of interpretation."

¹⁸ KOPP & SCHENKE, *supra* note 9, § 114 margin number 23-24; Stefan Liebetanz, *supra* note 9, § 40 margin number 61, 63.

¹⁹ Otto Bachof, *supra* note 12, 98; HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT § 7 margin number 28 (15th ed. 2004).

The requirement of an indefinite legal term is functionally equivalent to the ambiguous statute as one requirement for the application of *Chevron*.²⁰ Even though the terms may differ, the problems are the same.

2. Legislative Authorization

Due to constitutional reasons, there has to be an additional (explicit or implicit) legislative authorization to the agency to find a valuation which is not reviewable by courts (see a.). This is the most complicated challenge of the normative authorization doctrine. As mentioned above, there are only a few statutes in which the parliament explicitly granted deference to the agency. In all other cases, it has to be investigated whether there is a legislative authorization (see b).²¹

a) Constitutional Background

The question of the scope of judicial review in German law must be seen as a collision between separation of powers concerns on the one hand,²² and Art. 19(4) sentence 1 Basic Law on the other hand. The separation of powers doctrine requires that administrative agencies be given some latitude not only against the legislative, but also against the judicative.²³ A full judicial review of agency's

²⁰ See, *infra*, C.I.2.

²¹ KOPP & SCHENKE, *supra* note 9, § 114 margin number 24.

²² The separation of powers principle is included in Art. 1(3) and Art. 20(2) and (3) of the Basic Law.

Art. 1(3) of the Basic Law states:

"The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."

Art. 20 of the Basic Law states:

"(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

²³ Bundesverfassungsgericht, 3 February 1959, 9 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 137, 149.

actions through courts is incompatible with the separation of powers as a principle of checks and balances. It would give the judicial branch too much power. On the other hand, Art. 19(4) of the Basic Law basically requires that all the agencies' actions be controlled concerning questions of fact and questions of law.²⁴ Art. 19(4) provides in its first sentence: "Should any person's rights be violated by public authority, he may have recourse to the courts."

The normative authorization doctrine is a result of a coherent interpretation of Art. 19(4) sentence 1 of the Basic Law and the separation of powers principle. Art. 19(4) sentence 1 requires implementation by the legislative. The norm includes that if any "person's rights" are violated by public authority, there has to be a "recourse to the courts". The norm does not state what the rights are and how the recourse to the courts has to be.²⁵ It is the duty of the legislative to shape these requirements. Thus, it is the legislative which decides whether the courts must grant deference to an agency's decisions.

Furthermore, the normative authorization doctrine is based on Art. 20(3) of the Basic Law as a characteristic of the separation of powers principle. Art. 20(3) states that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.²⁶ Whereas the legislative is only bound by the constitutional order, the executive and the judiciary are also bound by the (statutory) law which is made by the legislative. As a consequence, it is the legislature which assigns the competence to the agencies and the courts. Finally, Art. 97(1) of the Basic Law states that "Judges shall be independent and subject *only to the [statutory] law.*"²⁷ Hence, the courts have to accept the standards of control as imposed by a legislative statute.²⁸

²⁴ Bundesverfassungsgericht, 5 February 1963, 15 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 275, 282; Bundesverfassungsgericht, 17 April 1991, 84 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 34, 49.

²⁵ Eberhard Schmidt-Aßmann & Thomas Groß, *Zur verwaltungsgerichtlichen Kontrolldichte nach der Privatgrundschul-Entscheidung des BVerfG*, 1993 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 617 (619).

²⁶ "Law" in the sense of Art. 20(3) means statutory law. Law as a principle is here translated with the word "justice". See GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 56-57 (2005) (explaining the dichotomic translation of the word "law").

²⁷ Emphasis added. Regarding the translation of the word "law", see, *supra*, note 26.

²⁸ Bundesverfassungsgericht, 31 May 1988, 78 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214, 226; Bundesverwaltungsgericht, 25 November 1993, 94 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 307, 309; Bachof, *supra* note 12, 100; Liebetanz, *supra* note 9, § 40 margin number 63; KOPP & SCHENKE, *supra* note 9, § 114 margin note 23.

b) The Normative Authorization Doctrine in Practice

Due to the fact that there is rarely an explicit authorization to the agencies, it is difficult to decide when the doctrine is applicable. The courts have decided several cases in which they granted deference to the agency because of the normative authorization doctrine. However, in the vast majority of cases, the courts do not grant deference to agency interpretations.

One reason for granting deference is the special characteristic of the procedure or the deciding organ. Such peculiar deciding organs are, for instance, expert commissions issuing recommendations to agencies which are exempt from executive orders.²⁹ Another line of cases concerns the capability of the courts to review agency decisions. Some agency decisions are too complex and are based on dynamic developments, such that the courts reach the functional limits of jurisdiction, e.g. in a licensing procedure for a nuclear power plant.³⁰ Furthermore, courts grant deference in cases of examinations or situations similar to examinations.³¹ Finally, judicial deference is granted when agencies assess civil servants.³²

C. The *Chevron* Doctrine

The *Chevron* case established the relevant standard to be used by courts to determine whether they should grant deference to an agency's interpretation of a

²⁹ Bundesverwaltungsgericht, 16 December 1971, 39 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 197; Bundesverwaltungsgericht, 28 August 1996, 1997 NEUE JURISTISCHE WOCHENSCHRIFT 602. See Konrad Redeker, *Fragen der Kontrolldichte verwaltungsgerichtlicher Rechtsprechung*, 1971 DIE ÖFFENTLICHE VERWALTUNG 757 (760); HUFEN, *supra* note 9, § 25 margin number 51.

³⁰ Bundesverfassungsgericht, 8 July 1982, 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 82, 114; Bundesverwaltungsgericht, 15 April 1988, 79 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 208, 213; Bundesverwaltungsgericht, 9 September 1989, 82 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 295, 299; Bundesverwaltungsgericht, 19 December 1985, 72 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 300, 316. See also SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY 73-74 (1995).

³¹ Bundesverwaltungsgericht, 24 April 1959, 8 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 272; Bundesverwaltungsgericht, 18 May 1982, 73 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 376.

³² Bundesverwaltungsgericht 13 May 1965, 21 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 127, 129; Bundesverwaltungsgericht, 26 June 1980, 60 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 245.

statute. In this case, Justice Stevens established the so-called *Chevron* two-step test: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."³³

I. The *Chevron* Test

Chevron merged two divergent lines of Supreme Court decisions. Prior to the *Chevron* decision, the Supreme Court did not have a consistent doctrine for determining whether or not and to what extent to defer to agency interpretations of statutes.³⁴ On the one hand, many decisions supported the view that great deference must be given to agency interpretations.³⁵ On the other hand, other decisions granted weak deference or did not grant any deference to agency decisions.³⁶

³³ *Chevron*, 467 U.S. at 842-43.

³⁴ See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 382-85 (4th ed., 2004); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUMBIA LAW REVIEW (COLUM. L. REV.) 452, 453-54 (1989); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2082 (1990); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VANDERBILT LAW REVIEW (VAND. L. REV.) 301 (1988); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE JOURNAL ON REGULATION (YALE J. ON REG.) 1, 6 (1990); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE LAW JOURNAL (YALE L.J.) 969, 971 (1992); Stephen M. Lynch, *A framework for judicial review of an agency's statutory interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE LAW JOURNAL (DUKE L.J.) 469, 470-72.

³⁵ *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956); *Gray v. Powell*, 314 U.S. 402, 412 (1941); *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 227-28 (1943).

³⁶ *National Labor Relations Board v. Bell Aerospace*, 416 U.S. 267 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Chevron*, the Court evaluated the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act. The EPA promulgated rules that defined the term "stationary source" as an entire plant, containing many different kinds of polluting facilities. This so-called "bubble solution" allowed a firm to increase the emissions of one unit of the whole plant, as long as the entire plant, considered as a single source, complied with the emission standard.

The Supreme Court in *Chevron* prescribed a two-step test to determine whether to defer to agency interpretations. Commentators and subsequent Supreme Court decisions suggest a new rigorous three-step test should be followed. This test includes the traditional *Chevron* steps one (see 2.) and two (see 3.), and the so-called *Chevron* step zero (see 1.).

1. *Chevron* Step Zero

"*Chevron* step zero"³⁷ concerns the question of whether the *Chevron* test is applicable at all. In *INS v. Cardoza-Fonseca*³⁸, the Supreme Court decided that the *Chevron* standard was inapplicable because the issue for decision was a "pure question of statutory construction."³⁹ Justice Stevens stated that *Chevron* deference would only be appropriate if the case concerned the application of law to the facts.⁴⁰

Justice Scalia in his concurring opinion⁴¹ as well as scholars⁴² protested against this decision. The distinction between pure questions of law and questions of the application of law to facts had been abandoned before *Chevron* was decided.⁴³

³⁷ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEORGETOWN LAW JOURNAL (GEO. L.J.) 833, 836 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VIRGINIA LAW REVIEW (VA. L. REV.) 187 (2006).

³⁸ *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

³⁹ *Id.*, 446.

⁴⁰ *Id.*; 448.

⁴¹ *Id.*, 454-55 (Scalia, J., concurring in judgment).

⁴² Merrill, *supra* note 34, 986; Anthony, *supra* note 34, 21-23.

⁴³ *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981); *Ford Motor Credit Co. v. Millhollin*, 444 U.S. 555 (1980); Merrill (note 34), 986.

Indeed, the *Chevron* decision itself concerned a pure interpretation of law, namely the interpretation of the legal term “statutory source.”⁴⁴ After that, the Court silently abandoned the *Cardoza-Fonseca* decision.⁴⁵

The *Chevron* test is not applicable when the agency is party in litigation,⁴⁶ or when the agency wrote its opinion in an amicus brief.⁴⁷ Furthermore, *Chevron* is not applicable when an agency interprets its own regulations and not statutes.⁴⁸ In this case, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”.⁴⁹

Courts do not grant deference to agencies when the agency is not directed to enforce the statute.⁵⁰ Two agencies might interpret the same statute differently. If courts granted deference to both interpretations, then the same statute would have

⁴⁴ *Cardoza-Fonseca*, 480 U.S. at 455 (Scalia, J., concurring in judgment); Sunstein, *supra* note 34, 2095.

⁴⁵ *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133-34 (1984) (Scalia, J., concurring); see *Mead Corp. v. Tilley*, 490 U.S. 714 (1989); *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988); *K Mart Corp v. Cartier, Inc.* 486 U.S. 281 (1988); Sunstein, *supra* note 34, 2084-85; Merrill, *supra* note 34, 986; Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council*, in: A Guide to Judicial and Political Review of Federal Agencies 55, 57 (John F. Duffy & Michael Herz eds., 2005); STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 343 (6th ed. 2006).

⁴⁶ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212; Steven Croley, *The Applicability of the Chevron Doctrine*, in: A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 103 (111) (John F. Duffy & Michael Herz eds., 2005).

⁴⁷ *Motor Vehicle Mfrs. Assn. v. New York State Dept. of Envtl. Conversation*, 17 F.3d 521, 535 (2d Cir. 1994).

⁴⁸ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS LAW REVIEW (U.C. DAVIS L. REV.) 49 (2000).

⁴⁹ *Seminole Rock*, 325 U.S. at 414.

⁵⁰ *Chevron*, 467 U.S. at 842; *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n9 (1997) (regarding the APA); *Prof'l Reactor Operator Society v. NRC*, F.2d 1047, 1051 (D.C. Cir. 1991) (regarding the APA); *DuBois v. United States Department of Agriculture*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996); *The Reporters Committee for Freedom of the Press v. United States Department of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (regarding the FOIA); *Federal Labor Relations Authority v. United States Department of Defense*, 984 F.2d 370, 373-374 (10th Cir. 1993) (regarding the FOIA).

two different meanings.⁵¹ Furthermore, one rationale for the *Chevron* doctrine is the agency's experience and expertise.⁵² If the agency is not alone entitled to administer a statute, then it cannot claim a special expertise.⁵³

Before courts consider *Chevron* deference, they must consider whether the *Chevron* clause is applicable as opposed to the so-called *Skidmore*⁵⁴ deference. Originally, *Skidmore v. Swift & Co.* distinguished between interpretative rules and legislative rules. If there was an interpretative rule, then courts granted minimal deference. *Chevron*, on the other hand, does not distinguish between interpretative and legislative rules, so it seems that *Chevron* overrules *Skidmore*. But *Chevron*'s scope has been narrowed by later cases,⁵⁵ hence the distinction between interpretative and legislative rule is still applicable. On the one hand, there is the *Mead*⁵⁶ test which continued the *Christensen*⁵⁷ test and the *Barnhart v. Walton*⁵⁸ test. The *Mead* test can be divided into two steps. First, courts ask whether Congress delegated the authority to act with the force of law to the agency. Second, the agency has to use that authority. This is the case in rulemaking and adjudication, but not if there is an interpretative rule, a policy statement, or a guidance opinion letter.

Only if both of these *Mead* requirements are fulfilled, the agency gets the stronger *Chevron* deference. If the requirements are not fulfilled, the agency gets *Skidmore* deference. The deference granted in *Skidmore* depends upon the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all factors which give it power to

⁵¹ John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS LAW REVIEW (TEX. L. REV.) 113, 208 (1998).

⁵² See, *infra*, C.II.

⁵³ See, *infra*, C.II.2.

⁵⁴ *Skidmore*, 323 U.S. 134; see also Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. Aramco*, 42 DUKE L.J. 166 (1992); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WILLIAM AND MARY LAW REVIEW (WM AND MARY L. REV.) 1105 (2001).

⁵⁵ *Christensen*, 529 U.S. at 586-88; *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001); *National Cable & Telecommunications Assn. v. Brand X*, 545 U.S. 967, 980-81 (2005); see also Angstreich, *supra* note 48, 49.

⁵⁶ *Mead*, 533 U.S. 218.

⁵⁷ *Christensen*, 529 U.S. 576.

⁵⁸ *Barnhart v. Walton*, 535 U.S. 212 (2002).

persuade.⁵⁹ *Mead* is justified by the fact that if there is no legal enactment, then there is no Congressional authorization either. In this case, the agency lacks the authority to issue binding rules. Furthermore, opinion letters and other informal administrative actions have no procedural requirements, hence there is little or no opportunity for citizen participation.⁶⁰ Section 553(b)(3)(A) of the APA explicitly declares that the norms on rule making procedure are inapplicable *inter alia* for interpretative rules, or general statements of policy.

As an alternative test for interpretative regulations, a few courts operate with the *Barnhart v. Walton* multi-factor test.⁶¹ This test considers the interstitial nature and the importance of the legal question, the related expertise of agency, the complexity to administer the statute and agency's consistency.⁶² An agency decision is especially inconsistent in case of a policy shift. Hence, under the *Barnhart v. Walton* test, the *Chevron* case would have been decided in a different way, because the "bubble solution" was a shift in policy.

2. *Chevron* Step One

In *Chevron*, the Court asked "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁶³ The court should use "the traditional tools of statutory construction"⁶⁴ to determine whether the meaning of the statute is clear with respect to the precise issue before it. These tools include examination of the statutory text, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history.⁶⁵

⁵⁹ *Skidmore*, 323 U.S. at 140; *Christensen*, 529 U.S. at 587; *Mead*, 533 U.S. at 228.

⁶⁰ Sunstein (note 37), 193; Croley, *supra* note 46, 119; RUTH ANN WATRY, ADMINISTRATIVE STATUTORY INTERPRETATION 88 (2002).

⁶¹ *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 59 (2nd Cir. 2004); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002).

⁶² *Barnhart v. Walton*, 535 U.S. at 222.

⁶³ *Chevron*, 467 U.S. at 842-43 (emphasis added); *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 623 (1991); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

⁶⁴ *Chevron*, 467 U.S. at 843 n. 9; *Cardoza-Fonseca*, 480 U.S. at 448.

⁶⁵ See, e.g., Russell L. Weaver, *Some Realism about Chevron*, 58 MISSOURI LAW REVIEW (MO. L. REV.) 129 (1993).

The primary source of statutory meaning is its language. To illuminate the language, the Supreme Court often refers to dictionary definitions.⁶⁶ Furthermore, judicial interpreters take into account the statutory structure. This does not only include other provisions of the relevant statute as a whole,⁶⁷ but also related statutes in order to interpret the meaning of the relevant terms “with a view to their place in the overall statutory scheme.”⁶⁸ Congress’ general purpose when enacting a regulatory statute may prove the legislative intent which meanings should be permissible under the statute.⁶⁹

Canons of statutory construction are for example textual canons like *expressio unius est exclusio alterius*,⁷⁰ or the requirement to avoid serious constitutional questions.⁷¹ The most controversial tool of statutory construction is legislative history. This issue reflects a movement from intentionalism to textualism that *Chevron* has experienced at step one.⁷² Intentionalism has been the dominant interpretive tool of the courts for a long time.⁷³ Intentionalists like Justice Stevens consider legislative history to illuminate statutory meaning and Congressional intent.⁷⁴ To investigate legislative history, they refer to legislative materials such as committee reports and

⁶⁶ See, e.g., *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 226 (1994); see also Ellen Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZONA STATE LAW JOURNAL (ARIZ.ST. L.J.) 275 (1998).

⁶⁷ *K Mart*, 486 U.S. at 291; *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Sullivan v. Strop*, 496 U.S. at 482.

⁶⁸ *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁶⁹ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 412 (1999) (The Chief Justice, Thomas, and Breyer, JJ., concurring in part and dissenting in part); *CSX Transp. v. United States*, 867 F.2d 1439, 1443 (D.C. Cir. 1989); Weaver, *supra* note 65, 151-53.

⁷⁰ See, e.g., *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002); *United States v. Vonn*, 535 U.S. 55, 65 (2002).

⁷¹ See, e.g., *Solid Waste Agencies of Northern Cook County v. Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958); *DeBartolo Corp. v. Florida Gulf Coast*, 485 U.S. 568, 575 (1988).

⁷² William N. Eskridge, Jr., *The New Textualism*, 37 UCLA LAW REVIEW (UCLA L. REV.) 621, 623 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AMERICAN UNIVERSITY LAW REVIEW (AM. U. L. REV.) 277 (1990); Merrill, *supra* note 34, 991-92.

⁷³ Garrett, *supra* note 45, 63.

⁷⁴ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 SOUTHERN CALIFORNIA LAW REVIEW (S. CAL. L. REV.) 845 (1992).

floor debates. Textualism means that the interpretation of a statute should be objective rather than subjective; that is, the judge should consider how a reasonable reader of a statute would understand the words.⁷⁵ Once a court has ascertained the plain meaning of a statute, legislative history may not be considered.⁷⁶ An argument for the disregard of legislative history is that legislators often use legislative materials to influence the Executive and courts.⁷⁷ Furthermore, textualists contend that using legislative materials violates the constitutional bicameralism and presentment requirements prescribed by Article I section 7 of the U.S. Constitution, because this raises non-statutory materials on the same level as statutes.⁷⁸ As a consequence, textualists like Justices Scalia and Thomas do not only inquire the intent of Congress; but they do emphasize more whether the language of the statute is ambiguous or unclear.⁷⁹ Since textualists also investigate Congressional intent, but do not refer to legislative history, the term "historicism" instead of "intentionalism" seems more accurate.⁸⁰

In many decisions, the Supreme Court asks at *Chevron* step one whether the statute has a plain meaning or a plain language.⁸¹ Other decisions as well as concurring or

⁷⁵ WATRY, *supra* note 60, 54; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASHINGTON UNIVERSITY LAW QUARTERLY (WASH. U. L.Q.) 351 (1994); Daniel A. Farber & Brett H. McDonnell, *New Perspective on Statutory Interpretation: "Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 THE JOURNAL OF CONTEMPORARY LEGAL ISSUES (J. CONTEMP. LEGAL ISSUES) 619, 621 (2005).

⁷⁶ Eskridge, *supra* note 72, 623-24; *INS v. Cadoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring).

⁷⁷ Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. LAW REVIEW (N.Y.U. L. REV.) 74, 84 (2000); Michael A. Fitts, *Retaining the Rule of Law in a Chevron World*, 66 CHICAGO-KENT LAW REVIEW (CHI.-KENT. L. REV.) 355, 362 (1990); Larry Evans, Jarrell Wright & Neal Devins, *Congressional Procedure and Statutory Interpretation*, 45 ADMINISTRATIVE LAW REVIEW (ADMIN. L. REV.) 239, 244 (1993).

⁷⁸ John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 533; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 336.

⁷⁹ See, e.g., *Pittston Coal Group v. Sebben*, 488 U.S. at 113; *Honig, California Superintendent of Public Instruction v. Doe*, 484 U.S. 305, 326 (1988); *Young, Commissioner of Food and Drug Administration v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 465-70 (2002) (Stevens, J., dissenting, referred to written explanations placed in the Congressional Record); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995).

⁸⁰ WATRY, *supra* note 60, 8.

⁸¹ See, e.g., *K Mart*, 486 U.S. at 291-92; *Sullivan v. Stroop*, 496 U.S. at 482; *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

dissenting opinions, however, upheld the inquiry for legislative history,⁸² but more and more judgments of the Supreme Court are characterized by the “new textualism” or “plain meaning rule”.⁸³

To illustrate the importance of this question, consider two short examples in which this question played an important role. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁸⁴ the Secretary of the Interior issued a regulation that interpreted the term “harm” as a legal definition of the term “take” within Section 9(a)(1) of the Endangered Species Act to contain “significant habitat modification or degradation where it actually kills or injures wildlife”. The majority opinion, written by Justice Stevens, held that this definition was a permissible construction of the Endangered Species Act and referred therefore, *inter alia*, to the legislative history of the Act.⁸⁵ Justice Scalia, joined by the Chief Justice and Justice Thomas, stated in his dissenting opinion that the agency’s definition “makes nonsense of the word that ‘harm’ defines”.⁸⁶ Filling his opinion with dictionary citations, Justice Scalia held that “harm” in context with “take” can only mean an affirmative conduct intentionally directed against a particular animal or animals.⁸⁷ Thus, Justice Scalia does not see an ambiguous statutory term, and hence would not grant *Chevron* deference to the agency.

An example for “new textualism” in market regulation is *MCI Telecommunications Corp. v. AT&T*, written by Justice Antonin Scalia.⁸⁸ Section 203 of the Telecommunications Act requires long-distance telephone carriers to file tariffs for

⁸² See, e.g., *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990); *Mead v. Tilley*, 490 U.S. at 722; *K Mart*, 486 U.S. at 303-05 (Brennan, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991).

⁸³ Eskridge (note 72), 623; Merrill (note 34), 992; Merrill (note 75), 357; Wald (note 72), 280; Richard J. Pierce, *The Supreme Court’s New Hypertextualism: A Prescription for Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); see Daniel A. Farber, *Legal Realism and Legal Process: Statutory Interpretation and the Idea of Progress*, 94 MICHIGAN LAW REVIEW (MICH. L. REV.) 1546 (1996) (elaborating the arguments pro and con new textualism and dynamic interpretation).

⁸⁴ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). See Simona Papazian, *Sweet Home’s Effect on the Chevron Doctrine and the Increased Role of the Judiciary in Reviewing Agency Statutory Interpretations*, 7 FORDHAM ENVIRONMENTAL LAW JOURNAL (FORDHAM ENVTL. LAW J.) 543 (1996).

⁸⁵ *Sweet Home*, 515 U.S. at 704-05.

⁸⁶ *Id.*, 719.

⁸⁷ *Id.*

⁸⁸ *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218.

services and rates with the FCC and charge customers in accordance with filed tariffs. Section 203(b)(2) authorizes the FCC to “modify any requirement made by or under the authority of this section.” The Supreme Court, referring to several dictionaries, decided that the term “modify” does not include basic and fundamental changes.⁸⁹

This shift in the jurisprudence of the Supreme Court has consequences for the scope of the judicial deference granted to agencies. Congress rarely expresses its intent regarding a precise issue. Thus, according to the former inquiry under step one courts granted more deference to agency’s decision than under the new textualism.⁹⁰

The new textual understanding of *Chevron* step one matches the German investigation of an indefinite legal term. However, there seems to be a difference between *Chevron* step one and the indefinite legal term, because it requires a certain interpretive effort to investigate whether the statute is ambiguous. In contrast, the indefinite legal term is relatively easy to elaborate on. The reason is that a significant part of the investigation *Chevron* requires at step one, the normative authorization doctrine ponders in connection with the question whether there is a legislative authorization, i.e. at the German “step two”. Since *Chevron* is based on the assumption that the use of an ambiguous statute is a legislative authorization, the difference between the German and the U.S. approach is gradual rather than fundamental. Both doctrines use very similar methods of statutory interpretation. Moreover, both doctrines face the same problem: in very rare cases, the legislature speaks in explicit terms on the question of deference.⁹¹ Hence, the statute must be interpreted concerning whether courts must abstain from second-guessing an agency’s reasonable interpretation of an ambiguous statutory term. Thus, in spite of the different legal background, German and U.S. courts and scholars use similar methods to inquire the deference question.

3. *Chevron* Step Two

⁸⁹ *Id.*

⁹⁰ Scalia, *supra* note 63, 521; Merrill, *supra* note 34, 991; Merrill, *supra* note 75, 354; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 298.

⁹¹ Sunstein, *supra* note 34, 2086.

When the statute is silent or ambiguous concerning the relevant issue, the court asks whether the agency's interpretation is reasonable and permissible.⁹² Even if the reviewing court assumes that an agency's interpretation is not the one the court would have chosen, the court has to affirm when it is reasonable and permissible.⁹³ Relevant factors for the reasonability are the language, legislative history, policies, and interpretative conventions that govern the interpretation of a statute by a court.⁹⁴ The agency's interpretation may not fall outside the bounds of the ambiguity. Since there is an overlap between the arbitrary and capricious test in the Section 706(2)(A) APA test and the *Chevron* test,⁹⁵ one might state that *Chevron* step two is superfluous. However, this assumption is wrong since *Chevron* is applicable to the legal interpretation of a statute, whereas the arbitrary and capricious test is relevant for agency's policy judgment.⁹⁶ However, the similarity between *Chevron* and the arbitrary and capricious test demonstrates that the interpretation of a statute also contains policy making.⁹⁷ As a matter of fact, the Supreme Court seldom strikes down an agency interpretation at *Chevron* step two.⁹⁸

II. Foundations of *Chevron*

The two main rationales for *Chevron* are the higher political accountability of agencies as compared to courts and the agencies expertise and experience.

⁹² *Chevron*, 467 U.S. at 843; *Rust v. Sullivan*, 500 U.S. at 186 (1991); *Auer*, 519 U.S. at 457; *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 699 (1991); *Skandalis v. Rowe*, 14 F.3d 173, 179 (2d Cir. 1994).

⁹³ *Chevron*, 467 U.S. at 843; *Brand X*, 545 U.S. at 980; Laurence H. Silberman, *Chevron – The Intersection of Law & Policy*, 58 GEORGE WASHINGTON LAW REVIEW (GEO. WASH. L. REV.) 821, 825 (1990); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 8 (1999).

⁹⁴ *Chevron*, 467 U.S. at 843-45; *Pauley v. Bethenergy Mines*, 501 U.S. at 699; *Rust v. Sullivan*, 500 U.S. at 186 (1991); *Sullivan v. Stroop*, 496 U.S. at 482; *K Mart*, 486 U.S. at 291-292; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); Merrill (note 34), 977.

⁹⁵ *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000); *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995); Ronald M. Levin, *The Anatomy of Chevron: Step 2 Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1254 (1997); Sunstein (note 34), 2105; M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 97 (John F. Duffy & Michael Herz eds., 2005); BREYER, STEWART, SUNSTEIN & VERMEULE (note 45), 328.

⁹⁶ *Chevron*, 467 U.S. at 865-66; *Republican National Comm. v. Federal Election Comm.*, 76 F.3d 400, 407 (D.C. Cir. 1996); *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1451-52 (D.C. Cir. 1988).

⁹⁷ See, *infra*, C.II.1.

⁹⁸ See *Whitman v. American Trucking*, 531 U.S. 457, 481 (2001); *AT&T Corp. v. Iowa Utilities*, 525 U.S. at 387-92.

1. Agencies as Policy-Making Institutions

The interpretation of an ambiguous statute necessarily involves policy judgment. Agency decisions involve reconciling conflicting policies.⁹⁹ The resolution of ambiguity in a statutory text is mostly a question of policy and not of law.¹⁰⁰ Hence, *Chevron* step one investigates whether the issue of statutory interpretation is a question of law or a question of policy.¹⁰¹ If the statute is ambiguous, then it is a question of policy.¹⁰² The resolution of a policy issue cannot be a question of “right” or “wrong”, but rather only of “reasonable” or “unreasonable”.

Judges are not part of either branch of the government, and therefore may not reconcile competing political interests on their own personal policy preferences.¹⁰³ By contrast, the Chief Executive is directly accountable to the people. Judges, who do not have constituencies, have a duty to respect legitimate policy choices made by those who do.¹⁰⁴ The exercise of policy is the duty of the executive, and not of courts.¹⁰⁵ Agency decision-making is more democratic than judicial decision-making because the agencies are subject to the oversight and supervision of the President, who has been elected by the people and who is politically accountable.¹⁰⁶ Thus, agencies are more politically accountable than courts. One example is the *Chevron* case itself: the new interpretation of the Clean Air Act resulted from the presidential shift from Carter to Reagan.¹⁰⁷

⁹⁹ *Chevron*, 467 U.S. at 865; *Brand X*, 545 U.S. at 980; Sunstein, *supra* note 37, 194; Silberman, *supra* note 93, 822; Weiser, *supra* note 93, 28.

¹⁰⁰ *Pauley v. Bethenergy Mines*, 501 U.S. at 699; *Pierce*, *supra* note 34, 304; Sunstein, *supra* note 34, 2086.

¹⁰¹ *Pierce*, *supra* note 34, 304.

¹⁰² *Id.*

¹⁰³ *Chevron*, 467 U.S. at 865; *Brand X*, 545 U.S. at 982.

¹⁰⁴ *Chevron*, 467 U.S. at 866.

¹⁰⁵ *Chevron*, 467 U.S. at 844-45; *Brown & Williamson*, 529 U.S. at 132; Scalia, *supra* note 63, 515; Farina, *supra* note 34, 466.

¹⁰⁶ Merrill, *supra* note 34, 978-79. Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 BOSTON COLLEGE LAW REVIEW (B.C. L. REV.) 757 (1991) criticizes this argument.

¹⁰⁷ *Chevron*, 467 U.S. at 838.

A decision in which the Supreme Court explicitly applied the *Chevron* doctrine to a policy choice is *New York v. FERC*.¹⁰⁸ In its Order No. 888, the FERC decided, *inter alia*, not to regulate bundled retail transmissions, because it did not have jurisdiction over those transmissions. The Supreme Court held that this “was a statutorily permissible policy choice.”¹⁰⁹ Hence, the characteristic of agencies as policy-making institutions is one rationale for the application of the *Chevron* doctrine.¹¹⁰

2. Agency Expertise

As stated in the introduction, in contrast to private and criminal law cases, prior to the decision of an administrative law court there is an agency’s decision. This leads to another rationale of *Chevron*: the agency expertise and experience.¹¹¹ The Supreme Court often emphasizes the advance of the agencies as compared to the courts when the subject matter is technical, complex, and dynamic.¹¹² In *Chevron*, the Supreme Court noted: “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”¹¹³ Especially in the complex field of telecommunications and energy regulation, the Supreme Court often refers to the *Chevron* doctrine.

In *AT&T v. Iowa Utilities Board*,¹¹⁴ the Supreme Court had to decide, *inter alia*, about the FCC’s interpretation of the term “network elements” in Section 251(c) of the

¹⁰⁸ *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002). See Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY LAW REVIEW (ENERGY L.J.) 59, 62 (1988), providing further examples for the application of the *Chevron* doctrine in the field of energy regulation.

¹⁰⁹ *New York v. FERC*, 535 U.S. at 3.

¹¹⁰ Garrett, *supra* note 44, 56.

¹¹¹ Pierce, *supra* note 34, 303; Nelson, *supra* note 108, 62; Weiser, *supra* note 93, 9-10; ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 467 (1993); Magill, *supra* note 95, 85.

¹¹² *Chevron*, 467 U.S. at 863; *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *Brand X*, 545 U.S. at 1002-03; *Brown & Williamson*, 529 U.S. at 132; *Reporters Committee for Freedom of the Press*, 816 F.2d at 734; *Pauley v. Bethenergy Mines*, 501 U.S. at 697; *Mead*, 533 U.S. at 228; *Barnhart v. Walton*, 535 U.S. at 222; *Rust v. Sullivan*, 500 U.S. at 187; see also Richard A. Posner, *Theories of Economic Regulation*, 5 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE (BELL J. ECON. & MAG. SCI.) 350 (1974); Silberman, *supra* note 93, 823; Weiser, *supra* note 93, 27.

¹¹³ *Chevron*, 467 U.S. at 843-845, 866; see also *Rust v. Sullivan*, 500 U.S. at 186.

¹¹⁴ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366.

Telecommunications Act. The term “network elements” is defined in Section 153(29). Section 251(c) entitles companies seeking to enter local markets to gain access to the incumbent monopolistic carrier’s local telephone service. A requesting carrier can obtain such access by purchasing local telephone services for resale to end users. It then interconnects its own facilities and equipment with the incumbent’s network, and leases network elements of the incumbent’s network on an unbundled basis. The FCC issued a rule in which it applied the definition of “network elements” to include items such as operator services and directory assistance, operational support systems, and vertical switching functions. The incumbent local carrier argued that a network element must be part of the physical facilities and equipment used to provide local phone service. The Supreme Court granted *Chevron* deference to the FCC’s interpretation and affirmed the FCC in this part of its decision.¹¹⁵

*Verizon v. FCC*¹¹⁶ concerned the regulation of rates charged by incumbent telephone local exchange carriers (ILECs). Section 252(d) of the Telecommunications Act directs the FCC to prescribe methods for state utility commissions to use in setting rates for the sharing of those elements as provided in Section 251(c). According to Section 252(d) of the Telecommunications Act, those rates have to be “just and reasonable”, and, *inter alia*, shall be based on the cost ... of providing the interconnection or network element, Section 252(d)(1)(A)(i). The FCC treated those costs as “forward-looking economic cost.” This is the sum of the total element long-run incremental cost (TELRIC) and a reasonable allocation of forward-looking common costs. The Supreme Court cited a decision reiterating that “the breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”¹¹⁷

In *National Cable & Telecommunications Association v. Brand X Internet Services*¹¹⁸, the FCC concluded that cable companies selling broadband Internet service do not provide “telecommunications servic[e]” in the sense of Title II of the Communications Act. The Supreme Court upheld the decision of the FCC, stating

¹¹⁵ *Id.* at 387. However, the Supreme Court rejected the FCC’s interpretation regarding the requirements that access to proprietary elements was “necessary” and whether lack of access to nonproprietary elements would “impair” an entrant’s ability to provide local service. See Section 251(d)(2).

¹¹⁶ *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

¹¹⁷ *Verizon*, 535 U.S. 467, citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

¹¹⁸ *Brand X*, 545 U.S. at 31.

that the Commission is in a far better position than the Court to decide this question.¹¹⁹ It held that “[n]othing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission’s use of its expert policy judgment to resolve these difficult questions.”¹²⁰

Section 5 of the Flood Control Act of 1944 authorizes the Secretary of Energy, acting through Administrators of regional Power Marketing Administrations, to fix rates for the sale of hydroelectric power generated at federally owned dams. The norm provides that “the rate schedules [shall] become effective upon confirmation and approval by the Secretary.” The FERC as the Secretary’s delegate approved and placed into effect new schedules increasing rates on an interim basis. Respondent cities, who had entered into power purchase contracts with the Government, filed suit, contending that interim rates violated Section 5 of the Flood Control Act. The Supreme Court, in *U.S. v. City of Fulton*, granted *Chevron* deference¹²¹ and upheld the decision of the FERC.

D. Comparison Between the *Chevron* Rationales and the Normative Authorization Doctrine

I. Constitutional and Administrative Legal Backgrounds

Congress is the primary lawmaking institution.¹²² Hence the onus is on Congress to solve the conflict of competence between agencies and courts. When Congress has not decided the issue, but has delegated the authority to act with the force of law to the agencies, then it can be assumed that the interpretative authority has been

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *United States v. City of Fulton*, 475 U.S. 657, 666 (1986).

¹²² Merrill, *supra* note 34, 979.

delegated to the agency as well.¹²³ This rationale is similar to the German foundation of the normative authorization doctrine. As shown above, Art. 19(4), 20(3) and 97(1) of the Basic Law require the parliament to decide whether the courts have to grant deference to an agency's decision or not. Furthermore, Congress as well as the German parliament – the Bundestag – are familiar with the jurisprudence on the scope of judicial review.¹²⁴ If they desired to abolish it, they would have to enact a law to that effect.

A constitutional tenet that has to be considered when applying *Chevron* is the non-delegation doctrine. According to *Chevron*, Congress delegates law-interpreting authority to agencies. However, Congress itself must decide basic questions of “great economic and political” significance, especially the question whether to regulate or not, and may not leave it to agency's discretion.¹²⁵ This requirement finds its equivalence in the German “reservation of law doctrine” (*Grundsatz vom Vorbehalt des Gesetzes*) and the “essentials theory” (*Wesentlichkeitstheorie*). According to those doctrines, parliament has to decide basic questions itself and may not delegate them to the executive.¹²⁶

The difference between independent regulatory agencies in the U.S. and the non-independent agencies in Germany is not of significant importance in this context. Recall that in the U.S., market regulation is enforced by independent regulatory commissions,¹²⁷ e.g. the Federal Railroad Commission (FRC), the Federal Energy Regulatory Commission (FERC), or the Federal Communications Commission (FCC). German agencies may not be independent. However, the *Chevron* doctrine is relevant for every agency and not only for independent regulatory commissions. The *Chevron* case itself effected a decision of the EPA, which is not an independent regulatory commission.

¹²³ *Brown & Williamson*, 529 U.S. at 159; Merrill, *supra* note 34, 979; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 343; Sunstein, *supra* note 37, 198.

¹²⁴ Scalia, *supra* note 63, 517.

¹²⁵ *Brown & Williamson*, 529 U.S. at 160; *MCI Telecommunications v. AT&T*, 512 U.S. at 231.

¹²⁶ KOPP & SCHENKE, *supra* note 9, § 42 margin number 125; Thomas von Danwitz, *Was ist eigentlich Regulierung?*, 2004 DIE ÖFFENTLICHE VERWALTUNG 977, 983. See Art. 87f(1) of the Basic Law, explicitly requiring a federal law: “In accordance with a federal law requiring the consent of the Bundesrat, the Federation shall ensure the availability of adequate and appropriate postal and telecommunications services throughout the federal territory.”

¹²⁷ See *Humphrey's Executor*, 295 U.S. 602 (1935).

II. Applicability of Chevron's Rationales in Germany

1. Agencies as Policy-Making Institutions

A significant question in the contemporary German administrative legal system is whether courts have to grant deference to an agency's interpretation of statutes in the field of market regulation. At the end of the 20th century, the European Union obligated the member states to establish so-called regulatory agencies which are to pursue the creation of effective competition and the supply of the population with universal services at affordable prices. The Federal Communications Commission (FCC) or the Federal Energy Regulatory Commission (FERC) served as role-models for the European directives and hence for their domestic implementation.¹²⁸ The German law hitherto did not know such agencies. The most important German regulatory agency is the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (FNA – *Bundesnetzagentur*).

Due to the principle of democracy, only the ministers are politically accountable in Germany, whereas agencies generally are only law enforcing institutes. Several facts indicate, however, that the FNA has a special role in the German executive branch. It is a separate higher federal authority within the scope of business of the Federal Ministry of Economics and Technology.¹²⁹ Since 2005, the FNA regulates network infrastructures in multiple sectors. Its task is to support, by liberalization and deregulation, the further development of competition in the electricity, gas, telecommunications, postal, and railway infrastructure market.¹³⁰ There are many reasons to assume that the FNA is not only a law-enforcing, but also a policy-making authority.

¹²⁸ Masing, *supra* note 3, 559; Martin Bulinger, *Regulierung als modernes Instrument zur Ordnung liberalisierter Wirtschaftszweige*, 2003 DEUTSCHES VERWALTUNGSBLATT 1355 (1356); Hans-Heinrich Trute, *Regulierung – am Beispiel des Telekommunikationsrechts*, in: DER WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART – FESTSCHRIFT FÜR WINFRIED BROHM ZUM 70. GEBURTSTAG 169 (170) (Carl-Eugen Eberle, Martin Ibler & Dieter Lorenz eds., 2002); Karl-Heinz Ladeur, *Regulierung nach dem TKG*, 1998 KOMMUNIKATION UND RECHT 479.

¹²⁹ Section 1 of the Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen [Act on the Federal Network Agency] of 7 July 2005, BGBl. I at 1970.

¹³⁰ See Section 1 of the Telecommunications Act, Section 1(2) of the Energiewirtschaftsgesetz [EnWG, Energy Industry Act] of 7 July 2005, BGBl. I at 1970, Section 1 of the Postgesetz [PostG, Postal Act] of 22 December 1997, BGBl. I at 3294, and Section 1(1) of the Allgemeines Eisenbahngesetz [AEG, Railroad Act] of 27 December 1993, BGBl. I at 2378.

First, there is an organizational specialty. In most of its decisions, especially in market regulation, the FNA decides through ruling chambers. Those ruling chambers are similar to the deciding boards of the independent regulatory commissions in the U.S. This is a novum in German administrative law. Even though Sections 88 ff. of the German APA include provisions concerning committees, those provisions are rarely ever used. Administrative acts are normally issued by a single official, who represents the agency. As shown,¹³¹ one rationale for the normative authorization doctrine is the special embodiment of the procedure or the deciding organ, such as the Federal Review Board for Publications Harmful to Young Persons. This rationale is applicable here as well, as the trial-like¹³² ruling chamber procedure is new in Germany. It finds its role-model in the complex U.S. adjudication and rulemaking procedure.

Second, the trial procedure as prescribed in Section 137 of the Telecommunications Act¹³³ underlines the importance of the FNA. In case of a ruling chamber decision in telecommunications, only appeals to the trial court (*Verwaltungsgericht*)¹³⁴ and the revision to the Federal Administrative Court (*Bundesverwaltungsgericht*) are possible. The trial court is authorized to review questions of fact and law, the Federal Constitutional Court may only review questions of law. An appeal against the decision of the trial court to the court of appeals (*Oberverwaltungsgericht*), which also may review facts and law, is ruled out. Thus there is only one rather than two

¹³¹ See, *supra*, B.III.2.b).

¹³² See Section 135 of the Telecommunications Act:

“Hearings, Oral Proceedings

(1) The Chamber is to give parties concerned the opportunity to state their views.

(2) Where appropriate, the Chamber may give persons representing business circles affected by the proceedings the opportunity to state their views.

(3) The Chamber shall decide on the matter in question on the basis of public oral proceedings; subject to the agreement of the parties concerned, it can take its decision without oral proceedings. At the request of any of the parties concerned or on the Chamber's own initiative the public is to be excluded from part or all of the proceedings if it poses a threat to public order, specifically to national security, or to an important trade or operating secret.”

¹³³ See Section 137(3) of the Telecommunications Act:

“(3) [A]ppeals (on issues of fact and law) against judgments and appeals (on procedural issues) against other decisions of the administrative court shall be ruled out.”

¹³⁴ Responsible lower court for actions against decisions of the FNA is the Trial Court of Cologne (*Verwaltungsgericht Köln*).

instances of reviewing the fact-finding. The reason for the shortening of the procedure is to facilitate decisions to invest in telecommunication markets.¹³⁵ Otherwise, investors may be scared by lengthy and cumbersome administrative trials.¹³⁶

Last, even though the FNA is not an independent agency, it is a separate agency within the scope of business of the ministry.¹³⁷ In contrast to the provisions of the Act Against Restraints of Competition, a so-called ministerial decision is not foreseen.¹³⁸ In case of a legal dispute, neither the head of the FNA nor the Federal Ministry of Economics and Technology can quash the decision made by the ruling chambers. Furthermore, Section 61 of the German Energy Industry Act and Section 117 of the German Telecommunications Act provide that all directives issued by the Federal Ministry of Economics and Technology shall be published in the Federal Gazette (*Bundesanzeiger*). In the case of the Energy Industry Act, the publication must even include the reasons. The so-caused transparency may increase the inhibition threshold of the ministry to issue such orders.¹³⁹ In addition to that, according to Section 3(1) of the Act on the Federal Network Agency it is the president of the FNA – and not, as usual, the ministry – who shall lay down the administration and order of business by rules of procedure. However, the rule of procedure shall require confirmation by the Federal Ministry of Economics and Technology.

¹³⁵ BERND HOLZNAGEL, CHRISTOPH ÉNAUX & CHRISTIAN NIENHAUS, TELEKOMMUNIKATIONSRECHT 67 (2nd ed. 2006).

¹³⁶ The situation in the field of energy regulation is similar. Here, the Higher Court of Appeals (*Oberlandesgericht*) is the first instance. An appeal against the decisions of the Higher Court of Appeals is only possible at the Federal Court of Justice (*Bundesgerichtshof*).

¹³⁷ Section 1 of the Act establishing the Federal Network Agency.

¹³⁸ See Section 42(1) of the Gesetz gegen Wettbewerbsbeschränkungen [GWB, Act against Restraints on Competition] of 15 July 2005, BGBl. I at 2114:

“Ministerial Authorization

(1) The Federal Minister of Economics and Technology shall, upon application, authorize a concentration prohibited by the *Bundeskartellamt* if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. In this context the competitiveness of the participating undertakings in markets outside the scope of application of this Act shall also be taken into account. Authorization may be granted only if the scope of the restraint of competition does not jeopardize the market economy system.”

¹³⁹ CHRISTIAN KOENIG, JÜRGEN KÜHLING & WINFRIED RASBACH, ENERGIERECHT 196 (2006); CHRISTIAN KOENIG, SASCHA LOETZ & ANDREAS NEUMANN, TELEKOMMUNIKATIONSRECHT 218 (2004).

The special expertise of the FNA is underlined by the fact that there is an Advisory Council constituted at the FNA.¹⁴⁰ It consists of 16 members of the German Bundestag and 16 representatives of the German Bundesrat. According to Section 120 of the Telecommunications Act, the Advisory Council shall participate in certain regulatory decisions, especially concerning award proceedings for requiring telecommunication frequency assignment. The Advisory Council is entitled to request measures to implement the aims of regulation and to secure universal service and to obtain information and comments.

2. Agency Expertise

The expertise rationale matches the German normative authorization doctrine. According to the normative authorization doctrine,¹⁴¹ one of the reasons to grant deference to agencies' decisions is given when courts reach the functional limits of adjudication, i.e. when agencies' decisions are too complex and based on a dynamic development. The argument of agency expertise also applies to some German agencies, e.g. the FNA. The FNA in Germany is concerned with highly technical and economic issues. Market-regulating agencies use economic theory to predict the consequences of a particular action and to determine whether the action is in accordance to the statute.¹⁴² Therefore, the FNA is furnished with many experts in these fields and has a technical advantage compared to courts. This distinguishes the FNA as an agency for economic regulation from other agencies concerned with the prevention of danger.

The substantial law also reveals that the FNA has latitude not reviewable by courts. It is not clear in every case whether the agency enjoys discretion, freedom of planning, or authority to interpret. As shown above, *Chevron* step two is very similar to the arbitrary and capricious test in Section 706 APA.¹⁴³ Thus, even *Chevron* may not clearly distinguish between discretion and interpretation.

E. Summary and Conclusion

¹⁴⁰ Section 5 of the Act on the Federal Network Agency.

¹⁴¹ See, *supra*, B.III.2.b).

¹⁴² Patricia M. Wald, *Judicial Review of Economic Analyses*, 1 YALE J. ON REG. 43, 44 (1983).

¹⁴³ See, *supra*, C.I.3.

A comparative legal investigation requires that both the factual problem and the proposed legal solution are functionally equivalent. In the U.S., the *Chevron* doctrine is the relevant standard on whether courts have to grant deference to agency's interpretations. According to German courts and scholars, the normative authorization doctrine decides whether courts have to grant deference to an agency's interpretation of statutes. Both doctrines are based on the assumption that it is the legislature who decides whether courts have to grant deference. However, the normative authorization theory has a further prerequisite compared to the *Chevron* doctrine. According to *Chevron*, the authorization of the agency lies in the ambiguity of the statute. German courts require an indefinite legal term and in addition an explicit or implicit legislative authorization to interpret the term. They have decided certain cases with the assumption that the legislation authorized the agency to make a final interpretation. The difference between the second requirement of the German normative authorization doctrine and the U.S. *Chevron* doctrine is marginal, because many of the requirements of the German "step two" are already included in the rationales of *Chevron*, e.g. the agency expertise or the procedure.

As a conclusion, there are many similarities between the *Chevron* doctrine and the German normative authorization doctrine. Both doctrines facilitate changes in agency interpretation.¹⁴⁴ This is necessary in a time of increasing technological progress and economic interdependence. Due to more and more complex technological and economic development, broad delegation to the Executive is a characteristic of the modern state. *Chevron* and the German normative authorization doctrine did not form the increasing power of the administration, but are a reaction to it. It is the duty of legal scholars and courts to deliver a framework and justification to handle this occurrence. When a statute uses an ambiguous or indefinite legal term, there is not one correct legal interpretation but rather a whole spectrum of correct decisions.¹⁴⁵

An implementation of *Chevron* in Germany would shift the balance of powers towards the executive. What would be the alternative? Either the legislative enacts "excruciatingly detailed statutes",¹⁴⁶ or the court trials take a longer time to analyze the highly complicated estimations and calculations of the agencies. Neither are desirable. Hence, it has to be accepted that the technological and economic

¹⁴⁴ Scalia, *supra* note 63, 518.

¹⁴⁵ Redeker, *supra* note 29, 762; Scalia, *supra* note 63, 517.

¹⁴⁶ Merill, *supra* note 34, 970.

progress creates powerful agencies. However, those agencies have to be controlled. Both the *Chevron* clause and the German normative authorization doctrine guarantee a sufficient standard of judicial control.

Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation

By Federico Fabbrini¹

A. Introduction

On 23 July 2008, the President of the French Republic promulgated – two days after the final vote of the two chambers of Parliament sitting jointly in *Congrès* (Congress) – the constitutional revision bill “*de modernisation des institutions de la Vème République*” (of modernization of the institutions of the Fifth Republic) n° 2008-724.² The bill was mainly based on the research work done by a *comité des sages* (expert committee) “*de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République*” (for the reflection and the proposition on the modernization and rebalancing of the institutions of the Fifth Republic).³ It had been presented by the Government to Parliament on 23 April

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² The full text of the revision bill is published on the Official Journal of the French Republic n. 171 of 24 July 2008 and available in French in the web site of the Government at: [http://www.legifrance.gouv.fr/affichTexte.do?cidTexte= JORFTEXT000019237256](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256) as well as is in the web sites of the National Assembly at: http://www.assemblee-nationale.fr/13/dossiers/reforme_5eme.asp and of the Senate at: <http://www.senat.fr/dossierleg/pjl07-365.html>, last accessed 25 September 2008. These websites also contain in French the bill presented by the Government and all the documents of the parliamentary revision procedure, including the report of the Law Commissions, the amendments proposed and the text of the bill as approved in both Chambers. For an overview of the political context in which the revision took place see: Stefano Ceccanti, *Le istituzioni ed il sistema politico dopo il primo quinquennato*, in LA FRANCIA DI SARKOZY, 27 (Gianfranco Baldini & Marc Lazar eds., 2007); Paolo Passaglia, *Le elezioni legislative in Francia: più conferme che novità*, 4 QUADERNI COSTITUZIONALI (QUAD. COST.) 860 (2007)

³ The full text of the research work is available in French in the web site of the *Comité* at: <http://www.comite-constitutionnel.fr>, last accessed 25 September 2008. The website also provides in

2008 and twice voted for by the *Assemblée Nationale* (National Assembly) and the *Sénat* (Senate).

According to Article 89 of the 1958 French Constitution,⁴ which sets out the amendment procedures,⁵ “(1) The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Prime Minister and to the members of Parliament. (2) A Government or private member's bill for amendment must be passed by the two Assemblies in identical terms. The amendment shall become definitive after approval by referendum. (3) Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly”.

The constitutional bill n° 2008-724 “is a coherent *ensemble*, that proposes a global and ambitious institutional change”⁶ and since roughly 33 articles over 89 of the French Constitution of 1958 have been changed, the bill has been called “the most important revision to which the Fundamental Law has been submitted”.⁷ All branches of Government are affected by the reform, which operates in three directions. A first series of provisions is aimed at renovating the exercise of the executive power by solving the ambiguous diarchy between the President of the

French the Presidential decree establishing the *Comité* as well as the name of its 12 members and all the documents thereof among which the final report entitled *UNE VÈME RÉPUBLIQUE PLUS DÉMOCRATIQUE* (2007). For an overview of the work of the *Comité* and an early comment on its proposals see: Federico Fabbrini, *Francia: è arrivata l'ora dell'exception d'inconstitutionnalité?* 1 *QUAD. COST.* 150 (2008); Federico Fabbrini, *Breaking from Tradition: Reshaping the French System of Constitutional Review*, 2 *WASHINGTON UNDERGRADUATE LAW REVIEW (WULR)* No.1 1 (2008)

⁴ The full text of the French Constitution is available in English in the International Constitutional Law web site at http://www.servat.unibe.ch/law/icl/fr00000_.html, last accessed 25 September 2008.

⁵ BERTRAND MATHIEU & MICHEL VERPEAUX, *DROIT CONSTITUTIONNEL* 220 (2004). Since the constitutional revision of 1962, however, another way of amending the Constitution has been found in Article 11 that affirms: “The President of the Republic may, on the proposal of the Government during sessions, or on a joint motion of the two Assemblies published in the Official Journal, submit to a referendum any bill dealing with the organization of the governmental authorities [...]”. See, Dominique Rousseau, *L'invenzione continua della V Repubblica*, in *L'ORDINAMENTO COSTITUZIONALE DELLA V REPUBBLICA FRANCESE*, 34, 75 (Dominique Rousseau ed., 2000)

⁶ *UNE VÈME RÉPUBLIQUE PLUS DÉMOCRATIQUE*, 7 (2007)

⁷ Patrick Roger, *La dernière mue?*, in *LE MONDE*, 21 May 2008

Republic and the Prime Minister,⁸ recognizing the supremacy of the first and at the same time limiting his prerogatives. A second set of measures is devoted to the legislative power with the goal to rehabilitate the role of Parliament by eliminating some of the harsher instruments of rationalized parliamentarianism introduced in 1958.⁹

A third field of intervention then, concerns judicial power and *droits du citoyen* (rights of the citizen) and certainly the most noteworthy provision here is the introduction of a new form of *a posteriori* constitutional review of legislation (*contrôle de constitutionnalité*). Indeed, even though all the changes are of great relevance, this one constitutes a “true revolution”¹⁰, since France was one of the few democracies that didn’t allow its courts to review whether acts of Parliament infringed over the fundamental rights of citizens. As such, I will devote the paper to this specific topic, with the purpose of highlighting the magnitude of the reform and its rupture with the French constitutional tradition. As I will argue, the major effect of the constitutional revision is to import into the French legal system the ideas of constitutional adjudication elaborated by Hans Kelsen.

Kelsen, a Czech jurist and the author of the *Reine Rechtslehre* (Pure Theory of Law),¹¹ is the architect of the centralized model of constitutional review.¹² Drawing inspiration from the American constitutional system, Kelsen believed that the Constitution ought to be the supreme law of the land and that no statute could violate it. However he did not support the idea that ordinary courts should have the duty to verify the compliance of acts of Parliament with the *Grundnorm* (Fundamental law), on the understanding that the function of constitutional review was in a sense a legislative function, even if purely negative.¹³ He supported, therefore, the institution of *ad hoc* (special) Constitutional Tribunals, charged with

⁸ CARLO FUSARO, LE RADICI DEL SEMIPRESIDENZIALISMO, 75 (1998)

⁹ STEFANO CECCANTI, LA FORMA DI GOVERNO PARLAMENTARE IN TRASFORMAZIONE, 107 (1997)

¹⁰ Gerome Courtois, *Le Parlement à qui perd gagne*, in LE MONDE, 21 May 2008

¹¹ HANS KELSEN, REINE RECHTSLEHRE (1960). English translation by Max Knight: PURE THEORY OF LAW (1989)

¹² MAURO CAPPELLETTI, IL CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPARATO 52 (1972)

¹³ Michel Rosenfeld, *Constitutional Adjudication in Comparative Perspective: The European Model as Against the American in Terms of Politics, Law and Interpretation* (Association of American Law Schools, Conference on Constitutional Law, Washington, 5-8 June 2002) available at: <http://www.aals.org/profdev/constitutional/rosenfeld.html>, last accessed 25 September 2008.

the specific duty to review the constitutionality of legislation and whose judges should be nominated *intuitu personae* (with special criteria).¹⁴

To assess the impact of a transformation that, metaphorically, brings Kelsen in Paris, I will structure my paper as follows. In part B, I will give an overview of the main characteristics and of the evolution of French constitutional review, analyzing the historical French distrust toward an institution that was considered to be the instrument of the *gouvernement de juges* (government of judges). In part C, I will illustrate the main features of the new form of *a posteriori* constitutional review introduced by the revision bill by describing its technicalities as well as certain caveats that need to be taken into account while considering the reform. Finally, in part D, I will underline how much this constitutional reform is inspired by the theoretical elaboration of Kelsen, and what are the effects of this Kelsenian legacy on the system of human rights protection in France.

B. Rousseau in Paris

Traditionally France has been averse to judicial review of legislation¹⁵. Since the Revolution of 1789, a strict separation of powers rule prevailed and the judiciary was not given the right to interfere with the activities of the legislature. While during the *Ancient Règime* judges could contest the legitimacy of a bill passed by the legislative power, “no court since the Revolution has ever invalidated or otherwise refused to apply a statute on the grounds that it was unconstitutional”¹⁶. Thus, contrary to what happened in the United States (where the Supreme Court¹⁷, “with a stroke of genius”, acknowledged its power to review legislation,¹⁸ making true Madison’s motto that “ambition must be made to counteract ambition”¹⁹), supremacy of Parliament and the lack of judicial review have been the defining

¹⁴ Jörg Luther, *La composizione dei tribunali costituzionali e le autonomie territoriali*, in LA COMPOSIZIONE DELLA CORTE COSTITUZIONALE: SITUAZIONE ITALIANA ED ESPERIENZE STRANIERE, 67, 76 (Adele Anzon & Gaetano Azzariti eds., 2004)

¹⁵ Michel Troper, *Judicial Power and Democracy*, in 1 EUROPEAN JOURNAL OF LEGAL STUDIES (EJLS) No.2 1 (2007)

¹⁶ ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE, 8 (1992)

¹⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

¹⁸ Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and in Europe*, in 5 GERMAN LAW JOURNAL No.6, 685, 687 (2004)

¹⁹ FEDERALIST PAPERS, number LI (J. Madison)

features of French “‘Jacobinian’ constitutionalism” since the time of the Revolution.²⁰

The theorization of Jean Jacques Rousseau was of particular relevance in shaping the traits of French Republicanism. According to the Swiss philosopher, “only *la volonté générale* (the general will) can direct the State according to the object for which it was instituted, *i.e.*, the common good”²¹. Since the general will “considers only the common interest”²² - diverging from the will of all, which “takes private interest into account, and is no more than a sum of particular wills”²³ - it ought be embodied in an organ representing the social compact, *i.e.* the legislator, and expressed through general and abstract laws. The Declaration of the Rights of Men and Citizen of 1789 codified this vision, stating in its Article 6, “*la loi est l’expression de la volonté générale* (the act of Parliament is the expression of the general will)”.

The consequence of Parliamentary sovereignty was to reduce the role of judges to that of “*la bouche qui prononce les paroles de la loi* (the mouth that pronounces the words of the law), mere passive beings, incapable of moderating either its force or rigor”,²⁴ as Charles de Secondat, Baron de Montesquieu, famously wrote. Not surprisingly, “the judge’s role in this centralized system is subservient and bureaucratic. [...He] may be required to verify the existence and applicability of a command but he may not investigate the work of the legislature any further”.²⁵ The dogma of “*la intangibilité de la loi* (the intangibility of the law)”²⁶ together with the myth of the judge as a “syllogism machine”²⁷, then, consolidated during the

²⁰ AUGUSTO BARBERA, *LE BASI FILOSOFICHE DEL COSTITUZIONALISMO*, 6 (1997)

²¹ JEAN JACQUES ROUSSEAU, *LE CONTRAT SOCIAL*, Book 2, Chapter 1 (1762) Italian Translation by Valentino Gerratana: *IL CONTRATTO SOCIALE*, 63 (1965)

²² *Id.*, Book 2, Chapter 3. Italian Translation by Valentino Gerratana: *IL CONTRATTO SOCIALE*, 68 (1965)

²³ *Id.*

²⁴ MONTESQUIEU, *L’ESPRIT DES LOIS*, Book 11, Chapter 6 (1748) Italian translation by Mauro Cotta : *IL PENSIERO POLITICO DI MONTESQUIEU* 207 (1995)

²⁵ STONE SWEET, *supra* note 16, 26

²⁶ Maria Rosaria Donnarumma, *Un mito infranto: l’intangibilità de la loi. Il controllo della ‘ragionevolezza’ delle leggi in Francia*, in 4 *DIRITTOE SOCIETÀ* (DIR. SOC.) 521, 579 (2007)

²⁷ Charles Eisenmann, *La pensée constitutionnelle de Montesquieu*, in *LA PENSÉE POLITIQUE ET CONSTITUTIONNELLE DE MONTESQUIEU: BICENTENAIRE DE L’ESPRIT DES LOIS 1748-1948*, 133 (Boris Mirkine-Guetzévitch & Henri Puget eds., 1952)

nineteenth century and survived in the Fifth Republic notwithstanding the burial of the parliamentary regime²⁸.

Indeed, when the Framers of the Constitution of 1958 instituted a *Conseil Constitutionnel* (Constitutional Council) – endowed with the function, among others, of exercising *a priori* constitutional review – their intent was not to create an organ charged with the duty to protect fundamental rights.²⁹ The Framers, in fact, intended to create an arm against the deviation of the parliamentary regime.³⁰ “The function of the Council in this system was made explicit: to facilitate the centralization of executive authority and to ensure that the system would not somehow revert to traditional parliamentary orthodoxy”³¹. The Council itself originally complied with this understanding: *e.g.* in the 1962 *Loi référendaire*³² decision, it refused to review referendum laws, thereby defining itself as a mere “organ that regulates the activity of the public powers”.³³

The peculiarities of French constitutional review indicate the continuity with the ‘Jacobinian’ tradition. According to Article 61(2) – as revised in 1974³⁴ – “acts of Parliament may, before their promulgation, be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*, sixty deputies or sixty senators”. As such, the Council rules *a priori*, “on the constitutionality of bills which have been definitively adopted by Parliament but not yet promulgated by the executive,”³⁵ in

²⁸ Stefano Ceccanti, *La V Repubblica: un lento (e parziale) avvicinamento alle altre forme di governo europee*, in *L'ORDINAMENTO COSTITUZIONALE DELLA V REPUBBLICA FRANCESE*, 13, 14 (Dominique Rousseau ed., 2000)

²⁹ LOUIS FAVOREU & LOIC PHILIP, *LE GRANDES DECISIONS DU CONSEIL CONSTITUTIONNEL*, 177 (2005)

³⁰ TEXTES ET DOCUMENTS SUR LA PRATIQUE INSTITUTIONNELLE DE LA VEME REPUBLIQUE, 5 (Didier Maus ed., 1978)

³¹ STONE SWEET, *supra* note 16, 47

³² *Loi référendaire* Décision 62-20 DC, 6 November 1962

³³ Louis Favoreu, *Le Conseil Constitutionnel régulateur de l'activité normative des pouvoirs publics*, in *REVUE DU DROIT PUBLIC (RDP)* 7 (1967)

³⁴ Before the Constitutional Revision law n° 1974-904 only the President of the Republic, the Prime Minister and the Presidents of the two Assemblies could refer a law to the Constitutional Council. See: JEAN JACQUES CHEVALLIER, GUY CARCASSONNE & OLIVIER DUHAMEL, *LA VE REPUBLIQUE: 1958-2004* 231(2004)

³⁵ STONE SWEET, *supra* note 16, 8

the absence of a concrete case and only upon referral of five political authorities.³⁶ Therefore, once the law is enacted "it may not be challenged or made subject to any jurisdictional control other than that of the Parliament itself".³⁷

Notwithstanding its structural limits, the Constitutional Council remarkably expanded its role in the course of the years. With a juridical *coup d'Etat*,³⁸ in the 1971 decision *Liberté d'association*³⁹ the Council incorporated the Preamble of the Constitution of 1958 within the *bloc de constitutionnalité* (norms of reference for exercising constitutional review).⁴⁰ The Constitution of 1958 was entirely dedicated to the framework of government. The Preamble of 1958, on the contrary, recalled the Declaration of Rights of Men and Citizen of 1789 (the *magna charta* of individual liberties) and the Preamble of the Constitution of 1946 (a charter dedicated to social rights). The effect of the 1971 decision, then, was to invent a compound Bill of Rights and to transform the Council into an institution charged with the protection of fundamental rights.⁴¹

The "strengthening"⁴² of the Constitutional Council was also favored by the 1974 constitutional revision that extended the *droit de saisine* (right of referral) to the Council to sixty deputies or sixty senators.⁴³ In fact, "by the mid-1970s, the politics of review [became] a central features of opposition tactics"⁴⁴ with an increase in the quality and quantity of cases to be decided by the Council. However, the main features of French judicial review remained largely unchallenged, as the Council would still review legislation *a priori*, abstractly and upon request of political authorities. Only in the 1990s were several attempts made to reform the system, but

³⁶ GIUSEPPE DE VERGOTTINI, *DIRITTO COSTITUZIONALE COMPARATO*, 186 (2004)

³⁷ STONE SWEET, *supra* note 16, 8

³⁸ Alec Stone Sweet, *The Juridical Coup d'Etat and the Problem of Authority*, in 8 *GERMAN LAW JOURNAL* No.10, 915, 922 (2007)

³⁹ *Liberté d'association* Décision 71-44 DC, 16 July 1971

⁴⁰ Bertrand Mathieu & Michel Verpaux, *La garantie des droits et libertés*, in *LE CONSEIL CONSTITUTIONNEL* 91, 92 (Michel Verpaux & Maryvonne Bonnard eds., 2007)

⁴¹ FAVOREU & PHILIP, *supra* note 29, 254

⁴² DOMINIQUE ROUSSEAU, *DROIT DU CONTENTIEUX CONSTITUTIONNEL*, 63 (2004)

⁴³ See, *supra*, note 34

⁴⁴ STONE SWEET, *supra* note 16, 60

all of them failed⁴⁵. In the recent comprehensive constitutional reform, though, the effort proved successful and eventually a form of *a posteriori* judicial review has been introduced in France.

C. The *exception d'inconstitutionnalité*

Article 26 of the constitutional revision bill n° 2008-724 introduces in the French Constitution a new provision: Article 61-1, will be placed immediately after Article 61 (which, as we saw in the previous section, disciplines *a priori* constitutional review). The provision reads as follows:

“(1) When, in the course of a controversy before a judicial court, it is claimed that a statutory disposition infringes over the rights and liberties that the Constitution safeguards, the Constitutional Council may be requested to judge on the issue by referral of the *Conseil d’Etat* (Council of State)⁴⁶ or of the *Cour de Cassation* (Court of Cassation)⁴⁷, which shall decide in a timely manner. (2) An organic law sets the conditions for the application of this article”⁴⁸.

Article 61-1 grants the Constitutional Council the power to exercise *a posteriori* constitutional review. The technical mean by which this goal is achieved is the

⁴⁵ A constitutional bill amending the Constitution to introduce *a posteriori* constitutional review was submitted to Parliament by the President of the Republic Mitterand on 30 March 1990, under the advice of the former President of the Constitutional Council Badinter. After two separate votes in the *Assemblée Nationale* and the *Sénat*, however, the two chambers of Parliaments, because of the opposition of the conservative party, didn't agree on the same text and therefore the proposal failed. A similar draft written by constitutional law professor Vedel was later presented to Parliament on 10 March 1993, but was dismissed by new conservative majority elected in spring. For a historical overview of these event see: NICOLO ZANON, *L'EXCEPTION D'INCONSTITUTIONNALITE IN FRANCIA: UNA RIFORMA DIFFICILE* 93 (1990); Didier Maus, *Nouveaux regards sur le contrôle de constitutionnalité per voie d'exception*, in *MELANGES EN L'HONNEUR DE MICHEL TROPER*, 665, 668 (Véronique Champeil-Desplats et al. eds., 2007). The main features of the two proposal are analyzed by: JEAN LUC WARSMANN, *RAPPORT FAIT AU NOM DE LA COMMISSION DES LOI CONSTITUTIONNELLES DE L'ASSEMBLEE NATIONALE N. 892-2008 439* (2008) available in French at: <http://www.assemblee-nationale.fr/13/rapports/r0892.asp>, last accessed 25 September 2008.

⁴⁶ The *Conseil d’Etat* is the French Supreme Court for administrative justice. It hears both recourses against decrees and other executive decisions as well as appellate cases from lower administrative courts. Its decisions are final.

⁴⁷ The *Cour de Cassation* is the French Supreme Court for civil and criminal justice. It is the main court of last resort in France (excluding cases of administrative justice, which go before the *Conseil d’Etat*)

⁴⁸ Author's translation. For the French text consult the Official Journal of the French Republic n. 171 of July 24th 2008 available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256>, last accessed 25 September 2008.

exception d'inconstitutionnalité (plea of unconstitutionality), an instrument shared by all the juridical systems that have attributed the power of constitutional review to *ad hoc*, centralized courts, following the theorization of Hans Kelsen. In those systems, ordinary and administrative judges can not review on their own the constitutionality of legislation; however, when it is claimed in the course of a legal dispute that the statute that commands the case is contrary to the Constitution, the judge may suspend the decision of the case in front of him and recur to the Constitutional tribunal asking for a ruling on the matter.⁴⁹

If the Constitutional tribunal does not declare the statute unconstitutional, the judge may proceed in the decision of the controversy applying the statute in its ruling. If, otherwise, the Constitutional tribunal does declare the statute unconstitutional, the judge should decide the case without taking into consideration the voided statute.⁵⁰ Accordingly, Article 62 of the French Constitution, as amended by Article 30 of the constitutional revision bill, affirms that: "(2) A statutory disposition declared unconstitutional on the basis of Article 61-1 is repealed as from the day of the publication of the ruling of the Constitutional Council [...] (3) The decisions of the Constitutional Council shall not be subject to appeal to any jurisdiction. They shall be binding on the governmental authorities and on all administrative and jurisdictional authorities".⁵¹

A peculiarity of the *exception d'inconstitutionnalité* mechanism recently introduced in the French Constitution, however, is that not all judges are allowed to recur to the Constitutional Council and ask whether a statutory disposition infringes over the rights and liberties that the Constitution safeguards. Indeed, only the top ordinary and administrative tribunals, *i.e.* the *Conseil d'Etat* and the *Cour de Cassation*, may defer a matter to the Constitutional Council. When lower judges face a constitutional question, they shall, on the contrary, submit the matter to their Supreme Ordinary or Administrative Court. The high court has the duty to verify the seriousness of the matter in a timely manner; only when the seriousness test is passed the Constitutional Council may then be called upon to review the allegedly unconstitutional statute.

⁴⁹ CAPPELLETTI, *supra* note 12, 98

⁵⁰ Gustavo Zagrebelsky, *La giurisdizione costituzionale*, in MANUALE DI DIRITTO PUBBLICO, 657, 666 (Giuliano Amato & Augusto Barbera eds., 1991)

⁵¹ See, *supra*, note 48

The choice not to allow lower judges to recur directly to the Constitutional Council is known as 'double-filter mechanism' and has drawn much criticism.⁵² Indeed, even though this mechanism has several advantages since, "on one hand it shelters the Council from being over flooded by lower judges' referrals, and, on the other hand it allows the *Conseil d'Etat* and the *Cour de Cassation* to participate in the elaboration of the Council's case law",⁵³ the proposal contains various limitations. In fact, not only the beneficial effects of a direct dialogue between judges and Constitutional Council will be neutralized,⁵⁴ but also the achievement of the reform could be jeopardized. After all, "shouldn't the high courts be interested in defending their competences by deferring only an infinitesimal quantity of cases to the Council and thus making no sense of the reform?"⁵⁵

The draft constitutional bill elaborated by the *comité de sages* did not grant to the Supreme Administrative and Ordinary Courts the power to review the seriousness of the constitutional question to be submitted to the Constitutional Council. The 'double filter mechanism' materialized during the Parliamentary work under the lobbying of the *Conseil d'Etat* which, besides a judicial function, also furnishes legal advice to the Government in drafting legislation.⁵⁶ Traditionally the most important French institution, the *Conseil d'Etat* is very deferential toward the legislature but endowed of a power of moral suasion *vis à vis* the other branches of government.⁵⁷ However, as the Constitutional Council in the course of time strengthened its position, becoming the prominent institution in the protection of fundamental liberties, the *Conseil d'Etat* has seen its prerogatives diminishing.

The success of the *Conseil d'Etat* in establishing a 'double filter mechanism' that allows it (and the *Cour de Cassation*) to interfere in the dialogue between the lower judges and the Constitutional Council may, nevertheless, turn out to be a 'Pirrus victory'. Such a complicated mechanism may be a disincentive for lower ordinary

⁵² ZANON, *supra* note 45, 129

⁵³ JEAN LUC WARSMANN, *supra* note 45, 439

⁵⁴ Valerio Onida, *Giurisdizione e giudici nella giurisprudenza della Corte Costituzionale*, in CORTE COSTITUZIONALE E SVILUPPO DELLA FORMA DI GOVERNO IN ITALIA, 159 (Paolo Barile et al. eds., 1984)

⁵⁵ The question was raised by professor Mathieu during an interview with the members of the Law Commission of the *Assemblée Nationale* and is reported in WARSMANN, *supra* note 45, 438

⁵⁶ Aldo Maria Sandulli, *La giustizia*, in ISTITUZIONI DI DIRITTO AMMINISTRATIVO, 381, 392 (Sabino Cassese ed., 2004)

⁵⁷ Andrea Patroni Griffi, *Il Conseil Constitutionnel e il controllo della 'ragionevolezza'*, in 1 RIVISTA ITALIANA DIRITTO PUBBLICO COMUNITARIO (RIDPC) 39, 73 (1998)

or administrative judges, dealing with an allegedly unconstitutional statute, to raise constitutional questions. Moreover, because in the French legal order treaties have a supra-legislative status, lower judges already have the power to review on their own whether a statute complies with international treaties (*contrôle de conventionnalité*).⁵⁸ And since there are international conventions that have catalogues of rights quite comparable to a constitutional Bill of rights, this review tends to resemble heavily a form of decentralized judicial review.⁵⁹ When assessing the impact of the current constitutional reform, therefore, this caveat also needs to be taken into account.

D. Kelsen in Paris

Beyond the technical debate about the features of the *exception d'inconstitutionnalité* mechanism introduced by the recent constitutional revision, the importance of the reform itself shall be highlighted. The introduction of a form of *a posteriori* constitutional review of legislation represents a milestone in the juridical history of a country that was traditionally hostile to judicial review and the "limitation of parliamentary sovereignty".⁶⁰ Eventually, also in France, individuals will be allowed to contest, in the course of a concrete controversy, by recurring to the Constitutional Council (via the *Conseil d'Etat* and the *Cour de Cassation*), the legitimacy of a statute that unjustly abridges the rights and liberties recognized by the Constitution. As such, this novelty may be appreciated as an "important step of the development of the *Etat de droit* (Rule of Law)".⁶¹

From this point of view, the innovation brought forward by the constitutional revision bill, reconciles the French juridical system with the theoretical and practical work of Hans Kelsen, who was favourable - as anticipated in the introduction - towards the realization of "a *Verfassungsgerichtsbarkeit* (constitutional justice), that is supportive of granting the function of safeguarding the Constitution to an *independent tribunal*".⁶² Indeed, according to the Czech jurist, the legal order is

⁵⁸ MAUS, *supra* note 45, 675

⁵⁹ Olivier Dutheillet de Lamothe, *Contrôle de constitutionnalité et contrôle de conventionnalité*, in MELANGES EN L'HONNEUR DE DANIEL LABETOULLE, 1, 13 (Ronny Abraham et al. eds., 2007)

⁶⁰ BARBERA, *supra* note 20, 13

⁶¹ UNE VEME REPUBLIQUE, *supra* note 2, 90

⁶² Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* in DIE JUSTIZ, 576-628 (1930) Translated in Italian by Carmelo Geraci: LA GIUSTIZIA COSTITUZIONALE 239 (1981); italics in the original text

a “*Stufenbau* (hierarchical structure)”⁶³ of norms, on the top of which stands the Constitution. It is therefore necessary to arrange certain technical means in order to assure the supremacy of the fundamental norm. Attributing to a specially created court the concrete function of “voiding the unconstitutional statutes secures the main and most effective warranty for the Constitution”.⁶⁴

Moreover, the *exception d'inconstitutionnalité* introduced by the constitutional reform, by establishing a ‘double filter’ to be exercised by the Supreme Ordinary and Administrative Courts, directly evokes the method set up in the Austrian Constitution written by Kelsen and embodying *par excellence* the idea of constitutional justice.⁶⁵ Indeed, in the 1920 Austrian Constitution, as modified in 1929,⁶⁶ the “unconstitutionality of an act of Parliament could be alleged only in front of the *Obster Gerichtshof* (Supreme Ordinary Court) or of the *Verwaltungsgerichtshof* (Supreme Administrative Court), as only those tribunals could suspend in that case the proceeding pending in front of them and ask the *Verfassungsgerichtshof* (Constitutional Court) to declare the statute void whenever they doubted of its constitutionality”.⁶⁷

A significant indication of the realignment of the French system of constitutional review with the Kelsenian model of constitutional adjudication is the approval by the *Sénat* of amendment n. 321, introducing in the bill a new Article 24-3 affirming: “In the Constitution, the words ‘Constitutional Council’ shall be replaced by the words ‘Constitutional Court’”. The socialist Senator (and former President of the Constitutional Council) Badinter presented the amendment on the following argument: “The name adopted in 1958 appeared already paradoxical [...] as the institution had essentially a judicial function. This role will be strengthened by the introduction of the *exception d'inconstitutionnalité*. It ought therefore be recognized

⁶³ HANS KELSEN, *REIHNE RECHTSLEHERE* (1934) Translated in Italian by Renato Treves: *LINEAMENTI DI DOTTRINA PURA DEL DIRITTO*, 105 (2000)

⁶⁴ Hans Kelsen, *La garantie juridictionnelle de la Constitution (La justice constitutionnelle)*, in XXXV RDP, 197-257 (1928) Translated in Italian by Carmelo Geraci, *LA GIUSTIZIA COSTITUZIONALE*, 170 (1981)

⁶⁵ WARSMANN, *supra* note 45, 435

⁶⁶ CAPPELLETTI, *supra* note 12, 94

⁶⁷ Hans Kelsen, *Judicial Review of Legislation. A comparative study of the Austrian and the American Constitution*, in *JOURNAL OF POLITICS (JOUR. OF POL.)*, 183-200 (1942) Translated in Italian by Carmelo Geraci, *LA GIUSTIZIA COSTITUZIONALE*, 308 (1981)

to the institution its true identity of 'court', following the example of its European homologues".⁶⁸

The amendment was later rejected in the *Assemblée Nationale* and did not appear in the final version of the revision bill. However, the proposal to change the name of the institution – "Court and Council, as if it was the difference between a judge and a consultive committee"⁶⁹ – also symbolically highlights the spreading awareness that with the approval of the reform the Council will wear 'Kelsenian clothes', becoming a true judicial institution charged with the duty to review constitutionality of legislation. Thus in the comparative perspective, the introduction of a mechanism of *a posteriori* constitutional review of legislation certainly terminates the anomaly of the French constitutional model and determines a convergence with most of the other European systems of constitutional adjudication, shaped over the Kelsenian prototype.⁷⁰

In other respects, the shift of the French judicial system toward a Kelsenian ratio, can be appreciated in the context of the transformation of the European legal space in a true *Grundrechtsgemeinschaft* (community of rights).⁷¹ Indeed, at the supranational level, both the European Court of Justice and the European Court of Human Rights have begun taking human rights seriously⁷² and claiming a constitutional status⁷³. The human rights' case law of these two European courts is becoming increasingly influential and often used as an example even by the domestic courts of states with well-built 'legal nationalism'.⁷⁴ There is, therefore, a strong incentive (if not duty) for the national jurisdictions to elevate their standard

⁶⁸ Available in French at: http://ameli.senat.fr/amendements/2007-2008/365/Amdt_321.html, last accessed 25 September 2008.

⁶⁹ BARBERA, *supra* note 20, 13

⁷⁰ ANDREA MORRONE, *IL CUSTODE DELLA RAGIONEVOLEZZA*, 506 (2000)

⁷¹ Armin Von Bogdany, *The European Union as a Human Rights Organization?*, in 37 COMMON MARKET LAW REVIEW (CML REV), 1307, 1308 (2000)

⁷² Marta Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in I DIRITTI IN AZIONE, 1, 37 (Marta Cartabia ed., 2007)

⁷³ Luzius Wildhaber, *A constitutional future for the European Court of Human Rights?*, in 23 HUMAN RIGHTS LAW JOURNAL (HRLJ) 161 (2002)

⁷⁴ Joel Andriantsimbazovina, *La prise en compte de la Convention européenne des droits de l'homme par le Conseil Constitutionnel*, in 18 CAHIERS DU CONSEIL CONSTITUTIONNEL 1 (2004); MAUS, *supra* note 45, 673; Jacques Ziller, *L'eupérisation du droit : de l'élargissement des champs du droit de l'Union européenne à une transformation des droits des Etats membres*, in EUI Law Dept. Working Papers No.19, 6 (2006)

of rights' protection to comply with the growing attention to fundamental liberties at the European level.⁷⁵

France's paradox was that while individuals had, since the eighteenth century, the right to contest the legality of an executive decree in front of the administrative judge (i.e. the *Conseil d'Etat*), they did not have any means to defend their rights at the national level from an unconstitutional statute. Individuals now have at their disposal, however, effective remedies at the supranational level and may benefit of a last resort mechanism in front of the European Court of Human Rights. From this point of view, as Prime Minister Fillon acknowledged, with the constitutional revision bill "this French idiosyncrasy ends".⁷⁶ Even though the reform does not establish an individual direct recourse to the Constitutional Council, like the German *Verfassungsbeschwerde* (Constitutional complaint), the introduction of *a posteriori* constitutional review significantly strengthens the protection of individual rights at the domestic level.⁷⁷

Moreover, by amending the 1958 Constitution with the introduction of the *exception d'inconstitutionnalité* the revision bill n° 2008-724 recognizes that democracy today finds its *raison d'être* "in pluralistic social and institutional systems, empowered by the progressive erosion of the classical concept of sovereignty as a consequence of the processes of international and supranational institutional integration".⁷⁸ Contemporary multicultural societies are characterized by a growing concern and demand for individual liberty.⁷⁹ The 'Jacobinian' belief that liberties are created and secured through the activity of a god-almighty legislature is thus gradually substituted by the consciousness that the will of the majority may violate the rights

⁷⁵ Diletta Tega, *La CEDU nella giurisprudenza della Corte Costituzionale*, in 2 QUAD. COST. 431 (2007)

⁷⁶ The speech of Prime Minister Fillon at the *Assemblée Nationale* on May 20th 2008 to present the constitutional revision bill is available at: http://www.assemblee-nationale.fr/13/cri/2007-2008/20080161.asp#INTER_0, last accessed 25 September 2008.

⁷⁷ MAURO CAPPELLETTI, *LA GIURISDIZIONE DELLE LIBERTÀ* (1955)

⁷⁸ MORRONE, *supra* note 70, 524

⁷⁹ See, among others: NORBERTO BOBBIO, *L'ETÀ DEI DIRITTI* (1992), GUSTAVO ZAGREBELSKY, *IL DIRITTO MITE* 97 (1992); PETER HÄBERLE, *DIRITTO E VERITÀ* (2000); ALESSANDRA FACCHI, *I DIRITTI NELL'EUROPA MULTICULTURALE* 21 (2001); ANTONIO CASSESE, *I DIRITTI UMANI OGGI* 3 (2005); Jürgen Habermas, *Lotta di riconoscimento nello stato democratico di diritto*, in *MULTICULTURALISMO*, 63 (Jürgen Habermas & Charles Taylor eds., 2005); ALESSANDRA FACCHI, *BREVE STORIA DEI DIRITTI UMANI* 144 (2007);

of the minority and by the 'liberal' confidence that a better deal is to empower judges of the duty to enforce individual rights.⁸⁰

In other words, the introduction in France of a form of *a posteriori* constitutional review of legislation embodies a transition from the logic of Rousseau, - of the inanimate judge *bouche de la loi*, expression of a general will that may never be wrong - to the logic of Kelsen. Here, the constitutional judge is the guardian (*Hüter*) of the fundamental values enshrined in the Constitution - a living institution that safeguards the principle of pluralism and the individual liberties whenever the exercise of the majority power degenerates into tyranny. Kelsen's vision, by recognizing that the majority may express its wishes in so far that it does not violate the rights of the individual, represents a successful attempt to balance the need of unity with the desire of pluralism.

E. Conclusion

French academics and politicians have been conscious for the last twenty years of the need to renovate the 1958 Constitution, especially of the need to introduce a new form of *a posteriori* constitutional review of legislation. Notwithstanding the fact that all such proposals failed, the reform was seen as something "that for sure [was] about to happen, soon or later".⁸¹ Therefore, even though the revision bill was approved in *Congrès* only by a one vote-majority, with the conservative and centrist members of Parliament voting in favour of it and the socialist against it (with the noteworthy exception of the socialist Deputy and vice President of the *comité des sages* Lang), there was a wider *consensus* on the suitability of the reform. Moreover, many of the innovations contained in the revision bill, such as the proposal to introduce a form of *a posteriori* constitutional review, had been for many years a battle horse of the left and strongly opposed by the conservative right.⁸²

⁸⁰ Just to recall some of the wide literature on the issue, see: Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION*, 17 (1996); BARBERA, *supra* note 20, 10; MORRONE, *supra* note 70, 508; Giorgio Bongiovanni, *Spirito protestante, libertà religiosa e Dichiarazioni americane e francese*, in *LA DICHIARAZIONE DEI DIRITTI DELL'UOMO E DEL CITTADINO DI GEORGE JELLINEK*, v, xviii (Giorgio Bongiovanni ed., 2002); MICHAEL IGNATIEFF, *UNA RAGIONEVOLE APOLOGIA DEI DIRITTI UMANI*, 34 (2003); Dieter Grimm, *Il significato della stesura di un catalogo europeo dei diritti fondamentali*, in *DIRITTI E COSTITUZIONE NELL'UNIONE EUROPEA*, 5 (Gustavo Zagrebelsky ed., 2003); Armin Von Bogdany, *Il costituzionalismo nel diritto internazionale*, in *POPOLI E CIVILTÀ*, 183 (Gustavo Gozzi & Giorgio Bongiovanni eds., 2006)

⁸¹ Louis Favoreau, *La questione pregiudiziale de constitutionnalité*, in *MELANGES EN L'HONNEUR DE PHILIPPE ARDANT*, 265 (Guy Carcassonne et al. eds., 1999)

⁸² Stefano Ceccanti, *Ora la Francia è un pò meno gollista*, in *IL RIFORMISTA*, 22 July 2008

A recent interview in French newspaper *Le Monde*⁸³ gives evidence of the bipartisan support for the introduction of the *exception d'inconstitutionnalité*. Asked to comment on the new Article 61-1 of the French Constitution, the gaullist Deputy, former Prime Minister and President of the *comité des sages*, Balladur affirmed that this innovation "is one of the most important measures that we propose". However, the socialist Senator Badinter had also declared in the same interview, "I am obviously favourable to the *exception d'inconstitutionnalité* [...] In a democracy, it should not be given effect to an act of Parliament that is contrary to the fundamental rights of citizen. This is a primary necessity. This reform is therefore a step forward".

Indeed, the introduction of *a posteriori* constitutional review represents a milestone innovation in French constitutional history. The design of this new legislative reality undeniably represents a change in paradigm, that was made possible by peculiar political and historical conditions.⁸⁴ On one hand, there is increasing attention towards human rights at the European level. On the other hand, contemporary societies become more pluralistic and multicultural. The concern for a stronger protection of fundamental rights and liberties, under both internal and external pressures, is at the core of this institutional change. Even though certain caveats are necessary, it is likely that *a posteriori* constitutional review will shape the life of the Fifth Republic in the years to come. Embracing the Kelsenian model of constitutional adjudication means breaking with the 'Jacobinian' constitutional tradition that considers the law as the expression of a general will that may never be wrong, but also putting the individual, with his bundle of rights and liberties, at the heart of the constitutional cosmos.

⁸³ Gerome Courtois, *Réforme constitutionnelle: Badinter face à Balladur*, in LE MONDE, 11 June 2008

⁸⁴ HOFFMANN-RIEM, *supra* note 18, 689

European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems

By Oreste Pollicino*

A. Introduction¹

“No one would accord the status of extradition to legal assistance for the surrender of an accused between a court in the *Land* of Bavaria and a court in the *Land* of Lower Saxony, or between a court in the autonomous community of Catalonia and a court in the autonomous community of Andalusia, from which it follows that assistance should not be regarded as extradition where it takes place in the context of the European Union.”²

The analogy, perhaps a bit strained, was made by Advocate General Jarabo Colomer³, in his final attempt to trace as sharp as possible the boundary between

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¹ The present article is a revised and specific part of the broader and different paper “EU Enlargement and European Constitutionalism through the looking glass of the interaction between national and supranational legal systems”, forthcoming in a changed and revised version in *Yearbook of European Law* (2009) and as a working paper in the series of the Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law (<http://www.jeanmonnetprogram.org/>). Another version of the same article is forthcoming on the *European Journal of Legal Studies* (www.ejls.eu). All my thanks to Wojciech Sadurski and to Christina K. Kowalik-Banczyk for their very helpful comments on an earlier draft of the Paper. I would like to thank also Erna Fütö for her very helpful support in researching the relevant German literature.

² See conclusions to C-303/05 *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, para. 45, fn. 40

³ See conclusions to C-303/05 *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, following the preliminary reference of the Belgian *Cour d'Arbitrage*, with regard to the alleged Community illegitimacy of framework decision 2002/584/JHA on the European arrest warrant. The relevant decision of the Court of Justice dated 3 May 2007, is available at: <http://curia.europa.eu/jurisp/cgi->

the European arrest warrant, which is mainly a judicial tool aimed at granting legal assistance in criminal matters among Member States, and extradition, an intergovernmental procedure having a political goal, as provided in a number of international⁴ and European conventions, with the latter being adopted under article K 3 of the Maastricht Treaty⁵, and which were all replaced as of 1 January 2004, by framework decision 2002/584/JHA (the Justice and Home Affairs Council) relating, specifically, to the European arrest warrant (the “Framework Decision”).

It seems, instead, that the above mentioned boundary line should have not been clearly perceived by the Supreme and Constitutional and Supreme Courts of Warsaw, Karlsruhe and Nicosia, if, in 2005, with their judgments respectively issued on 27 April⁶, 18 July⁷ and 7 November⁸, they annulled the respective Polish,

bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-303%2F05&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mts=&resmax=100&Submit=Submit, last accessed 1 October 2008.

⁴European Convention on extradition dated, 13 December 1957 and supplementary protocols of 15 October 1975 and 17 March 1978 and European Convention for terrorism repression of 27 January 1977, for the part concerning extradition.

⁵Convention on streamlined extradition procedures among European Member States of 10 March 1995 and the Convention on extradition among European Member States of 27 November 1996.

⁶*Trybunał Konstytucyjny* (Polish Constitutional Court), ruling 27 April 2005 (P 1/05), available in a vast summary in English at: http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_GB.pdf last accessed, 1 October 2008.

⁷*Bundesverfassungsgericht* (German Federal Constitutional Court), ruling 18 July 2005 (2236/04) in *Diritto&Giustizi@*, available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html, last accessed 1 October 2008.

⁸ Cyprus Supreme Court, ruling 7 November 2005 (294/2005), available only in the Greek language at: www.cylaw.org. With that decision, the Court noted that the national regulation for the adoption of the framework decision establishing the arrest warrant, was incompatible with art. 11.2 (f) of the Constitution, according to the original wording of which: “no one can be deprived of their freedom except for those cases provided for by the law.” According to the disposition, those cases comprised solely the extradition of foreigners, thus ruling out the possibility that a Cypriot citizen could be extradited. Particularly, the Cypriot Court recalled, as a ruling of 1991 had already clarified how the extradition of a Cypriot citizen was banned by art. 11.2 F of the Constitution. The ruling, in fact, made express reference to the *Pupino* case, therefore recalling the discretionary freedom left to the single national judges, as regards assessment of the national regulation’s compliance to a framework decision adopted in the third pillar. On the strength of this ruling, art. 11 of the Constitution was reviewed and today it provides that: “the arrest of a citizen of the Republic aimed at surrender following the issue of an arrest warrant, is possible only with regard to facts and actions subsequent to Cyprus’ adherence to the European Union.”

German and Cypriot national law implementing Framework Decision 2002/584, due to their alleged conflict with the respective constitutional prohibitions against extraditing nationals.

In chronological order, the fourth national Constitutional Court to rule over the compliance between the national regulation implementing the Framework Decision and the constitutional system, has been the Court of Brno⁹. In manifest opposition with the above-mentioned current trend, on 3 May 2006, the said Court rejected the constitutional issue, thus declaring the Czech criminal code dispositions adopted following the transposition into national legislation of the European Framework Decision on the European Arrest Warrant (EAW), not in contrast with article 14 (4) of the Constitution, according to which: "no Czech citizen shall be removed from his/her homeland."

However, a number of issues trouble this scenario: advancements in and sudden stoppages relating to the European integration process regarding the third pillar; Member States' reluctance to yield sovereignty in criminal matters; the effects and binding character of the framework decisions adopted under article 34 (2)(b) EU, and settlement opportunities for inter-constitutional conflicts. The above are only a few of such issues.

Therefore, an in-depth study of the outlined issues appears necessary, starting from the evolution and state of the art of the European integration process within the third pillar, along with a brief description of objectives and features of Framework Decision 2002/584 establishing the European arrest warrant. The study will then move on to a comparative analysis, using a case law based approach, concerning the delicate question of constitutional compatibility entailed in the adoption of the framework decision at the Member State level, to eventually conclude, after examining the European Court of Justice's reasoning in its recent European Arrest Warrant, with an attempt to consider the different judicial stances in the context of the current state of European constitutionalism.

⁹Czech Constitutional Court (*Ústavní Soud*) ruling 3 May 2006 (Pl. ÚS 66/04), available in English at: http://angl.concourt.cz/angl_verze/doc/pl-66-04.php, last accessed: 1 October 2008

B. The Evolution of European Integration in Criminal Matters: From Nothing to the Amsterdam Treaty

In 1977, the then French President Valéry Giscard d'Estaing, was among the first¹⁰ to envisage a form of Member States cooperation also in criminal matters¹¹, when, in his famous declaration at the European Council of Brussels, he urged the need for a European judicial area of security and justice, pointing out that although, "the Treaty of Rome, in its economic-oriented view made no reference whatsoever to these issues, it was high time, in order to safeguard the four fundamental freedoms at the heart of the European economic constitution, especially the one relating to the free movement of persons, to put in place suitable standard conditions of security and justice within the European judicial area, to be accessible to all."..At the same time, the European Commission proposed common measures to counter Community-wide frauds and official corruption.

The sole achievement worth noting from those first years was the Dublin agreement of 4 December 1979, relating to the implementation among Member States of the European Convention of Strasbourg of 27 January 1977, concerning repression of terrorism. The following years have been characterized by a halt in Member States' cooperation activities in criminal matters. Only in the mid-1980s,

¹⁰ The very first time that proposed cooperation in criminal matters at a European level was advanced was in 1975, in concurrence with the establishment of the Trevi Group, an intergovernmental forum to improve interstate cooperation in counterterrorism matters within the EC.

¹¹ For an overview on the evolution and state of the art of the cooperation process in criminal matters, and more generally on the institutional evolution concerning the third pillar, see for the Italian doctrine: C. Tracogna, *La tutela della libertà personale nel procedimento di consegna attivato dal mandato d'arresto europeo*, in RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE, 988 (2007). Also the broad bibliography mentioned, among which: *La cooperazione in materia di giustizia e affari interni tra comunitarizzazione e metodo intergovernativo*, in IL DIRITTO DELL'UNIONE EUROPEA 481 (1998); E. Gatti-A. Venegoni, *La cooperazione giudiziaria in materia penale dal "Terzo Pilastro" alla Convenzione*, in QUEST. GIUST. 407 (2003); B. Piattoli, *Cooperazione giudiziaria e pubblico ministero europeo* 65 (2002); L. Salazar, *La cooperazione giudiziaria in materia penale*, in GIUSTIZIA E AFFARI INTERNI NELL'UNIONE EUROPEA. IL "TERZO PILASTRO" DEL TRATTATO DI MAASTRICHT 133 (N. Parisi-D. Rinoldi eds. 1998). For comparison with foreign literature, see Mitsilegas, *The constitutional implications of mutual recognition in criminal matters in the EU*, in 43 COMMON MARKET LAW REVIEW 1277 (2006); G. De Kerchove, *L'Europe Pénale: Bilan et Perspectives*, in POLICE AND JUDICIAL CO-OPERATION IN THE EUROPEAN UNION 335 (A. Moore ed. 2004); P.J. Kuijper, *The evolution of the third pillar from Maastricht to the European Constitution: institutional aspects*, in 41 COMMON MARKET LAW REVIEW 609 (2004); EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE (N. Walker ed. 2004).

and even then merely at the intergovernmental level, the European Single Act provided for a European political cooperation plan.¹²

If the creation of an autonomous pillar (the third one) aimed at Member State cooperation in matters of justice and home affairs (JHA) occurred in 1992 with the Maastricht Treaty, it was only in 1997 with the Amsterdam Treaty that such pillar, which was renamed “police and judicial cooperation in criminal matters,” acquired its proper juridical dimension. The amendment to former article K 1 (currently article 29) EU, aims in fact, at the adoption of common measures also in the field of “judicial cooperation in criminal matters” through closer and mutual assistance among police forces, customs and judicial authorities. Furthermore - and wherever necessary - *Member States’ criminal laws* could be harmonised in order to “ensure the citizens a higher level of safety in an area of freedom and justice.” The latter objective is officially listed among the aims of the European Union, as set out in article 2 EU.

In other words, the Amsterdam Treaty is extremely innovative, as compared to the Maastricht Treaty, firstly for adding to the scope of Member State intergovernmental cooperation the mutual assistance in civil and criminal matters. Secondly, and more importantly, it is innovative since it expresses, for the sake of, “a higher level of freedom in an area of security, liberty and justice which grants prevention and fight against crime¹³” an unprecedented will to “harmonise Member States’ national legislations in criminal matters¹⁴.” According to article 31(e), this alignment could lead to the progressive adoption of “measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”

The Amsterdam Treaty, as compared to Maastricht, opens a new scenario also in terms of the sources available to European institutions as regards the third pillar. The generalised and weaker resolutions of the Maastricht Treaty are replaced, in fact, by a wide range of viable instruments, among which figures the framework decisions provided for by article 34 (b) EU, with the precise goal of harmonising Member States’ regulatory and legislative laws and regulations in criminal matters as well. The juridical nature and the effects of the Framework Decision that

¹²M. CALMIERI, MANDATO DI ARRESTO EUROPEO, LA COOPERAZIONE COMUNITARIA IN MATERIA PENALE (2005).

¹³ Art. 3 EU.

¹⁴ Art. 29 EU.

represents the *nomen iuris* of the act inspiring the very discipline of the European arrest warrant will be discussed later on.

The third remarkable novelty brought about by the Amsterdam Treaty was to confer, for the first time, the Court of justice with interpretative powers in the field of cooperation *in criminal matters* also. It is therefore evident how the new competence, whose function is to foster dialogue between European and national Courts, also relating to sensitive matters of constitutional relevance such as security, freedom and justice, is aimed at conferring on the Court of Justice the power, optional for the Member States¹⁵, to make preliminary rulings on the validity and interpretation of the framework decisions adopted as per article 34 EU.

It was this procedure that brought the European framework decision establishing the arrest warrant to the "attention" of the Court of Justice, as will be seen in due course, when the discussion will focus on the decision that the EU judges rendered last May "in order to answer" the preliminary questions raised by the Belgian *Cour d'Arbitrage* (Arbitration Court). It should be noted that the underlying theme of the raft of implementation measures pursuant to the third pillar might be identified with the affirmation and consolidation of a *securitization ethos*.

Consequently, and to a much greater extent after 9/11¹⁶, a new awareness has emerged in terms of EU security, initially, to ensure the appropriate safeguarding and fulfilling of the four fundamental freedoms, and later on, under the Maastricht Treaty, as an autonomous achievement of the Union, which, after the creation of a European single market, has set priorities of an enhanced political nature. From an external point of view, this led to a greater credibility on an international level, whilst in terms of *home affairs*, it led to the development of a common judicial area where the circulation of people, capital and goods was accompanied by the fight against organised crime through a further cooperation between Member State

¹⁵ Currently, to our knowledge, only Spain, Hungary, Austria, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Holland, Portugal, Slovenia and Sweden have subscribed the declaration provided by art. 35 EU, conferring the power to rule over preliminary questions to the Court of Justice. This means that the other Member States, although willing, could not address the Court of Justice for a preliminary question concerning any third pillar-related issue. For an in-depth study, see M. Fletcher *The European Court of Justice, carving itself an influential role in the EU third pillar*, paper submitted for presentation at the MONTREAL INTERNATIONAL CONFERENCE 17-19 May 2007 and available at: www.unc.edu/euce/eusa2007/papers. See Also T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the preliminary Reference Procedure*, 40 COMMON MARKET LAW REVIEW 9 (2003).

¹⁶ J. Wouters and F. Naerts, *Of arrest warrants, terrorist offences and extradition deals: an appraisal of the EU's main criminal law measures against terrorism after "11 September"*, 41 COMMON MARKET LAW REVIEW 909 (2004).

jurisdictional authorities, the mutual recognition of judicial decisions, as well as by taking a step back in terms of interstate political relations of an intergovernmental nature.

C. Rules, Regulations and Aims of the European Arrest Warrant Framework Decision

The events of 9/11 were followed by an urgent need to carry out these objectives in the shortest time possible. The acceleration is evident: only a few months after the attacks, and in light of the fact that it had been years since the EU produced any legislative response to the European diplomacy¹⁷ declarations, the European Council speedily adopted, pursuant to article 34 EU and following a rather limited debate among national Parliaments and within the European one¹⁸, the Framework Decision on the Arrest Warrant and surrender procedures between Member States, with the explicit intent to replace all existent extradition-related¹⁹ instruments within the European judicial area.

As provided for by article 1 of the above-mentioned regulation, the European arrest warrant is a judicial decision issued by a Member State based on the arrest or surrender by another Member State, of a requested person for the purposes of conducting a criminal prosecution or the carrying out of a custodial sentence or detention order. It is, therefore, a cooperation mechanism of a strictly judicial nature, which permits the practical-administrative assistance among Member State²⁰ executive bodies, thus leading to the free circulation of criminal decisions, grounded on a system of *mutual trust* among the Member States' legal systems²¹.

¹⁷ See the CONCLUSIONS OF THE PRESIDENT OF THE EUROPEAN COUNCIL GATHERED IN TAMPERE, FINLAND on 15-16 October 1999, which reads as follows: "the strengthening of the mutual recognition of the judicial decisions and the necessary harmonization of the legislations, would ease the cooperation among authorities as well as the judicial protection of individual rights."

¹⁸ See Mitsilegas, *The Constitutional Implications of mutual recognition in criminal matters in the EU*, 43 COMMON MARKET LAW REVIEW 1277-1283 (2006).

¹⁹ See whereas 1 and 11 of the framework decision 2002/584. For an in-depth study of its most innovative and complex aspects, see S. Alegre, M. Leaf, *Mutual recognition in European judicial cooperation: A step too far too soon? Case study - the European Arrest Warrant*, in 10 EUROPEAN LAW JOURNAL 200 (2004).

²⁰ Whereas 9 and art. 7 of Framework Decision 2002/584.

²¹ See for comparison whereas 5, 6, 10 and art. 1 n. 2 of Framework Decision 2002/584.

The legal translation for such *mutual trust* is the principle of mutual recognition – as provided for by article 1 n. 2 of the Framework Decision – on the obligation binding on all Member States to carry out arrest warrants issued by another EU Member States.

It has been noted that, “given its adoption as a response to 9/11 events, a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences²².” In effect, the arrest warrant may be issued by any Member State for an act punishable under its legislation which involves a custodial sentence or a detention order for a period of at least twelve months, or where a sentence has been passed or a detention order has been made for sentences of at least four months.

The implementing State may set, as a condition for the surrender, a requirement that the facts pursuant to which the warrant was issued represent an offence under its legal system as well. This faculty of enforcing the double criminality rule however, does not apply – and this is one of the most innovative and complex aspects of the discipline in exam – in respect of a *numerus clausus* of 32 offences listed under article 2 (2) of the Framework Decision. It is enough, in fact, that the said crimes be provided for by the criminal law of the State issuing the arrest warrant, on condition that they are punishable with a maximum detention period of at least three years²³.

Another relevant innovation about the discipline which has drawn a number of constitutional complaints from the Member States is the permissibility of an arrest warrant issue also for a citizen of the implementing Member State, against the general practise explicitly codified by many EU Members’ Constitutions according to which state sovereignty does not permit the extradition of nationals²⁴. Within the Framework Decision, *au contraire*, the faculty awarding the executing Member State with the power to hinder the surrender of a citizen (or resident), is considered a mere exception, and namely provided for by article 4 (6), according to which, “if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.”

²² MITSILEGAS, *supra* note 17, 1284.

²³ For this and the other outlines concerning the discipline of the decision on the European arrest warrant, see the broad study by C. TRACOGNA, *supra*, note 10.

²⁴ M. Plachta, *(Non) extradition of nationals: a never ending story?* 13 EMORY INTERNATIONAL LAW REVIEW 77 (1999).

The derogation logic at the basis of the power conferred to Member States to eventually refuse the surrender of a citizen is corroborated by another paragraph, under article 5, of the Framework Decision. Under this article, additional guarantees must be provided, in specific cases, by the issuing Member state when, “a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State²⁵.”

It is evident, as Advocate General Ruiz-Jarabo Colomer pointed out in his conclusions to the aforementioned C-303/05 case, that there exist substantial differences between extradition and the European arrest warrant. The extradition procedure implicates the relationship between two sovereign states: the first one requesting cooperation from the other, which in turn decides to grant it or not on the grounds of non-eminently judicial reasons, which rather lie, in fact, in the international relations framework, where the principle of political opportunity plays a predominant role²⁶.

As for the arrest warrant, instead, it falls into an institutional scenario where judicial assistance is requested and granted within an integrated transnational judicial system. In so doing, the States, by partially giving up their sovereignty, transfer their competences to foreign authorities which have been endowed with regulatory powers.

Furthermore, the AG continues arguing that such a mechanism, “which falls within the scope of the first pillar of the Union, also operates in the third, intergovernmental, pillar – albeit with a clear Community objective, as was demonstrated in *Pupino* – by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives²⁷.” In spite of all

²⁵ In this particular instance, the additional guarantees are represented by the power to subject the surrender to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

²⁶ For an in-depth study on the extradition principle at both a national and international level, refer to *supra*, note 23. Namely the author points out how «the justification of the rule of non extradition of nationals largely derives from a jealousy guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment” (*supra*, note 23 at 99,100).

²⁷ See, *infra*, note 2, AG’s conclusions.

the differences the doctrine²⁸ may emphasize, highlighted as well in certain national legislation for the adoption of the Framework Decision²⁹, that it is clear that both measures have as their goal the surrender of a requested person to a Member State authority, for the purposes of prosecution or the carrying out of a criminal sentence.

A number of Member States have wanted to avoid the application of such a measure to one of their own citizens. In fact, before the Framework Decision's adoption, thirteen of the (then) twenty-five Member States provided for constitutional dispositions forbidding³⁰, or, somehow, limiting³¹ the extradition of nationals. No wonder, then, that the innovations of the European arrest warrant provisions caused, at the time of their adoption³² in Member States, unavoidable "constitutional disturbance." Some countries, such as Portugal³³, Slovakia³⁴, Latvia³⁵

²⁸ M. Plachta, *European Arrest Warrant: revolution in extradition*, 11 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 193 (2003); O. Lagodny, *Extradition without a granting procedure: the concept of surrender*, in HANDBOOK OF THE EUROPEAN ARREST WARRANT, 41 (T. Blekxtoon and W. Van Ballegooij eds. 2005); I. Jegouzo, *Le mandat d'arret europeen ou la premiere concretisation de l'espace judiciaire europeen*, in GAZETTE DU PALAIS 2311 (2004).

²⁹ As the Advocate General pointed out in the mentioned conclusions, the preamble to the Spanish law dated 14-3-2003, on the EAW and surrender procedures (BOE n. 65 of 17-3-2003, 10244), highlights how: "the EAW changes the classical extradition procedures so radically that one can safely say that extradition as it once was no longer exists in the framework of the relationships between Member States in matters of justice and cooperation."

³⁰ In the pre-amendment version of the constitutional texts, the inadmissibility of nationals' extradition was ratified by the German (art. 16, para 2), Austrian (art. 12, para. 1), Latvian (art. 98), Slovak (art. 23, para. 4), Polish (art. 55), Slovenian (art. 47), Finish (art. 9.3), Cypriot (art. 11.2) and to a lesser extent, by the Czech (art. 14 of the Fundamental liberties and rights' Charter) and Portuguese Constitutions.

³¹ Other constitutional texts provide, as sole exception to the extradition ban, that a different measure be imposed by an international treaty (art. 36.2 Estonian Const.; art. 26,1 Italian Const.; art. 13 Lithuanian Const.).

³² Italy was the last European country to transpose the Framework decision through its adoption, on 22 April 2005 of the 1 n. 69. See F. Impalà, *The European Arrest Warrant in the Italian legal system between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, 2-1 UTRECHT LAW REVIEW 56 (2005). It is worth noting how some very authoritative doctrine had already highlighted, before the adoption of the Framework decision's final version, its incompatibility with the constitutional principle, among others, of the preemptory nature of crime. See Caianello et al., *Parere sulla proposta di decisione quadro sul mandato di arresto europeo*, in *Cassazione penale* 462 (2002).

³³ Under art. 33 para. 3, of the Portuguese Constitution, which followed the review: "the extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant state's legal system enshrines guarantees of a just and fair trial."

and Slovenia³⁶, revised their respective constitutions before the relevant Constitutional Courts had a chance to rule on the alleged unconstitutionality of the implementing act, as what actually occurred in Poland, the Czech Republic and Cyprus.

Germany, instead, faced quite an unusual scenario: the constitutional³⁷ amendment, in fact, was carried out shortly before the adoption of Framework Decision 2002/584 to allow, under certain circumstances, the previously utterly banned³⁸ extradition of a citizen, but it did not avoid the intervention of the Karlsruhe³⁹ Federal Court over the national regulation for the adoption of the Framework Decision.

D. The *Pupino* "Acceleration"

Before dwelling on the implications arising within the above-mentioned constitutional courts' decisions concerning the relationship between interconnected legal systems, it is relevant to point out the unexpected acceleration of European integration in the areas of freedom, security and justice, brought about by a well-

³⁴ Before the review of 2001, art. 23 para. 4, provided the right for the Slovak citizens: "not to leave their homeland, be expelled or extradited to another state." The review brought to the elimination of the reference to the right not to be removed.

³⁵ In Latvia, two acts promulgated respectively on 16 June 2004 – and in force as of 30 June 2004 – and 17 June 2004 – in force as of 21 October 2004 – introduced the necessary amendments to implement the constitutional modifications to art. 98 and the other relevant parts of the code of criminal law, in order to execute the EAW of Lithuanian citizens.

³⁶ In the original version, art. 47 of the Slovenian constitution, provided the extradition ban of its citizens. Following its review, occurred with the *Constitutional Act 24- 899/2003*, the notion of surrender was added, as autonomous constitutional concept, compared to extradition. Today, art. 47 of the Slovenian constitution, states verbatim that: "no Slovenian citizen may be extradited or surrendered (in execution of a EAW), unless the said extradition or surrender order stems from an international treaty, through which Slovenia has granted part of its sovereign powers to an international organisation."

³⁷ The German constitution, in its original wording, utterly banned the extradition of a German citizen. The 47th review to the fundamental act of 29 November 2000, added to the unconditional ban provided for by 16 (2), the disposition according to which: "no German may be extradited to a foreign country. The law can provide otherwise for extraditions to a Member State of the European Union or to an international court of justice, as long as *the rule of law is upheld (Rechtsstaatliche Grundsätze)*."

³⁸ Prior to the 2000 review, art. 16 of the Basic Law was rather strict: "no German citizen may be extradited abroad."

³⁹ See, *supra* note 6.

known ECJ ruling. By manipulating the relevant EU treaty provision related to the effect of the framework decisions and reducing the gap between the Union's first and third pillar, *Pupino*⁴⁰ has contributed to exacerbate the tension at a constitutional level, with specific regard to the Member States' national implementation of the EAW Framework Decision. Precisely, the controversy originated in the request of an Italian Public Prosecutor to an Investigating Magistrate to take the testimony of eight children, witnesses and victims of abuse of disciplinary measures and grievous bodily harm, offences which Mrs. Pupino was charged with. The evidential episode, in fact, in light of an earlier collection of evidence, was not provided for under the criminal code provisions relating to the crimes being investigated.

The Investigating Magistrate, while holding that the evidential incident was a special judicial instrument whose application must be restricted solely to the cases provided for by law, and therefore that the public prosecutor's request should be rejected, pointed out the procedural drawback of this mechanism. It was noted, in fact, how limited application of the special evidential incident procedure within Italian law could actually be in breach of the provisions of Council's Framework Decision 2001/220 JHA, relating to the victim's role within the criminal proceedings adopted as per article 34 EU (the same legal basis at the heart of the arrest warrant's framework decision), according to which, if the victims are particularly vulnerable subjects, they may benefit from special treatment to best respond to their needs (articles 2 paragraph 2 and 8 paragraph 4 of Framework Decision).

It was the opinion of the Italian judge addressing the ECJ as per article 35.1 of the Treaty on the European Union (TEU) that the said special treatment should ensue in derogation to the primary rule which confers value of evidence only to witness brought before the Court, and the faculty of the judge, as opposed to the Italian legislation's provisions, to rule out the option of public testimony if this would affect the victim called as witness. However, if the conflict between the Italian and European legislation was evident, even more explicit is article 34 (b) TEU in its wording, where it says that the Framework Decisions "shall not entail direct effect."

⁴⁰ ECJ, ruling of 16-6-2005, C-105/03 in ECR, I-5285 among which see at least: V. Mazzocchi, *Il caso Pupino e il principio di interpretazione conforme delle decisioni quadro*, QUADERNI COSTITUZIONALI 884 (2005); P. Salvatelli, *La Corte di giustizia e la comunitarizzazione del terzo pilastro*, QUADERNI COSTITUZIONALI 887 (2005); and E. Spaventa, *Opening pandora's Box: some reflections on the constitutional effect of the decision in pupino*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW 5 (2007).

According to the Court of Justice, within the third pillar and in respect of framework decisions, it would be possible to extrapolate, on the basis of article 1 TEU⁴¹, and being the wording of article 34 (2)(b) EU closely inspired by article 249 (3) of the first pillar of the European Community (EC), an obligation on national judges to interpret the national regulation in conformity with the European discipline, relying on the cooperation principle between the Community and the Member States, as stated in article 10 EC. Looking at this carefully, it would entail, on the European judges' part, a bold application by way of analogy, within the third pillar intergovernmental dynamic, of the EC first pillar's jurisprudence providing for an obligation of consistent interpretation of domestic law regarding the directives not having direct effect.⁴²

To make it 'worse', the express EU Treaty provisions deny any framework decisions direct effect. Notwithstanding, and almost to counterweigh this notable *ouverture*, the Luxembourg judges remarked that, "In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*." (paragraph. 47)⁴³.

Although the conflict between European and national legislation was rather evident, the European judges did, nonetheless, contemplate the possibility of a harmonization between national law and the Framework Decision, and therefore asked the Italian judge to make a further effort in terms of consistent interpretation of the domestic law, as much in line with the European provisions. Quite obviously, such decisions came in for criticism among those who held the intergovernmental pillar free from the activist aims of the European Court of Justice (ECJ) that, in so doing, brought framework decisions much closer in essence to directives, therefore substantially reducing the Member States' discretionary power in the phase of the European provision's implementation. All this exactly just as the Member States were preparing for the implementation of the controversial arrest warrant framework decision, which lays its foundations, as already highlighted, in

⁴¹ According to which: "the present Treaty marks a further step in the process of the creation of a closer union of the peoples of Europe, where decisions be taken for the citizens' sake and in the name of transparency."

⁴² WCJ ruling 13-11-1990, C-106/89, *Marleasing* in ECR, I-4135.

⁴³ In this regard, objections were raised by the Italian, English and Swedish governments intervening in the debate, who remarked within the EU Treaty regarding the lack of a provision similar to EC Treaty's art. 10 concerning the loyal cooperation between Member States and the Community, standard feature in the ECJ jurisprudence and therefore *sine qua non* condition to set out the principle of consistent interpretation of the national legislations to EC law. See also MAZZOCCHI, *supra*, note 39, 886.

the mutual trust in the area of judicial cooperation in criminal matters among Member States.

It is precisely this principle that some of the Member States' (constitutional or supreme⁴⁴) Courts did not fully accept, as was the case for the Karlsruhe and Warsaw Courts when they declared the Framework Decision's national implementing legislation unconstitutional. Although the Polish decision (on 27 April 2005) came out a few months before the German one (on 18 July 2005), the jurisprudential analysis will start from the latter, as the Polish ruling appears best suited for a comparative study with the Czech Constitutional Court's decision (rule 3-5-2006), which, on the basis of similar constitutional parameters, came to the opposite conclusion.

E. The German Case

As previously mentioned, shortly before the implementation of the Framework Decision on the European Arrest Warrant, article 16 (2) of the German Constitution had, "thanks to a prophetic intuition", already been revised. The new provision permits derogation to the ban on extraditing a German citizen to allow his surrender to a European Union Member State or international Court, on condition that the fundamental principles of the *rule of law* be respected. In 2003, the German Minister of Justice had rejected the request of extradition to Spain submitted by the Spanish police authority against a German and Syrian national accused by the Spanish authorities of participation in a criminal association and terrorism which were committed in Spanish territory. The reason for the decision was that back then the legislation for the implementation of the new provisions under article 16(2) of the Constitution, had not yet been issued, and therefore, the application of the article's previous version, unconditionally forbidding the extradition of a German citizen, could not be possibly questioned.

⁴⁴ Perhaps, it may be worth noticing how the British *House of Lords*, notwithstanding its reputation of "eurosceptical" judge, immediately welcomed the *Pupino* outcome - expressly quoting the ruling of the ECJ in its reasoning - declaring it binding on all national judges. Namely, in the recent case *Dabas (appellant) v. High Court of justice, (Madrid) (Respondent)*- UKHL, dated 28-2-2007, Lord Bingham of Cornhill, with regard to the framework decision's adoption procedures, stated as follows: "a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member States under article 10 of the EC Treaty." In light of such considerations, the English Supreme Court of Justice added that although a national judge may not, as the ruling clearly reads, attain to a *contra legem* interpretation of the national law: "He must do as far as possible in light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34 (2) (b) EU." To support these statements, the mentioned passage expressly quotes the ECJ's *Pupino* case.

Following Germany's adoption of Framework Decision 2002/584 through the *Europäisches Haftbefehlsgesetz* (The Second European Arrest Warrant Act) of July 21, 2004, Hamburg's jurisdictional authorities granted the request for surrender of the individual to Spanish authorities on the basis of the new European regulation which, as anticipated, does not exempt Member States' citizens. After appealing against this decision before the competent national courts in vain, the German citizen subject to the arrest warrant appealed to the Constitutional Court asserting, *inter alia*, the alleged violation of provisions as per article 16 (2) of the Basic Law. The appellant claimed that the transposition act of Framework Decision 2002/584, lacked democratic legitimacy for having introduced into national legislation a provision potentially depriving one's personal liberty and the principle of legal certainty, such as, for instance, the derogation rule to the principle of double criminality. The federal Government intervened stating that the constitutional complaint was to be considered groundless, above all due to the binding nature of the decisions pursuant to the EU Treaty which, strikingly enough, if stressed by the German government, "must have unconditional supremacy over national law, including constitutional principles."

Moreover the German government pointed out a twofold aspect: on one hand, the innovation of the surrender procedure, with no particular limitations, of Member State citizens, brought by the Framework Decision compared to the extradition procedure carried out pursuant to article 16 (2) of the Constitution; on the other, the Government argued how the mentioned innovation determined the inapplicability of article 16 (2) as a constitutional parameter of the Framework Decision and its implementing act. Secondly, the federal Government noted how in case of any doubt about interpretation, the federal Court could always make a preliminary reference, although it had always refrained from doing so.

The German⁴⁵ constitutional judges⁴⁶ must have been of very different opinion, if, after having deemed the constitutional parameter pursuant to article 16 (2)

⁴⁵ For an interesting comment on the relevant decision, see: F. Palermo, *La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo*, QUADERNI COSTITUZIONALI 897 (2005). Also also C. Tomuschat, *Inconsistencies. The German Federal Constitutional Court on the European Arrest Warrant*, in 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 209 (2006); J.P. Pierini, *Il mandato d'arresto europeo alla prova del Bundesverfassungsgericht tedesco: «schiaffo» all'Europa o cura negligente dei diritti del nazionale da parte del legislatore?*, in CASS. PEN. 237 (2006); J. Woelk, *Parlare a nuora perché suocera intenda: il BVerfG dichiara incostituzionale la legge di attuazione del mandato d'arresto europeo*, DIR. PUBBLICO COMPARATO ED EUROPEO 160 (2006); S. Molders, *Case note, The European Arrest Warrant in the German Federal Constitutional Court*, 7 *German Law Journal* No.1 45 (2006); N. Nohlen, *Germany: The European Arrest Warrant case*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, No. 1 153 (2008).

perfectly applicable to the implementing national law, declared it unconstitutional since, the German legislator did not conform to the provision pursuant to which the extradition of a German national is only admissible as long as the rule of law is upheld. In particular the German judges made it clear that the third pillar's intergovernmental dynamic may, in no event, fall within the EC *acquis* of the first, thus recalling how the EU Treaty's express provisions on the framework decision's absence of direct effect, is due to the Member States' precise willingness to avoid the ECJ conferring direct effect on these sources as well, as it had determined EC directives' interpretation.

Furthermore, the constitutional judges maintained that, notwithstanding the high level of integration, the European Union still embodies a partial legal system pertaining to the field of international public law. Accordingly, under a constitutional point of view and directly pursuant to article 16 (2) of the Basic Law, a concrete review on a case-by-case basis should be made to ascertain that the prosecuted individual is not deprived of the guarantees or fundamental rights he would have been granted in Germany, and that except for obvious language problems and a lack of familiarity with the criminal law of the destination country, this may, in no event lead, to the worsening of the individual's situation.

Seemingly, the underlying theme of the whole reasoning about the decision is a sense of ill-concealed distrust in the legal systems of the other Member States as to the safeguarding of the accused person. Therefore, the German legislator is blamed for infringing, by implementing the Framework Decision, the principle of proportionality, in that not having chosen the least restrictive among the possible options of the right for German citizens to be prosecuted and serve the sentence passed against them in their native land, and thus underestimating the citizens' special connection to their own state's legal order.

Apparently, according to the German constitutional judges, the legislator did not fully use the discretion allowed by the Framework Decision which permitted, in fact, judicial authorities to refuse execution where the European Arrest Warrant relates to offences: which, "are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or have been committed outside the territory of the issuing Member State and the law of the executing Member State

⁴⁶As the *obiter dictum* of the constitutional judge Gerhardt shows the Senat was not unanimous in its opinion. See NJW 2005, 2302.

does not allow prosecution for the same offences when committed outside its territory.”⁴⁷

In such circumstances, according to the *Bundesverfassungsgericht* (German Federal Constitutional Court, FCC), a significant *domestic connecting factor* is established and “trust of German citizens in their own legal order shall be protected” (paragraphs 86-87). In the German literature it has been harshly criticized that the *Bundesverfassungsgericht* (based its reasoning mainly on historical arguments, thus overemphasizing the historically emerged close relationship between the German state and its citizens. As Ulrich Hufeld pointed out the Senate remained in an etatistic “Schneckenhaus” by focusing only on article 16.2 GG as would the *Grundgesetz* (Basic Law) in its literal shape reflect the meaning of the whole constitution.⁴⁸

By reading the ruling from a different perspective, it is rather evident how, behind the attempt to verify the responsibility of the German legislator in the transposition activity, the Federal Court’s actual aim was to halt the acceleration process, which followed the EAW Framework Decision’s adoption, of European integration concerning the third pillar which, according to the same Court, “cannot overrule, given its mainly intergovernmental character, the institutional dynamic peculiar to a system of international public law.” It was opinion of the Karlsruhe judges that in light of the safeguards of the subsidiarity⁴⁹ principle, “the cooperation in criminal matters established within the third pillar on the basis of a *limited* mutual recognition of criminal decisions, does not presuppose general harmonization of criminal laws of the Member States; conversely, it is a way to preserve national identity and statehood within the uniform European legal space” (paragraph 77).

It has been correctly pointed out⁵⁰ that the key word in this crucial part of the reasoning is the adjective “limited” through which the Constitutional Court has

⁴⁷Provision as per art. 4 para. 7 of decision 2002/584/ JHA.

⁴⁸U. Hufeld, *Der Europäisches Haftbefehl vor dem BVerfG* - NJW 2005, 2289, JuS 2005, 865, 866.

⁴⁹ As Francesco Palermo observed, the constitutional judges consider this principle as having been complied with, thus sorting out a difficult situation: “in fact, the non-recognition of subsidiarity, therefore of the urgent need for a European discipline on the European arrest warrant, would have hampered it forever. Conversely, the judges deem Germany’s participation in European judicial cooperation a significant step towards the administration of justice within an integrated context, which makes it not only possible, but desirable as well.” See, *supra* note 44, F. Palermo at 899.

⁵⁰ J. Komarek, *European Constitutionalism and the European Arrest Warrant: in search of the limits of the “contrapunctual principles”*, 44 COMMON MARKET LAW REVIEW 9, 24 (2007).

precisely set a limit to the “optimism” of European judges who, in the first ruling⁵¹ dealing directly with the third pillar’s integration scope, expressly stated how “the *ne bis in idem* principle necessarily implies a high level of confidence between Member States and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (paragraph 33). The message sent from Karlsruhe proved, beyond all doubts, that any member State’s attempt to emulate first pillar’s procedures in such a constitutionally sensitive context, by definition part of its (remaining) hard core of sovereignty, would not have been tolerated by the *Solange* judges.

Although the majority of the Senate⁵² makes no mention of the ECJ ruling of 16 June 2005, it is quite a direct response to the “acceleration”, by way of the third pillar, which *Pupino* embarked on thirty days before. It could have been expected from the German Constitutional Court to at least mention and get involved with the outcome of the *Pupino* decision even if it after having articulated the conflict would have finally deviated from the approach of the ECJ⁵³.

I. A Comparison Between the Polish and the Czech Case

To fully understand the implications related to the relationship between the European and the constitutional legal systems by the adoption of the Framework Decision on the European arrest warrant in Poland and the Czech Republic, as well as the ensuing jurisprudential reactions of the Warsaw and Brno Constitutional Courts, it is necessary to take a step back to the process which led to the adoption of the Czech and Polish Constitutions in 1992 and 1997, respectively. Both Constitutions are characterized by a number of clauses aimed at the protection of long sought sovereignty, attained after decades of subjugation to communist regimes, which make a distinction, as was the case for the constituent documents of most Central-Eastern countries, between internal and external sovereignty⁵⁴.

⁵¹ ECJ 11-2-2003 in the joint cases C-187/01 e C-385/01 *Hüseyin Gözütok e Klaus Brügge*.

⁵² Judge Gerhardt takes a dissenting opinion on the innovation brought about by the *Pupino* ruling asserting that the Court’s decision contradicts the ECJ ruling of June 16th 2005, where it is emphasised that the principle of Member States’ loyal cooperation in the area of police and judicial cooperation in criminal matters must also be respected by the Member State when implementing framework decisions within the third pillar. See C. Tomuschat, *Inconsistencies – the German Federal Constitutional Court on the Arrest Warrant*, 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 209, 212 (2006).

⁵³ For a concurring opinion, see *supra*, note 47, 867.

⁵⁴ For a cross-reference to independence, see the preamble to the Czech Constitution and arts. 26 and 130 of the Polish Constitution: for the emphasis on state sovereignty, see art. 1 of the Czech Constitution, the

Further, the next aspect to be taken into account is the “low profile approach” typical of all Central-Eastern countries as regards the constitutional amendments leading to accession to the European Union.

Although a group of scholars maintains a difference between the two countries, qualifying as remarkable the constitutional harmonization level reached by the Czech Republic and only average Poland's⁵⁵ - owing as well to the public opinion's hostile response to their accession - with regard to the sensitive issue of the supremacy between EU law and the Constitution, both legislators only slightly amended the relevant constitutional parameters, leaving then to the respective constitutional Courts the heavy and ungrateful burden to find a solution to the inevitable conflicts between the constitutional and European dimension that such relaxed “super primary” parameters could but only worsen⁵⁶. It is worth noting, to confirm that assumption, the flowery of decisions of the respective constitutional Courts concerning the relations between EC legislation and domestic law⁵⁷ in the years immediately following Central and Eastern countries' adhesion to the European Union.

In an attempt to summarise the judicial emerging trends, and notwithstanding the most pessimistic⁵⁸ predictions and the bitter, certainly non-eurofriendly⁵⁹ tones of

preamble and arts. 104 para. 2 and 126 para. 2, of the Polish Constitution. For further reference see also: E. Stein, *International law in internal law*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 427 (1994).

⁵⁵ See: A. ALBI, EU ENLARGEMENT AND THE CONSTITUTIONS OF THE CENTRAL AND EASTERN EUROPE (2005).

⁵⁶ As for the Czech Republic, in the 2001 revision of art. 10 a, a general and undifferentiated, clause of openness to international organizations was introduced, which made no mention of the EC system's peculiar features, or stressed, in any way, how the supremacy given to the Constitution could be combined with the doctrine of EC law primacy over domestic laws, as extrapolated, some decades ago, by ECJ caselaw which, as the rest of the European *acquis*, all the Central-Eastern European Countries have undertaken to follow pursuant to the Athens Adhesion Treaty of 2003. The same, more or less, applies to the 1997 Polish Constitution, the most recent among Central-Eastern European Countries', therefore already inclusive *ab origine* of the European clauses. Conversely, art. 91 para. 3, as opposed to the more international approach of the Czech Constitution, makes express reference to the EC system and particularly to the off-shoot European law, stressing its direct effect and supremacy over ordinary national regulations. Again, no mention is made of the relationship between Constitution and Community law, especially primary law.

⁵⁷ Besides the decisions herein examined of the Warsaw and Brno's constitutional Tribunal. For Poland see the Polish constitutional tribunal, K 18/04, *Judgment on Poland's Membership in the European Union (Accession Treaty case)*, 11.05.2005, *Procedural Decision no. 176/11/A/2006 on the Excise Duty Tax*, 19.12.2006. Ref. No.P 37/05; for the Czech Republic, Czech constitutional Tribunal, Pl. ÚS 50/04, 08.03.2006.

⁵⁸ Z. Kuhn, *The Application of European Union Law in the New Member States: Several Early Predictions*, in 6 GERMAN LAW JOURNAL No. 3, 566 (2005).

the Eastern Courts' reasonings, it appears plausible to note mainly encouraging signs of an increasing judicial dialogue crucial to maintain the delicate balance underlying the mechanism of mutual support between the national and supranational levels.

As to the specific question relating to the alleged constitutional invalidity of the EAW Framework Decision's implementing act, the constitutional Courts of Warsaw and Brno made direct judgements. Within the two legal systems, the implementing regulations did not bear notable differences, and the relevant constitutional parameters, as to the extradition ban on nationals, were very similar. The Polish Constitution was lapidary: article 55 stated, in fact, that, "the extradition of a Polish citizen shall be forbidden." Article 14 (4), of the Charter of Fundamental Rights and Liberties, which encompasses all rights and liberties protected by the constitution of the Czech Republic, states more generally that, "no Czech citizen shall be removed from his/her homeland."

Surely, one distinctive feature between the two systems has been the extent of the debate on the opportunity to amend the two above-mentioned provisions in view of the, at least back at that time, future accession to the European Union. If the Czech Republic never granted priority to the issue, in Poland, on the contrary, revision of article 55 of the Constitution had already been envisaged by a portion of the insiders who stressed how an unconditional extradition ban of nationals could potentially represent a hinder to the European integration process within the third pillar, which in turn - as already emphasized - had been gaining strength since the enforcement of the Amsterdam Treaty. Conversely, others thought that the conflict could be settled during discussions.

Finally, it was the second possibility to be opted for, given the highly symbolic value of article 55 which, in the Polish Constitution, enshrines those ideals of identity and sense of belonging deeply rooted within an ethnocentric oriented *demos* still bound to nationalistic⁶⁰ memories which characterise the predominant

⁵⁹ As, for instance, the one underlying the Polish decision on the adhesion Treaty of 11-05-2005 k. 18/04 and that of the Hungarian constitutional Court (17/2004). On the first see: O. Pollicino, *Dall'Est una lezione sui rapporti tra diritto costituzionale e diritto comunitario*, DIRITTO DELL' UNIONE EUROPEA 819, (4/2006), on the second: K. Kowalik-Banczyk, *Should we polish it up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERMAN LAW JOURNAL NO. 10 1360, and A. Lazowski, *The Polish Constitution, the European Constitutional Treaty and the Principle of Supremacy*, in, THE EUROPEAN CONSTITUTION AND NATIONAL CONSTITUTIONS: RATIFICATION AND BEYOND, 178 (A. Albi and J. Ziller eds. 2007).

⁶⁰ See A Sajo, *Protecting nation states and national minorities: a modest case for nationalism in Eastern Europe*, U. CHI. L. SCH. ROUNDTABLE 53 (1993).

view in Central-Eastern Europe. Clarifications having been made, it would be interesting to move on to draw a parallel of the actual *reasoning* of the Courts of Warsaw and Brno which, while starting from similar constitutional principles, and a practically equivalent object of the matter, reached opposite outcomes. The first judgement, in fact, annulled the national regulation; the second did not detect any constitutional illegitimacy. The Polish judges⁶¹ had to establish whether surrender, substantive issue of the European arrest warrant, could anyhow be regarded as a subset of extradition, the latter being expressly forbidden by article 55 of the Constitution if the person concerned is a Polish national. The Court, answering positively to the interpretative dilemma, hold that the constitutional concept of extradition was so far-reaching to encompass also the surrender of a Polish citizen, necessary provision to implement the European arrest warrant, whose purpose, at least at the Framework Decision's level, is to replace within the European legal space, the bilateral, intergovernmental dynamic typical of extradition' mechanism.

After grouping under the same legal notion the two concepts of extradition and surrender, the second argument of the Polish constitutional Court was to point out how the admissibility of a national's surrender, provided for by the Framework Decision, undermined the rationale behind the ban as per article 55 of the Polish Constitution, pursuant to which the essence of the right not to be extradited is that a Polish citizen be prosecuted before a Polish Court. According to the Warsaw Tribunal, Poland's adhesion to the European Union brought about a radical change. Namely, its accession not only accounts for, but also necessarily implies, a constitutional revision of article 55, to conform constitutional requirements to EU provisions. The said constitutional revision, according to the judges, could not be carried out using a manipulative and dynamic interpretation of the relevant constitutional principle but needs, but needs an *ad hoc* constitutional action by the legislator.

The *Pupino* judgement, which reasserts the obligation for national Courts to a consistent interpretation of the Framework Decisions pursuant to article 34 (b) EU, was yet to be adopted by the ECJ. Nevertheless, AG Kokott's conclusions regarding the judgement, had already been published⁶². The Polish constitutional judges, without directly mentioning it, considered the possibility of an obligation of

⁶¹ One of the first studies on the decision is by S. Sileoni, *La Corte costituzionale polacca, il mandato arresto europeo e la sentenza sul trattato di Adesione all'UE*, QUADERNI COSTITUZIONALI 894 (2005). Now also A. Nußberger. Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW NO. 1 162 (2008)

⁶² AG Kokott's conclusions to case C-105/03, *Pupino*, in *Racc.*, I-5285.

consistent interpretation. However, they did not find it relevant in the current situation since, according to the Warsaw Tribunal, the obligation was limited by the ECJ itself, as it may not worsen an individual's condition, especially as regards the sphere of criminal liability⁶³.

As has been recently noted⁶⁴, the Polish judges did not refer to specific judgements to show on what basis they had construed such an argument. The relevant ruling to which the Polish Tribunal should have deferred, the *Arcaro* case from 1996⁶⁵, didn't perfectly apply to the arrest warrant procedure, the implementation of which is conditional on the surrender of an individual whose question of criminal liability is pending before the Member State issuing the European arrest warrant: this liability remains untouched: it cannot be expanded or diminished whether the person requested is finally surrendered or not.

According to the constitutional judges on the other hand, while national legislation is bound under article 9 of the Constitution to implement secondary EU legislation, a presumption of the implementing act's compliance with constitutional norms cannot be inferred *sic et simpliciter*.

The Tribunal easily concluded how, by permitting the prosecution of a Polish citizen before a foreign criminal court, the national regulation implementing the Framework Decision would have prejudiced the constitutional rights granted to Polish citizens, and therefore, it could only be found to be unconstitutional.

In spite of the clarified unconstitutionality of the matter, the Tribunal found that the mere annulment of the provision would have led to breach of article 9 of the Constitution, according to which, "Poland shall respect international law binding upon it," and whose application, according to the constitutional judges, also encompasses Poland's obligations stemming from accession to the European Union. Therefore, in order to fully comply with such obligation, a change of article 55 was suggested by the Polish judges considered necessary to provide for the possibility,

⁶³ Polish Constitutional Tribunal, ruling. cit., part. III, point 3.4.

⁶⁴ J. KOMAREK, *supra* note 49, 16.

⁶⁵ C-168/95, *Arcaro*, 1996, in *Racc.*, I-4705, which at para. 42 reads: " However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive' s provisions"

departing from the general extradition ban of nationals, of enabling such persons' surrender to other Member States in execution of a European arrest warrant.

Meanwhile, the Tribunal, by enforcing article 190 (3) of the Constitution, set a deadline for the decision's effects - 18 months - to give the constitutional legislator time to adopt the necessary amendments while the provision remained temporarily in force, and for the constitutional revision to be in line with the Framework Decision on the European warrant⁶⁶. One year later, the Czech constitutional judges founded their reasoning on a completely different set of grounds. After recalling the decision issued barely two months earlier, (decision 8-3-2006), where they had carried out an express *revirement* of their own jurisprudence in order to meet the interpretation criteria required by the application of the equality principle as interpreted by the ECJ⁶⁷, the judges were faced with the sensitive issue of the binding nature, and related discretionary margin left to the legislator regarding cooperation in criminal justice matters, which were to be attributed within the scope of the framework decisions pursuant to article 34 EU.

Showing a further degree of openness and extensive knowledge of Community law, the Czech judges broadly touch upon the *Pupino* judgement, and although perhaps underestimating its added value, they pointed out how the obligation of national judges to interpret, *as far as possible*, national law in conformity with framework decisions adopted under the third pillar - and pursuant to such jurisprudence - would leave unprejudiced the issue relating to the enforcement of the principle of primacy of the EU law over (all) national legislation. Issue, the latter, which most of the scholars⁶⁸ have instead maintained inextricably linked to the obligation of consistent interpretation.

⁶⁶ Amendments to art. 55 of Constitution were made within the deadline provided for in the decision, and as of November 7th 2006, Poland has agreed to the execution of European arrest warrants against its nationals, subject to two conditions, which do not appear to be in line with the EU regulation: the fact that the crime has been committed outside Polish territory and that it is recognised under and also capable of being prosecuted under Polish criminal law.

⁶⁷ See O. Pollicino, *Dall'Est una lezione sui rapporti tra diritto costituzionale e diritto comunitario*, in DIRITTO DELL' UNIONE EUROPEA 819 (April 2006).

⁶⁸ D. Piquani, *Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe*, paper presented at the VII WORLD CONFERENCE OF THE CONSTITUTIONAL LAW INTERNATIONAL ASSOCIATION held in Athens - 11-15 June 2007, available at: <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>, last accessed: 21 September 2008; C. W. Herrmann, *Much Ado about Pluto? The Unity of the Legal Order of the European Union" revisited*, EUI Working paper, May 2007, available at: www.iue.it.

The Court of Brno, taking into account the doubts concerning the interpretation of the Framework Decision's nature and scope, seriously considered the possibility of proposing, evidencing once again⁶⁹ its will to dialogue with the EC's supreme judicial body, a preliminary reference in Luxembourg, though later ruling out the option due to the fact that the Belgian *Cour d'Arbitrage*, as anticipated⁷⁰, had already addressed the ECJ regarding the same issue. The Czech judges faced with the dilemma of whether they should suspend judgement concerning constitutionality while "awaiting" the ECJ's answer, or rather rule on the matter, chose the second option, attempting to, and this is the most interesting aspect, find amongst all the potential interpretations of the relevant constitutional norm - article 14 (4) of the Czech Charter of Constitutional Rights - the one not which did not clash with Community law principles and the contribution of EU law secondary legislation. In particular, the judges highlighted how, without the support of an interpretation effort, the provision's wording of article 14 (4) according to which no Czech citizen shall be removed from his homeland, does not fully account for⁷¹ the actual existence of a constitutional ban on the surrender of a Czech citizen to a foreign state, in execution of an arrest warrant, for a set period of time.

In the view of the Czech Court, two plausible interpretations exist. The first and literal one, even though it might lead to the ban's provision within the constitutional norm, would have at least two disadvantages. Firstly, it would not take into account the "historical impetus" underlying the adoption of the Fundamental Rights' Charter, and especially of article 14 (4). The Court stressed, in fact, how a historical interpretation of the criterion under discussion clearly explained that, based on the wording of the Charter between the end of 1990 and the beginning of 1991, the authors who drafted the ban of a Czech citizen to be removed from his homeland, far from considering the effects of the implementation of extradition procedures, had in mind "the recent experience of communist crimes" and especially of the "demolition operation" that the regime had perpetrated in order to remove from the country whoever represented an obstacle to the hegemony of the regime itself. Secondly, an interpretation of that sort would lead to a violation of the principle, clearly expressed for the first time by the

⁶⁹ They had already done so many times with decision PI US 50/04, 8 October 2006. See, *supra*, note 66.

⁷⁰ Preliminary reference by the *Cour d'Arbitrage* dated 29 October 2005 case C-303/05, defined by the ECJ ruling, following the Czech judgement of 3 May 2007, available at: www.curia.eu.int, last accessed 21 September 2008.

⁷¹ As it did, instead, according to the Czech judges, the contribution of the corresponding art. 23 (4) of the Slovak Constitution which, prior to the constitutional review of 2001, made express provision of the extradition ban of Slovak citizens.

constitutional judges, according to which all domestic law sources, including the Constitution, must be interpreted as far as possible in conformity with the legislation implementing the European integration evolution process.

An obligation that the constitutional provisions be consistently interpreted in light of EC law, which the constitutional judges derived from the combined provisions of article 1 (2) of the Constitution, added in light of the accession to the Union and pursuant to which, “the Czech Republic is compelled to fulfil obligations originating under international law”, and article 10 EC on the principle of loyal cooperation between Member States and the European Union. On the basis of a teleological approach, the Czech judges went on to identify the constitutional norm’s most consistent interpretation of the implementing act, as well as of Framework Decision 2002/584, to the Czech Constitution.

It is not surprising then, that the Court managed to find constitutional grounds to almost all problematic Framework Decision dispositions. Noteworthy in this respect was the legislative omission which had induced the FCC to declare the framework decision’s implementing law unconstitutional and void, that is to say, the non-acceptance under national regulation of the possibility, pursuant to article 4 (7), to enhance the domestic connecting factor and allow a legitimate rejection of a European arrest warrant request by the implementing⁷² judiciary authority. Actually, the provision had not been taken into account by the Czech legislator either in the implementation of the framework decision. Nevertheless, according to the Constitutional Court, the obstacle could be surmounted through the (extreme) application of the principle of consistent interpretation. They hold in fact that notwithstanding the legislative omission, the Czech system could not afford to lose the citizens’ trust in their own legal order, therefore, coming close to a *contra legem* interpretation of the relating provision, the judges concluded that any offence carried out within the national borders would continue to be prosecuted under domestic criminal law. In other words, under the same circumstances, the Czech constitutional authorities, would, most likely reject the request to execute a European arrest warrant.

⁷² As already stressed at the beginning, under art. 4 (7), the implementing judicial authority may refuse to execute the European arrest warrant if the latter relates to offences which, according to the law of the executing Member State, have been committed in whole or in part in the territory of the executing Member State or in a place treated as such. It also permits refusal of execution where the offences were committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Accordingly, it is plausible to infer that the Czech Court, in its firm intent to reach greater consistency between article 14 (3) of the Constitution and the European regulation, strained the verbatim content of both the constitutional disposition and the domestic law under discussion. The argument was that whereas the constitutional norm had been interpreted as mere ban on the surrender of a Czech citizen to the jurisdictional authority of another Member State, in light of prosecution for a crime committed in that territory, the grounds underlying the whole decision, would have ceased, i.e. the equivalence in terms of fundamental rights' protection among Union Member States, reflecting also a substantive convergence of the various criminal legislations and procedures.

Unavoidably, this led to the acceptance by the Czech Judges of the principle of mutual trust, rejected by their German judicial colleagues, in the criminal legislation of other Member States' legal systems, through the direct reference to *Gozutok* and *Brugge* by the Court of Justice, whose findings have been questioned by the "sceptical" approach of the Karlsruhe judges.

F. The Awaited Decision of the Court of Justice on the European Arrest Warrant

Owing as well to the great deal of interest aroused by the German, Polish and Czech constitutional Courts' decisions, there was long wait for the Court of Justice's decision, requested under article 35 EU by the Belgian *Cour d'Arbitrage*, on the validity of Framework Decision 2002/584. As the Advocate General stressed in his conclusions⁷³, the referring court expressed doubts on the Framework Decision's compatibility with the EU Treaty on both procedural and substantive grounds.

The first of these questions related to the Council decision's legal basis. In particular, the referring Court was unsure that the Framework Decision was the appropriate instrument, holding that it should be annulled because the European arrest warrant should have been implemented instead through a Convention provided by art 34 2 d. In this case, in fact, according to the Belgian Court, it would have gone beyond the limits of article 34 (2)(b), pursuant to which framework decisions are to be adopted only for the purpose of approximation of the laws and regulations of the Member States.

Secondly, the *Cour d'Arbitrage* asked whether the innovations brought by the Framework Decision regarding the European arrest warrant, even when the facts in question do not constitute an offence under the law of the executing State, were

⁷³ Conclusions in case C-303/05.

compatible with the equality and legality principles in criminal proceedings in their role of general principle of European law as enshrined in article 6 (2) EU. More specifically, the alleged infringement of the principle of equality would have been due to the unjustified dispensation with, within the list of 32 offences laid down in the Framework Decision, the double criminality requirement, which is held instead for other crimes.

Conversely, the principle of equality would have been breached owing to the Framework Decision's lack of clarity and accuracy in the classification of the offences. It was opinion of the *Cour d'Arbitrage*, in fact, that should Member States have to decide whether to execute a European arrest warrant, they would not be in the position to know whether the acts for which the requested person is being prosecuted, and for which a conviction has been handed down, actually fall within one of the categories outlined in the Framework Decision.

The Advocate General, in his conclusions, had no doubts about the high relevance of the preliminary request which should have included, also in the light of the German, Polish, Cypriot and Czech rulings, when he states, "...in a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems."⁷⁴

The decision's first reading could lead to much disappointment: it was opined, indeed, that the Court of Justice had failed to fully engage in undertaking the role of "protagonist" assigned to it by the Advocate General⁷⁵. There are few doubts that the ECJ Court steered clear of protagonist leading roles, but given the inter-constitutional tension preceding the decision, it seems a right option than one which, in the light of low-profile approach therefore, through a succinct, moderate, and in some parts even apodictic *reasoning*, reached the conclusions that the legislative instrument of the EAW Framework Decision was, indeed, legally valid.

⁷⁴ Conclusions in case C-303/05. para. 8. Of the same opinion is Alonso Garcia in *Justicia constitucional y Union Europea*, Madrid, 2005, expressly mentioned by AG in his conclusions.

⁷⁵ For a criticism of the judgment see now D. Sarmiento, *European Union: The European Arrest Warrant and the quest for constitutional coherence*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 171 (2008).

The European judges settled the dispute over the appropriateness of the Framework Decision as legal instrument to govern an EAW, stating that EU Treaty provisions may not be interpreted as granting the sole adoption of framework decisions falling within the scope of article 31 (1)(e) EU⁷⁶.

It is true, the Court held, that the EAW could have been governed by a Convention as per article 34 (2)(d), but at the same time it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, where, as in the case, the conditions governing the adoption of such a measure are satisfied.

With regard to the alleged violation of the principle of legality, the Court made clear that article 2 of the Framework Decision which abolishes the requirement of double criminality from the 32 offences' list, does not itself harmonise the criminal offences in question, in respect of their constituent elements or penalties to be attached⁷⁷. "Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State' The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract" (paragraph 52).

Accordingly, the European judges didn't lose the occasion to stress how the principles of legality and non-discrimination fall within the "supra primary" parameters on the basis of which ascertain the validity of an EC secondary law not only through the usual "transfiguration" of Member States' constitutional principles into common constitutional practice first, and EC law's general principles then, but also by the express acknowledgement of these principles, by articles 49, 20 and 21 of the Fundamental Rights' Charter, which is mentioned for the fourth time in a ruling by the Court of Luxembourg⁷⁸.

⁷⁶ With regard to the progressive adoption of measures for the setting of offences and their punishments' constituent elements in matters relating to organised crime, terrorism and drug trafficking.

⁷⁷ Under art. 2 (2) FD, the offences listed "if in the (issuing) Member State the punishment or the custodial sentence incurs a maximum of at least three years" provide for surrender pursuant to a EAW regardless the fact that the acts constitute an offence in both the issuing and the executing Member State.

⁷⁸ See para. 46. The other three references to the Nice Fundamental Rights' Charter may be found in the decisions, respectively, of 27 June 2006, 13 March 2007 and now 14 February 2008

In response to the third argument concerning the EAW alleged violation to the principles of equality and non-discrimination, owing to the unjustified differentiation between the offences listed under article 2 (2) providing for the abolition of double criminality requirement on one hand, and all the other crimes where surrender is conditional on the executing Member State's recognition of the criminal liability on which the arrest warrant is based, on the other hand, the Court of Justice has played, in just one passage, that protagonist role the AG referred to, in his conclusions. The ECJ in an attempt to justify the rationale behind the differentiation, made in fact express reference to the *mutual trust* between Member States as indispensable tenet at the heart of any third pillar's action – argument openly questioned by the FCC – thus stating that according to the classification as per article 2 (2) – “the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the *high degree of trust and solidarity* between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.” (paragraph 57).

G. Comparative Jurisprudential Views: a Twofold Survey

To sum up the constitutional adjustments within the relationship between interconnected legal systems entailed by the European Arrest Warrant saga, which seems to have not yet faced the final curtain⁷⁹, it is necessary to differentiate the two most affected dimensions. The first relates to the European one, the second to the

⁷⁹ In the broader respect of judicial cooperation in criminal matters, along with the vertical conflicts involving Member States' legal system and EC law, there emerges within the European system a cross-pillar litigation, between the first and the third pillars. This is the case of the *Commission v. Council* in a dispute over the identification of the most appropriate legal basis for an act aimed at the harmonization of Member States' criminal laws in the field of two EC relevant areas – such as the environment and transportation. Noteworthy in this regard was the ECJ judgments c-176/2003 of 13-9-2005 and c-440/05 of 23-10-2007, which annulled the two framework decisions adopted under art. 14 (2)(n)EU, thus establishing that the most appropriate legal basis was to be found within the institutional dynamic of the first pillar. Accordingly, the Court clarified in the second of its rulings (par. 66) that “Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19; and Case C-176/03 *Commission v Council*, paragraph 47), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective (see, to that effect, Case C-176/03 *Commission v Council*, paragraph 48).”

boundary line between the European and the Member States' constitutional Legal systems.

On the European front, one of the main challenges relates to the possibility to extend the first pillar's requirement of the Community law primacy to the off-shoot regulations of the third, and particularly to framework decisions which, as it has been observed, according to Article 34 (2) (b) EU, cannot create direct effect. However, would it be reasonable to gather that this absence of direct effect prevents national Courts from conferring priority on the said acts, even when they clash with a domestic, subsequent, law? It is, indeed, hard to understand why should EC law direct effect and primacy be considered so interwoven.

The European judges' elaboration of the first principle anticipating under both a chronological⁸⁰ and argumentative point of view the identification, the following year⁸¹, of the second, does not seem to be enough, as it never was for the EC legislation within the first pillar, to argue that primacy may be only acknowledged to EC law bearing direct effect, when the Luxembourg Court asserted the supremacy of the *whole* EC Law regardless direct effects⁸² and notwithstanding under what pillar's scope⁸³. On the same opinion is who recently stressed how: "to the extent that a national measure is inconsistent with the EC law, it cannot be allowed to apply over EC law. However, if we take inconsistency seriously, there is no need for identifying whether a provision confers rights on individuals. The only thing that matters is that EC Law, and by extension EU law, puts forward an identifiable result which cannot be thwarted by incompatible national measures⁸⁴."

⁸⁰ Court of Justice, ruling of 5-2-1963, case C-26/62, *Van Gend en Loos*, in ECR. I-1.

⁸¹ Court of Justice, ruling of 15 -7-1964, case C-6/64, *Costa/ENEL*, in ECR I-1141.

⁸² On the strength of what has been said, see the Court's reasoning in ruling *Francovich* (21-11-1991, C-9/90). Initially, the Court ruled out the possibility of conferring direct effect on the directive in question, (points 1-26), conversely, later on, it asserted the obligation of the defaulting Member State to pay compensation damages, thus grounding the said obligation on its precedent pursuant to the primacy of Community law (*Costa Enel*, cit. e *Simmenthal*, sent. 9-3-1978, causa C-106/77, in ECR I- 629).

⁸³ Article I-6 of the now old constitutional Treaty of Rome, stated that, as a general rule, the Union's legislation should prevail over domestic law. Although the latter rule has been "relegated" to a secondary plane along with the whole treaty, by the French and Dutch referendums, not to be restored anywhere in the draft Treaty of Lisbon's, its current relevance is evidenced above all by recalling that the declaration of art. I-6 attached to the constitutional Treaty, stressed how the latter provision reflected the relevant views of the First Instance Tribunal and the ECJ in their case law.

⁸⁴ K. Lenaerts and T. Corthaut, *Of Birds and Hedges, the Role of primacy in invoking norms of EU law*, 31 EUROPEAN LAW REVIEW No.3 287 (2006).

To support this contention, the focus may be shifted from a supranational -oriented perspective to another, domestic one, according to which in front of the Member States' constitutional Courts European law faces constitutional law. At a closer examination of the Polish and Czech Constitutional Courts' decisions on the European arrest warrant, two different expression of the same acceptance of the primacy of the third pillar EC legislation, with no direct effect, over domestic law, including the Constitution, can be identified.

In the Czech case, the judicial strategy leading to primacy was resorting to consistent interpretation, along with the manipulation of the wording of the relevant article 14 (4), so to provide constitutional validity to a European arrest warrant issued against a Czech citizen. In the second case, instead, the Polish Tribunal "tightened" in a constitutional parameter, which left no room to misunderstandings or creative interpretative ways, asserted Poland's respect for European law binding upon it in a different way. Accordingly, a constitutional change in the relevant parameter - which it possible to include within the fundamental principles at the heart of the Constitution - was considered necessary for attaining the full conformity with the EU law requirement.

Needless to say, if the primacy of European Union legislation over internal law can be in theory quite easily assumed with regard to the European dimension, its fulfilment on a national level is conditional upon the constitutional courts' acceptance and, in the end, openness to the "reasons of European law." It is possible to argue that, although the Czech and Polish Courts took a fundamentally different approach in reaching their conclusions, they both showed a certain willingness towards that openness. Conversely, the final outcome of the FCC's decision evidences the radically different, tough stance adopted by Germany as regards the European arrest warrant.

With regard to the final output of the decision, despite the constitutional parameter's predisposition to international and supranational pluralism would have allowed to somehow save the Framework Decision's implementing act, decided to annul it, coming in for much criticism, asserting the rule v. exception-ratio between article 16 (2)'s first and second passage.⁸⁵ Such an unconditioned, dismissive approach accounts for the FCC's presumption that European law - and particularly that stemming from the third pillar - may, in no event, override Basic Law.

⁸⁵ The recent constitutional review of art. 16(2) added to the extradition ban of a German national the derogation rule of extradition to a Union Member State or before an international court, on the condition that the rule of law is upheld. (*Rechtsstaatliche Grundsätze*).

Such an output is not surprising. Unsurprisingly, as far as the counter-limit doctrine (*riserva dei controlimiti*) is concerned, the German Federal Court is in fact in good company in Europe, and recently also some Central-Eastern States' constitutional courts⁸⁶, although with slightly different attitudes, have joined the club. What instead is truly amazing, as compared to that which emerged from the analysis of the Polish and Czech decisions, is the reasoning that led the German Court to declare the European arrest warrant implementing national law unconstitutional and void.

The FCC confined the power of the second paragraph of article 16 (2), introduced by the 2000 constitutional, providing - only under specific circumstances - for the possibility of a German national's extradition, to a mere exception to the rule embodied by the statement "freedom of extradition" granted to all German citizens, as per the first paragraph of article 16 (2). As has recently been observed⁸⁷, the clause in the second paragraph of article 16 (2) differs significantly from the other derogatory clauses present within German Basic Law. The latter, in fact, serve the purpose of authorising strict restrictions to fundamental rights, whilst the former is instrumental to achieving the objectives set out in the European clause of article 23 (1) of the Constitution⁸⁸. The axiological link between the paragraph added in 2001 to article 16(2) and the conditional opening to the supranational dimension, as codified in the first paragraph of article 23 of the Basic Law, appears, therefore, to be the main missing element in the FCC's legal reasoning which focused, instead, on another nexus, that between "the German people and their domestic law (point 67)" along with the need "to preserve national identity and statehood in the uniform European legal area (point 77)."

⁸⁶ For an analysis of the tensions among the legal systems on fundamental rights, which seem to currently feature the supranational scenario, see Tizzano, *La Corte di giustizia delle Comunità europee ed i diritti fondamentali*, in *DIRITTO DELL'UNIONE EUROPEA* 839 (2005).

⁸⁷ TOMUSCHAT, *supra* note 44, 209, 212.

⁸⁸ According to which: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by law, subject to the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of article 79."

The ruling makes clear that the only standards the German constitutional court is willing to uphold are, precisely, those relating to national identity and statehood which touch upon the core of society's fundamental values, and which establish that strong sense of belonging, though somewhat ethnocentric, so dear to Karlsruhe⁸⁹'s judges as well. Accordingly, their distrust as to the scope of the protection of individual rights granted under the other legal systems in the European Union, merges with a firm belief that the right to a commensurate protection from those different criminal law systems, which cannot protect the legal rights of a person under investigation, is the exclusive right of German citizens themselves. In all likelihood, the gap between this rationale and the European arrest warrant's basic underlying values could not have been greater.

Firstly, as regards the above-cited distrust, both the Framework Decision and its interpretation by the European Court of Justice have called for mutual trust and solidarity among Member States, stressing their paramount importance as funding elements to the continuation of the European-wide cooperation in criminal matters.

Secondly, as to the exclusive nature of the protections granted to German citizens, the essence of the European framework decision, based on a pluralistic, open concept of citizenship, is to grant additional guarantees to those, regardless their nationality, having a special connection with the European arrest warrant's executing State, as witnessed under the previously mentioned article 5 of the Framework Decision. This article indeed, whilst specifying the guarantees to be granted by the State in particular cases, expressly provides for additional guarantees in the event that "the person subject to the arrest warrant for the purposes of prosecution is a national or resident of the executing Member State⁹⁰", as well as by article 4 (6), of the same decision⁹¹.

⁸⁹ In reference to the FCC decision of 12 October 1993, *Maastricht Urteil*, see particularly, J.H. Weiler, *Does Europe need a constitution? Demos, Telos and the Maastricht German Decision*, in 1, EUROPEAN LAW JOURNAL 219 (1995).

⁹⁰ In this case, the additional guarantees arise where the surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State to serve the custodial sentence or detention order passed against him in the issuing Member State. It may be noteworthy how numerous Central-Eastern European legal systems have come to share such an open and pluralistic concept of citizenship, regardless the strong influence in terms of national identity and ethnocentrism typical of the *idem sentire* in Eastern Europe. Suffice it to say that art. 411 letter 'e', of the Czech Criminal Code, as amended after the framework decision's adoption, provides, among the grounds for refusing to execute the EAW, the condition that the person being investigated "is a Czech citizen or a resident of the Czech Republic."

⁹¹ As already pointed out, "the executing judicial authority may refuse to execute an arrest warrant issued for the purposes of execution of a custodial sentence or detention order, where the requested person

H. Models of Conflict Settlement Between Legal Systems and Final Remarks

In the attempt to provide a conceptual conclusive framework of the different approaches of the German, Polish and Czech constitutional judges, the three decisions appear to be the expressions of their courts' different ways of tackling the delicate issue concerning the relationship between EU law and Member States' constitutional legal systems.

With the ruling on the European arrest warrant, the FCC proved that it advocates a certain "democratic statism", as defined by Mattias Kumm. This is, to state more clearly, "a normative conception of a political order establishing a link between three concepts: statehood, sovereignty and democratic self-government"⁹². Statehood and sovereignty⁹³ constitute, indeed, the *leitmotif* of the entire argument underlying the German judgment.

A decision based on such cornerstones could not but lead to the annulment of the national implementation of the EAW Framework Decision, as well as, more generally, as has emerged from the decision's analysis, to the refuse of any idea to "communitize" the European area which mainly reflects statehood and sovereignty among Member States: i.e. the cooperation in criminal matters entailed by the Union's third pillar. In such a state-oriented view of the European integration process, the Constitution represents the supreme *grund norm* conferring validity on any other, internal or external source of law, including European law, namely through the *Solange* jurisprudence's codification of article 23 of the Basic Law⁹⁴.

is staying in, or is a national or a resident of the executing Member State and the State undertakes to execute the sentence or detention order in accordance with its domestic law."

⁹² M. Kumm, *Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German federal constitutional court and the European Court of Justice*, 36 COMMON MARKET LAW REVIEW 351, 366 (1999).

⁹³ For a recent contribution on the primary role that sovereignty plays within the European scenario which is characterized, more and more, by conflicts arising within legal orders, see A. Jakab, *Neutralizing the sovereignty question*, 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 375 (2006).

⁹⁴ With regard to the FCC decision, Julio Baquero Cruz is very critical when he stresses how «the German Constitutional Court saw the case through the exclusive prism of German Constitution, misinterpreting the framework decision». See J. Baquero Cruz, *The Legacy of the Maastricht Urteil decision and the Pluralist Movement*, EUI working paper, 2007/13.

The focus on the concept of *Staatsvolk*, giving rise to *objective ethnic factors*⁹⁵ as legitimate grounds for the Constitution's supremacy has, needless to say, further repercussions, beyond the relationship between Germany and the EU, on horizontal dimension which connect the European Union Member States. The most evident of these repercussions is that sense of poorly-hidden distrust, which permeates the entire judgement, of the other European legal systems' ability to secure an adequate level of rights protection. The sole guarantee left to the German citizen is the certainty of being, as far as possible, prosecuted, judged and eventually convicted by a domestic German court.

On the opposite side, to a closer look, The Polish Constitutional Tribunal did exactly what the most extremist "pro-Community activist" would ask for in case of an irreconcilable conflict between the Constitution and EU law. Does the Framework Decision clash with the constitutional norm of a Member State? Fine, we thus suggest to amend the Constitution and, meanwhile, the annulled provision remains temporarily in force. EC law 1 - Constitutional law 0; and *game over*.

It is not by chance that the Polish doctrine observed how the legislator's request to review the Constitution and the temporal limitation of effects of the decision proves that "the Constitutional Tribunal in fact recognized the supremacy of EU law. [...] It thus accepted that the Constitution itself was no longer an absolute framework for control- if it hinders the correct implementation of EU law, it should be changed. [...]...it seemed that in this judgment the Tribunal went further than the existing practice - it implicitly accepted the supremacy of EU law over constitutional norms⁹⁶."

At a closer look, the two approaches considered herein (the German and Polish ones), while so different in their identification of which is the supreme law source of reference (in the former, the Constitution, in the latter, EU legislation), have something in common: the fact that they focus on identifying a supreme source of law. In other words, in both decisions, the game is played out on the field of the

⁹⁵ Judge Kirchhof, according to many, the "mind" behind the Maastricht decision of the Federal Constitutional Court in 1993, encompasses these factors within a common language, a shared culture, with common historical roots. *Supra* note 92 at 367.

⁹⁶ See K. Kowalik-Banczyk, *supra*, note 58 at 1360, 1361. On the some line Angelika Nußberger, the judgment might seem to suggest that the tribunal denies the supremacy of EU law and is adopting an euroskeptical position, in fact, the opposite is true. - See A. Nußberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW NO.1 162, 166.

sources-based theory delimited by the identification of hierarchical, predetermined and unassailable relations among the norms involved. Correspondingly, such an idea of the relationship between EC law and national constitutional law is neither flexible nor open to comparisons. It is not flexible because it is determined by a clear-cut, "once and for all" definition of these relations, which does not permit derogations and force upon the judicial interpreter the solution for the relevant conflict settlement. It is not open to comparisons because of the tendency to solve said conflicts by solely referring to the domestic constitutional landscape.

In this respect, it is worth noticing how both the Polish and German judgements, 1) did not recall relevant ECJ jurisprudence, 2) did not refer to decisions adopted by other European constitutional courts attempting to solve similar conflicts, and 3) never considered the possibility of a dialogue with the Court of Justice through a preliminary reference⁹⁷. Conversely, the three elements do converge in the Czech decision and represent specific and concurring clues to demonstrate that the Brno Court opted to play the game of conflict settlement between domestic and EU law in a field characterised by an interpretation-based theory⁹⁸, rather than a sources of law- hierarchical based theory, as it seems has been favoured by their colleagues in Karlsruhe and Warsaw.

A field, that one chosen by the Czech constitutional court, characterised from a substantive point of view, by the acceptance of the idea of constitutional pluralism as paramount parameter for the constitutional conflicts settlement, while, as to

⁹⁷ Actually, Warsaw's Constitutional Tribunal wouldn't have been in the position to use the preliminary procedure's instrument provided for by art. 35 EU anyway, owing to the not particularly eurofriendly attitude of the Kaczynski twins' government, which, needless to say, had not carried out the (optional) jurisdiction attribution declaration to the ECJ, as per the same article of the Maastricht Treaty. The awaited change of strategy promised by the Civic Platform's leader Donald Tusk, who won the last political elections in October, has yet to come.

⁹⁸ In Italy, one of the most extensive study of this issue was done by Antonio Ruggieri. Amongst his numerous papers dealing with this subject, see at least the following, A. Ruggieri *Prospettive metodiche di ricostruzione del sistema delle fonti e Carte Internazionali dei diritti, tra teoria delle fonti e teoria dell'interpretazione*, *Ragion Pratica* 63 (2002); A. Ruggieri, *Tradizioni costituzionali comuni e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione*, in *DPCE* 102 (2003). Such an axiologically-oriented view seems to share the reconstructive bases of MacCormick and of those supporting the constitutional pluralism rule in the framework of the relationship between the constitutional and supranational legal orders. See N. MacCormick, *Beyond the sovereign State*, 56 *MODERN LAW REVIEW* 1 (1993); N. MACCORMICK, *QUESTIONING SOVEREIGNTY, LAW STATE AND NATION IN EUROPEAN COMMONWEALTH* (1999); M. P. MADURO, *CONTRAPUNCTUAL LAW: EUROPE'S CONSTITUTIONAL PLURALISM IN ACTION*, (2003); N. Walker, *The idea of constitutionalism pluralism*, 65 *MODERN LAW REVIEW* 317 (2002).

methodology and procedure, the application of a dialogic and communicative theory of inter-constitutional law.

From a substantive point of view, the Czech court, although never fully giving up focusing its reasoning on the classical concept of sovereignty, limited transfer to the supranational system and the counterlimit doctrine's application, attempted to convey on an axiological basis, and without any idea of hierarchicalization between different but interconnected legal systems, the ultimate rationale behind the European arrest warrant implementing national law on the one hand, and the constitutionally protected values on the other. To sum up, the judges found that the fact that the Framework Decision does not always apply the double criminality requirement, does not infringe the constitutional principle of legality in criminal law, as the absence of the latter rule does not affect the principle "in relationship among the Member States of the EU, which have a sufficient level of values convergence and mutual confidence that they are all states having democratic regimes which adhere to the rule of law and are bound by the application to observe this principle⁹⁹."

The process of ascertaining conformity of national rules implementing EU norms to the Constitution is not carried out through a strict application of the unassailable rule of EU law primacy over the whole domestic law, nor by assuming unconditioned supremacy of the Constitution over any other source of law, but rather with the objective of identifying the best solution to fulfil "the ideals underlying legal practice in the European Union and its Member States¹⁰⁰." With regard to the second, methodological based, aspect, the Czech court fits its reasoning with in a much broader normative framework than a relevant constitutional parameter's literal interpretation would require. Through certain word-for-word quotes of European and comparative constitutional jurisprudence, far from giving evidence of "constitutional arrogance", has shown the willingness to be part in that project of *cooperative constitutionalism*, which seems to represent one way out from constitutional conflicts between the Community order and Member States' constitutional systems. Certainly enough, it is not the easiest road to take, but it is most likely the only one having a chance to strike the right balance

⁹⁹ M. Kumm, *The jurisprudence of Constitutional conflict: constitutional Supremacy in Europe before and After the Constitutional Treaty*, 12 EUROPEAN LAW JOURNAL 262, 286.

¹⁰⁰ *Id.*

between different but interconnected legal systems, and to find consequently an “harmony in diversity”¹⁰¹.

There is no doubt that the Belgian *Cour d'Arbitrage* adhered to the above mentioned of *cooperative constitutionalism* project, showing its willingness to interact with the ECJ through the recourse to the preliminary reference procedure, still too seldom used by Member States' constitutional courts¹⁰².

As the European arrest warrant saga has brought into focus, this dialogue can take on harsh tones if the referring constitutional court, as was the case of the *Cour d'Arbitrage*, questions the validity of a Community norm and, especially when dissenting opinions emerge on the issue between the national and European courts, but it can enhance the mutual exchange, both culturally and legally, on national and supranational levels, which is such an essential requirement for the creation of a truly common European legal area.

Finally, it should be observed how the constitutional court's fears of losing “the right to the last word” justifying the non-use of the “institutional” communication instrument with the Community judges, as provided under article 234 EC, prove to be excessive from both a technical and methodological standpoint in light of a more general reasoning on possible multi-level interactions among European courts in the new millennium.

With reference to the first (technical standpoint), as the reasoning of the Danish Supreme Court decision, *Colson and Others versus Rasmussen*¹⁰³ shows, where the misapplication by Danish judges of a Community act in which breaches the domestic constitutional system are conditional on a preliminary request to the Court of Justice, via article 234 EC, for the interpretation and validity of the Community norm, it is not true, as has been duly observed¹⁰⁴, that initiating the preliminary procedure entails depriving the constitutional courts of all their

¹⁰¹ See V. Onida, «Armonia tra diversi» e problemi aperti. La giurisprudenza costituzionale sui rapporti tra ordinamento interno e comunitario, QUADERNI COSTITUZIONALI 549 (2002).

¹⁰² Besides the *Cour d'Arbitrage*, only the Austrian, *VfGH*, 10 March 1999, B 2251/97, B 2594/97, the Lithuanian Constitutional Courts (decision of 8-5-2007) and very recently and surprisingly the Italian Constitutional court (ordinance of 14-2-2008) have had recourse to the procedure provided by arts. 234 EC and 35 EU.

¹⁰³ *Caso Carlsen*, judgement of 6-5-1998.

¹⁰⁴ S.P. Panunzio, *I diritti fondamentali e le Corti in Europa*, in I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA 25 (Panunzio ed, 2005).

powers. Applying the method used by the Danish Supreme Court, the final solution to the problem, in fact, would still depend on such courts, which could, in the event that the Luxembourg judges' opinion was unconvincing, apply – in practical terms – the counter limits doctrine, and thus overruling *in parte de qua*, the Treaty article on which is founded the alleged unconstitutional EC piece of legislation.

As to the second standpoint, dealing with methodology, it is plausible to state, supported by eminent scholars¹⁰⁵, that constitutional judges' concern "to have the last word" reflect a questionable methodological approach, i.e. an "old fashion" expression of the pursuit of the "final power", or even "Kompetenz-Kompetenz." Such a concept which lead back to old-fashioned struggles for unity and the attainment of an exclusive centre of gravity is destined to give way instead to a network of complex, "multi-centered" relations amongst courts, fuelled by the principle of loyal cooperation between Community and constitutional judges, and reluctant, by definition, to favour any sort of hierarchal process whatsoever. A second consideration relates to the fact that, in times of *judicial globalisation*¹⁰⁶ and the *European Community of Courts*¹⁰⁷, in the framework of the relationship between

¹⁰⁵ G. Morbidelli, *Corti costituzionali e corti europee: la tutela dei diritti (dal punto di vista della corte di Lussemburgo)*, DIRITTO PROCESSUALE AMMINISTRATIVO 285, 341.

¹⁰⁶ C. L'Heureux-Dube, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARVARD L. REV. 2049 (2001) A.M. Slaughter, *A Global Community of Courts*, 44 HARVARD INTERNATIONAL LAW JOURNAL 191 (2003); A.M. SLAUGHTER, *A NEW WORD ORDER* (2004); S. Choudhry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L. J. 821 (1999); A. McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD JOURNAL OF LEGAL STUDIES 499 (2000); A. STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002); A. STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE*, (2000); E. ORUCU, *JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES* (2003).

¹⁰⁷ G. Martinico, *Il dialogo fra le Corti nell'arena del Gattopardo: l'Europa fra novità costituzionale e nostalgia di comportamento*, in *GIURISPRUDENZA COSTITUZIONALE E PRINCIPI FONDAMENTALI, ALLA RICERCA DEL NUCLEO DURO DELLE COSTITUZIONI* (S. Staiano ed. 2006). F. LICHERE, L. POTVIN SOLIS E A. RAYANOUARD (ED.), *LE DIALOGUE ENTRE LE JUGES EUROPÉENS ET NATIONAUX: INCANTATION OU REALITÉ*, (2004); G. Zagrebelsky, *Corti europee e corti nazionali*, in *I COSTITUZIONALISTI E L'EUROPA: RIFLESSIONI SUI MUTAMENTI COSTITUZIONALI NEL PROCESSO D'INTEGRAZIONE EUROPEA* 529 (S.P. Panunzio ed. 2002); S.P. PANUNZIO (ED.), *I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA* (2005); P. FALZEA, A. SPADARO E L. VENTURA, *LA CORTE COSTITUZIONALE E LE CORTI D'EUROPA* (2003); V. Onida, *La tutela dei diritti davanti alla Costituzionale ed il Rapporto con le Corti sovranazionali*, in *LA TUTELA MULTILIVELLO DEI DIRITTI, PUNTI DI CRISI, PROBLEMI APERTI E MOMENTI DI STABILIZZAZIONE* 105 (P. Bilancia e E. De Marco 2004.); A. Barbera, *Le tre corti e la tutela multilivello dei diritti*, in *LA TUTELA MULTILIVELLO DEI DIRITTI* 89 (P. Bilancia e E. De Marco 2004); V. Zagrebelsky, *I giudici nazionali, La Convenzione e la Corte europea dei diritti umani*, in *La tutela multilivello dei diritti* 99 (P. Bilancia e E. De Marco 2004.); R. Alonso Garcia, *Il giudice nazionale come giudice europeo*, *QUADERNI COSTITUZIONALE* 111 (2005).

interconnected legal systems, a growing distance is emerging between the law degree of openness towards supranational law in the CEE constitutions and the more generous tendency to accept the European law integration into domestic law which Central and Eastern European constitutional courts are currently showing.

In an attempt to be less obscure, let us apply this consideration to the European arrest warrant case.

Upon an initial, "static" reading of the relevant constitutional norms, it has often been pointed out in the paper how an *ex ante* evaluation of the European arrest warrant Framework decision provisions, as regards the binding obligation on the executing State, except for the cases strictly provided for, to surrender a national to the requesting Member State appeared more in line with German Basic Law regulating extradition, than it appeared to be capable of complying with the corresponding provision of the Czech Fundamental Rights' Charter.

More generally, while always maintaining the relevant constitutional norm's perspective, it is evident that the "sovereign" nature of the Eastern European constitutions, and specifically the Polish and Czech ones, left little room for the constitutional courts' pro-European "enthusiasm", when compared to the flexibility theoretically allowed the FCC under the Basic Law's relevant provisions, which was never noted for a marked "sovereignty-focused" character (also in light of the historical context in which it took shape). Moreover, one should bear in mind that the European clause introduced upon the ratification of the Maastricht Treaty in 1993, further acquired the already existing predisposition of the German Constitution to amendments stemming from the European and international experience.

Notwithstanding the advantage of Germany as to the relevant constitutional parameter's construal as compared to the Central-Eastern European legal systems, and especially to the Polish and Czech ones, the "leap" of Warsaw and Brno constitutional courts, which were just examined herein, not only cancelled out this advantage, but it enabled Polish and Czech constitutional jurisprudence, despite a "super primary" which was rowing against, to accept the European law penetration in domestic legal system to a much greater extent than the FCC proved with its decision. In other words, this new season of European constitutionalism seems to be marked by a sense of exploration in terms of new argumentative techniques and original judicial interaction between national and European courts, which follows novel "off-piste" routes from those outlined by the interpretative routes suggested by applicable constitutional parameters.

To simplify even more, what is emerging seems a constantly growing bifurcation between the static reading of the constitutional interconnecting legal systems clauses and their dynamic judicial interpretation by constitutional courts

One final remark should be made. If certain constitutional courts seem to take different views from their respective constitutional law-makers who construed the "super primary" benchmark norms, it cannot be denied, however, that the same courts when considering the implementation-stage of Community norms, very often ask the ordinary legislator for greater cooperation, as well as the constitutional law-maker during the phase of the harmonization of the domestic system with the new supranational provisions.

Apart from the Court of Brno, which managed to settle the dispute within its constitutional interpretation boundaries by (ultimately) resorting to the principle of consistent interpretation, the Polish and German judges reached out to the legislative approach, both at a constitutional (*ex post*) and ordinary (*ex ante*) level. The first ones expressly ask the constitutional legislator to amend, within an eighteen month deadline, the constitutional principle for attaining full conformity with the constitution; the second, instead, formally addressed the ordinary legislator, thus "punishing" him - through the annulment of national regulation for the adoption of a Framework Decision - for not using the discretion that the same legal provision allowed for, in order to safeguard the "domestic factor" connecting German citizens to their homeland.

That said, by observing these horizontal dynamics, which involve the judiciary and Member States' lawmakers, what trend appears to be emerging? Perhaps, the time when the Community integration process could move forward solely based on national and Community courts activism (while, constitutional or ordinary, national and European legislators remained inactive) is over. The same judges, in fact, perfectly aware of the difficulties in order to succeed, as well as of the inconvenience (and why not, a lack of democracy as well) of having the European integration road map project's advancement exclusively determined by judicial activism, increasingly ask for lawmakers' involvement in the coming season of cooperative constitutionalism in Europe¹⁰⁸.

However, for the legislator, being involved is not enough. As the European arrest warrant saga shows, member states' constitutional courts, seem more and more

¹⁰⁸ This view is at the heart of the recent paper of A. Albi, *Supremacy of EC Law in the New Member States Bringing parliaments into the Equation of 'Co-operative Constitutionalism*, 3 *European Constitutional Law Review* 25 (2007).

concerned not only about the *an* of a legislative intervention in the EU relevant area, but also about the *quomodo* of that intervention, which as was the case of Germany, cannot simply consist in a mere “telegraphic transmission” of a European legislation within any domestic legal system. The crucial question concerning the third pillar and the continuous steps towards the predefined goal of an ever closer integrated European Union is to which degree each and every of these EU integrative steps on the rocky road of “communisation” should be subject to a full constitutional control under the patronage of 27 constitutional courts. It is predictable that without an effective judicial communication and through mutually ignoring each others and the ECJ judgements in this area the Member States constitutional courts could soon find themselves along very different roads, without the guarantee that all these roads “will lead to Rome”¹⁰⁹.

Waiting for awaited qualitative legislative improvements two and a half years after the “knock out” French and Dutch constitutional referendums ‘the European treaties’ reform process started to move forward again at least at a Community-wide level, and last December 13th, twenty-seven Member States became signatories to the new Reform Treaty¹¹⁰ in Lisbon.

In terms of liberty, security and judicial space, there is significant news as well. All the innovations already envisaged by the outdated constitutional Treaty of Rome have, in fact, been adopted, starting from the suppression of the pillared structure and the broadening of the scope of legal instruments’ enforceability provided for under the first pillar, as a replacement for the framework decisions and conventions currently in force in the area of judicial cooperation in criminal matters.

The most relevant resulting advantage is the increased effectiveness of the principle of judicial protection, not only because the ECJ’s preliminary jurisdiction will be binding on Member States and no longer merely optional, but also because the Commission will have the possibility, which had been refused until now, to initiate infringement proceedings against Member States failing to transpose, for instance, a framework decision¹¹¹ in the field of judicial cooperation in criminal matters. That is the good news. The bad news is that not only the United Kingdom will not enforce the new regulation as regards the Court of Justice’s preliminary jurisdiction and the Commission’s role as guardian of the treaties in the area of judicial cooperation in

¹⁰⁹ Similar doubts are risen by U. HUFELD, *supra* note 47, 868.

¹¹⁰ See J. ZILLER, *IL NUOVO TRATTATO EUROPEO* (2007).

¹¹¹ *Id.*, 60.

criminal matters, but also that the rules will not be immediately applicable to all the other Member States on the Treaty's entry into force, but only much later, (or perhaps not so much, depends on the future of the Lisbon Treaty), as of 1 January 2014.

DEVELOPMENTS

Conference Report – 30 Years Additional Protocols to the 1949 Geneva Conventions: Past, Present and Future

18th Conference of the Legal Advisors to the German Army and of the Representatives of the German Red Cross, 7 and 8 March 2008, Bad Mergentheim (Germany)

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A. Introduction

One of the cornerstones of the law of armed conflicts, known under the term of “international humanitarian law”, is the so-called “Geneva Law”. Bearing in mind the experiences of the Second World War, Geneva Law was an International Committee of the Red Cross (ICRC) initiative to focus codification on the protection of the individual from the ravages of war. Today it mainly consists of the four Geneva Conventions of 12 August 1949¹ and the two Additional Protocols of 8 June 1977². However, since the end of the 1970s³, further development of the codified body of international humanitarian law has slowed, not least because the

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¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

³ Recently, only the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) of 8 December 2005 has been adopted; see the Notification of the Federal Department of Foreign Affairs of Switzerland dated 4 January 2006, P.242.512.0.

international community, given the number of armed conflicts taking place, has become reluctant to accept further obligations.

As a result, new momentum has only been generated by other areas of public international law which, however, have also influenced the development of international humanitarian law. For instance, in the field of disarmament and arms control law, the 1997 Mine Ban Treaty seeks to alleviate the detrimental effects of specific weapons used in armed conflicts and, hence, at the same time promotes one of the principal targets of international humanitarian law. Beyond that, progress in the field of international criminal law had a catalyzing effect on the development of international humanitarian law.

At the beginning of the 21st century, international humanitarian law faces new challenges, resulting *inter alia* from the introduction of modern, often information technology-based weapon systems and methods of warfare or the emergence of new kinds of asymmetrical conflicts between state actors and non-state transnational terror organizations operating clandestinely. Thus, a thorough examination of the existing sources of international humanitarian law is still a matter of importance.

It was against this background that this year's Teinach Conference had been held. Organized for the 18th time by the German Red Cross (DRK), the Administration of Justice Department of the Federal Ministry of Defence, and the Institute for International Law of Peace and Armed Conflict, the conference took place between the 30th anniversaries of the signing⁴ and the entry into force⁵ of the Additional Protocols. Being a historically memorable date for the Geneva Law, the organizers took this opportunity to stimulate a discussion on the review as well as on the perspectives of the Additional Protocols.

B. Day 1

In her introductory presentation, Dr. Heike Spieker, Federal Convention Representative of the German Red Cross, underlined the relevance of the four Geneva Conventions and the two Additional Protocols which she referred to as the "constitution" of international humanitarian law. While the Conventions to date had been ratified by 194 state parties, and thus were backed by virtually the entire

⁴ 10 June 2007.

⁵ 7 December 2008.

community of states, the Additional Protocols—with 167 and 163 ratifications respectively—came equally close to such universal validity. Aiming to fill existing gaps in the Conventions, with particular regard to the protection of the civilian population and the rules on the conduct of war, the Protocols were of particular importance.

Against this background, *Spieker* stressed that the community of states and the Red Cross had a common responsibility to examine whether the existing body of rules was still suitable to address new challenges or not. Questions currently discussed included the applicability of the Geneva Law on new kinds of conflicts and on combating terrorism, and with it the related distinction between civilians and combatants as well as the choice of the relevant rules applicable to deployments abroad. Although the advancement of the relevant rules should not be *per se* rejected, the given regulatory system had to be respected since it represented a value system comparable to the German constitution.

Spieker pointed out that during the 30th International Conference of the Red Cross the international community had basically affirmed the adequacy of the Additional Protocols. The Teinach Conference thus followed the tradition to benefit from partnerships and synergies between states, the Red Cross and university institutions in order to adequately implement, disseminate and improve international humanitarian law.

The first presentation, “The Principle of Distinction: Combatants and Participation in Hostilities”, held by Prof. Dr. Thilo Marauhn, Justus Liebig University Giessen, stressed the particular importance of treaty law as the principal source of international humanitarian law. All efforts of generating new rules of humanitarian law notwithstanding, Marauhn argued that treaty law always reflects an explicit textual consensus of the international community. This, however, was not necessarily true for rules generated by international custom as it was, for instance, gathered by the ICRC’s *Study on International Custom in the field of Humanitarian Law*⁶.

Additionally, new treaty rules that had been set up outside of the codified regime of international humanitarian law in force today might end up in an erosion of the existing body of humanitarian law. This might soon be observed when

⁶ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, VOLUME II: PRACTICE (International Committee of the Red Cross ed., 2005).

humanitarian law is enforced by rules of the Rome Statute of the International Criminal Court, should those rules only differ marginally from each other.⁷ Marauhn then emphasized the importance of Additional Protocol I rules on combatants. He stated that Art. 43 and 44, which can be traced back to Art. 1 of the Regulations Concerning the Laws and Customs of War on Land and Art. 4A of Geneva Convention III, created a uniform notion of armed forces encompassing both regular and non-regular armed forces. This had finally clarified the classification of members of liberation movements in occupied territories as combatants granting them possible prisoners of war status at the same time, an issue of some controversy during decolonization.

However, the finally codified compromise had not been able to solve this issue for good for an exact differentiation had still been avoided. Thus, the wording of Art. 43 Additional Protocol I proved controversial again during the debate on the "War on Terrorism" and the notion of armed forces. Discussion here focused on the meaning of armed forces for illegal combatants and their status as prisoners of war. Therefore, though not all problems existing under the prior regime could have been dissolved, its range of application had at least been considerably broadened. That was always to be considered when interpreting the rule.

As regards the ICRC's Study, Marauhn stressed its value for the application and development of humanitarian law as such. Nevertheless, he pointed at several critical issues closely connected to the study's approach. One concerned methodological inconsistencies in establishing state practice, as national military field manuals were weighted in an undifferentiated manner within the study.⁸ Furthermore, Marauhn criticized Rules 3 to 6 compiling existing custom on the status of combatants. He recognized an excessive interpretation of these rules as regards direct participation in hostilities, and considered this to be problematic as these rules served as an important means of differentiation between civilians and combatants.⁹

⁷ See Art. 8 para. 2 (b) (i) of the *Rome Statute*: "Intentionally directing attacks against the civilian population as such or against individual civilians *not taking direct part* in hostilities" vs. Art. 51 para. 3 of Additional Protocol II: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they *take a direct part* in hostilities" (emphasis added).

⁸ See *International Committee of the Red Cross*, *supra* note 6, Introduction, xxv-li, at xxxii, in particular xxxviii.

⁹ See *International Committee of the Red Cross*, *supra* note 6, Rule 6, 19-24, at 22.

This notwithstanding, the Study was still constituting a highly valuable means of interpretation for Art. 43 und 44 of Additional Protocol I. Identifying some most recent challenges for international humanitarian law, Marauhn, first, mentioned the “War on Terrorism” and stated that – at least in this context – there must not be any differentiation between combatants and illegal combatants.

Second, he highlighted that private individuals and private military contractors alike had become increasingly involved in hostilities. Their status as members of the armed forces of a party to a conflict was not always clear, which had made it difficult to assess the application of the framework set out by Art. 43 and 44.

Finally, raising some critical issues closely connected with the deployment of modern unmanned aerial vehicles, Marauhn doubted that when using these it would always be possible to adhere to the principle of distinction. Furthermore, he stated that it was still unclear whether the person in control had to be seen as taking a direct part in hostilities or not.

Summing up, Marauhn argued that the rules laid down in Additional Protocol I concerning the status of combatants had provided useful answers for problems in the past. To resolve future challenges, a careful textual analysis was required. For the codified rules contained a reliable and useful system of concrete universal values in the sense of the Martens Clause.

Prof. Dr. Michael Bothe, Chairman of the Commission on Humanitarian Law of the German Red Cross, delivered a presentation entitled “The Enforcement of Humanitarian Law – Red Cross, Civil Society, Penal Jurisdiction and Interstate Conflict Resolution”. Bothe explained that, different from national law, the international law system lacks an authority with a monopoly on the use of force. As the enforcement of humanitarian law by physical force was not an option at the international level, other ways of law enforcement must be resorted to.

According to Bothe, three different strategies could be identified. One focused on enforcement by prevention, comprising the incorporation of humanitarian law rules by national legislation and the diffusion of relevant expertise by the International Red Cross Movement. Another strategy could be labeled as repressive as it made use of post-World War II developments in international criminal law. In this respect, the duty to national criminal prosecution, according to the universality principle, was of particular importance, the strict prohibition of reprisals in conventional law notwithstanding.

As typical examples for a strategy of diplomatic enforcement of humanitarian law, Bothe mentioned the concept of the protecting power as supervisory body and

inter-mediator having access to prisoners of war. Finally, the principles of state responsibility might serve as a means of enforcement when, for instance, a friendly agreement was reached under the auspices of an investigation commission in a case of an existing liability for damages due to a violation of treaty law.

Bothe then proceeded to the improvements to law enforcement contained in Additional Protocol I, which he rated to be rather marginal given the ambitious goals of the Geneva Diplomatic Conference. Due to the loss of practical relevance of the concept of the protecting power after World War II, it had been agreed on the so-called "Geneva Mandate" to be – in cases of doubt – exercised by the ICRC automatically. This approach, which had laid law enforcement in the hands of an impartial third party, had fallen prey to the deep mistrust between the former superpowers.

Worth highlighting was, according to Bothe, the establishment of the international humanitarian fact-finding commission, which, as a permanent body of the international community, served as an investigator for serious humanitarian law violations offering its investigative capacities to national criminal prosecutors. It was only due to its crucial weakness, the facultative clause establishing its jurisdiction, that as yet no single application for investigation by the Commission had been filed. This ran contrary to the high practical relevance the right to initiative of the ICRC had gained. The appointment of protecting powers had become increasingly obsolete the more the International Red Cross Movement had become the custodian and guardian of conventional law, now being the established "humanitarian superpower".

As a latest development Bothe recognized one he explained to be almost a proliferation of dispute settlement procedures. Thus, the Security Council was increasingly enforcing humanitarian law by setting up ad-hoc tribunals for the prosecution of war crimes. The same was true for the ICJ ruling on questions of humanitarian law in the case of *Congo v. Uganda*¹⁰ and its recent Advisory Opinions on the Legality of the Threat or Use of Nuclear Weapons as well as the Israeli West Bank Barrier. In addition, Bothe referred to arbitral tribunals like the Eritrea-Ethiopia Claims Commission. The recognition of a parallel application of human rights law and humanitarian law offered the opportunity to enforce the latter by making use of individual remedies provided for in international human rights instruments. Considering this, even civil society might support law enforcement by supporting petitioners filing appropriate claims.

¹⁰ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Report 2005, 168.

Dr. Knut Dörmann, Head of the ICRC Legal Division, started his presentation on “Additional Protocol II” with a brief outline of the genesis of the Protocol. At the beginning of the 1970s it had become apparent that given the increasing number of non-international armed conflicts, particularly with regard to national liberation movements in Africa after the end of WW II, Art. 3 of the Fourth Geneva Convention could not sufficiently provide for the protection of the civilian population. However, as attempts to reform the Convention in this respect proved to be unrealizable, the Diplomatic Conference agreed on the adoption of a second Additional Protocol relating to the protection of victims of non-international armed conflicts.

The Protocol provides, *inter alia*, fundamental guarantees for the humane treatment of persons who do not take a direct part or who have ceased to take part in hostilities (Art. 4), or whose liberty has been restricted (Art. 5), judicial guarantees (Art. 6), rules for the treatment of the wounded, sick and shipwrecked (Art. 7-12), as well as provisions for the protection of the civilian population (Art. 13-18). Dörmann pointed out that the legal treatment of non-international armed conflicts under humanitarian law had been highly controversial at that time since many states feared that such inclusion might pave the way for interference in their internal affairs. Due to these objections the scope of the Protocol was eventually reduced from 47 to 28 Articles.

Ever since its adoption it has been brought forward that, compared to Additional Protocol I, essential issues had not or only insufficiently been dealt with. Most notably, critics claimed that provisions on the conduct of war were too rudimentary, the status of combatants had been entirely excluded, and the implementation rules were merely superficial. However, Dörmann stressed that Additional Protocol II should not be assessed on a solitary basis.

Since the creation of the Additional Protocols, both public international law and customary international law had made considerable progress and particularly the ICRC’s Study on Customary International Humanitarian Law identified rules applicable to non-international armed conflicts. It had to be considered that, in relation to Common Art. 3, the scope of Art. 1 para. 1 of Additional Protocol II was more restricted as it excluded from the applicability of the Protocol conflicts between non-state factions without the involvement of the government’s armed forces and provides that the non-state belligerents must be able to exercise control over a part of the state’s territory. For Dörmann, this restriction represented one of today’s challenges to the future development of humanitarian law.

With regard to international terrorism, it had to be analyzed whether the fight against terrorism represented an international conflict or not. Additionally, there was a need for action to answer the question whether non-state actors might be granted the same combatant status as Art. 43 and 44 of Additional Protocol I provide for armed forces taking part in international armed conflicts. Dörmann stressed that, as long as non-state actors respected the basic rules of international humanitarian law, the option for exemption from punishment had to be guaranteed.

Furthermore, international humanitarian law partly suffered from a lack of regulatory density. Thus, in the case of arbitrary deprivation of liberty, Additional Protocol II did not provide any procedural rules for persons concerned and offered no definitions for elementary terms such as “civilian” or “direct participation in hostilities”. However, the ICRC’s Study could facilitate the interpretation of ambiguous terms.

Apart from content-related challenges, the implementation of international humanitarian law gave cause for concern. It could be observed that primarily non-state entities would not abide by the basic principles of the Geneva Law, which, for one thing, could be attributed to a lack of knowledge of the applicable rules, but also to insufficient training and the absence of disciplinary structures. Finally, the origins and objectives of ethical conflicts often ran contrary to the basic rules of international humanitarian law.

C. Day 2

The second day of the conference was opened by Dr. Katharina Ziolkowski, Legal Advisor and Operational Law Instructor, NATO School Oberammergau, who focused on “Computer Warfare and the Additional Protocols to the Geneva Conventions”. Ziolkowski departed from the premise that modern wars were primarily characterized by the mode of warfare and the weapons used, with computer-controlled methods of warfare becoming more and more common.

Such “cyber warfare” ranged from the defense of cyber attacks, to computer-based gathering of information and the performance of cyber attacks, while cyber attacks could be understood as the alteration, suppression, or deletion of electronic data. Potential targets of cyber attacks included, *inter alia*, military orders, data bases, or internet communication, as well as the functioning of public infrastructures, such as water and energy supplies, traffic infrastructure, or financial, judicial and administrative institutions.

Although cyber attacks were not per se directed at human beings, they, however, had the potential to indirectly cause severe injuries or even lead to death, if they were, for example, aimed against a nuclear plant's cooling system. Furthermore, the growing dependence of public institutions on IT systems allowed for cyber attacks to sometimes have devastating effects. Thus, the cyber attack directed at Estonia in spring 2007 in parts massively affected banks, public authorities, parliament, police and governmental as well as private institutions for a period of several weeks.

Besides the defense of such attacks, notably the identification of its originators caused difficulties. Worldwide computer networking and cross-border data flow allowed cyber attackers to remain largely anonymous. Additionally, various tools existed that help attackers obscure their IP address and thereby hide their identity, so that, for example, it remained unclear to date who had been responsible for the cyber attack against Estonia.

Ziolkowski further raised the question whether cyber attacks had to be qualified as armed attacks as understood under the Additional Protocols, and asserted that, when evaluating the nature of an activity concerned, not only the methods applied but also the impacts caused had to be examined. Accordingly, a cyber attack would amount to a quasi-armed attack if human beings or valuable tangible assets were affected, whereas in the case of theft or deletion of individual data such classification had to be declined.

Ziolkowski emphasized that despite the lack of express regulation of cyber attacks, the Additional Protocols showed a remarkable degree of progressiveness and could be applied to circumstances which had not been considered by the Diplomatic Conference when preparing the Protocols in 1977. As an example, she referred to Art. 38 and 39 of Additional Protocol I and to Art. 12 of Additional Protocol II, the purpose of which is to prohibit the misuse of a group's identity and consequently comprised the concealment of one's electronic identity. Moreover, cyber attacks were also subject to the prohibition of perfidy as contained in Art. 37 of Additional Protocol I and, according to Art. 48 of Additional Protocol I and Art. 13 of Additional Protocol II, should not be directed against the civilian population, but only against military objectives.

In this context, the problem was discussed whether the internet constituted a military target. Ziolkowski noted that it had to be examined in each particular case whether a data transmission served a military purpose, which could, *inter alia*, be the case if the opposing party's telecommunication were channeled via internet. Given the degree of reliance of civil and public institutions on international IT systems, Ziolkowski concluded that computer controlled methods of warfare were becoming more and more important in armed conflicts.

Contrary to conventional strategies of warfare, cyber warfare had the advantage of being territorially independent and economically more efficient, with only few individuals needed for the performance of an attack. However, the observation of the Protocols revealed that their inherent protective purpose was timeless and, despite several questions remaining yet unanswered, the Protocols still mattered, even in the age of computer warfare.

Following Ziolkowski's presentation, Dr. Stefan Weber, Head of Division 4 at the Center for Internal Command of the German Armed Forces, elaborated on "Review of Weapons under Additional Protocol I and non-lethal weapons" and argued that no explicit definition of non-lethal weapons (NLW) existed in international humanitarian law. Having said that, Weber sketched out the basic components of the term he claimed to be understood broadly.

One characteristic of NLW was that they were not necessarily used with the purpose to kill, but rather to stop or hinder a person from moving, to provoke disorientation, or to dissipate crowds. Though killing was not intended in the first place, a target might still suffer serious injuries or even die upon application. As NLW were not employed as a method of warfare only, but also used in peace or police missions, there was a high risk that both violators and innocent bystanders were hit.

NLW were thus designed to fill the gap between firearm and baton, and there was a great variety of NLW which might affect either the body, the mind or the senses of a target. Weapons affecting the body embraced rubber and other pressure projectiles, capture nets, sticky foam encapsulating the corpus, and tasers, while teargas, acoustic weapons, and flash bangs aimed at a person's senses. Simultaneous impacts on multiple senses were intended by NLW that affect a target's mind, and even moral influencing experiments based on the use of radiation and waves were reported. Finally, anti-materiel weapons included microorganisms that degrade metals, plastics, fuels, and coats of paint, while microwaves might be used for electromagnetic disturbances in order to deny enemy radio communication.

While, according to conventional law, NLW were not banned completely, there existed some restrictions which needed to be carefully observed. Rules related to certain categories of weapons were contained in the 1886 St. Petersburg

Declaration,¹¹ the 1972 Biological Weapons Convention,¹² the 1980 Convention on Certain Conventional Weapons¹³ as amended in 2001,¹⁴ and the 1993 Chemical Weapons Convention.¹⁵ Additional restrictions flowed from general clauses as formulated in Art. 23 of the 1907 Regulations Concerning the Laws and Customs of War on Land¹⁶ and Art. 35 of Additional Protocol I.

Regarding the introduction of a new weapon, the duty to determine whether its employment would be prohibited by the Protocol or by any other rule of applicable international law contained in Art. 36 Additional Protocol I would have to be observed. This duty had been, however, relatively unknown for a long time, and compliance with it had been consistently neglected, before a change had been brought about as a result of the ICRC sponsored SIrUS Project studies.¹⁷ These had shed some light on the terminology used in Art. 35 para. 2 of Additional Protocol I by developing objective criteria for the manifestation of “superfluous injury” and “unnecessary suffering”, which were based on medical experiences made with patterns of injuries in the field. These so-called “SIrUS criteria” were designed to assist states in setting up enhanced and standardized national mechanisms for the study provided for in Art. 36 of Additional Protocol I.

In cases of weapons inflicting, by their very nature, damages exceeding these criteria, their military benefits should be balanced against these damages and, if necessary, alternatives ought to be checked. However, the respective audit was not monitored by an autonomous authority, and the responsibility of its performance was rather resting with the states themselves. Therefore, as many states feared

¹¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight [St. Petersburg Declaration], 29 November 1868, 1 AJIL Supplement 95-96 (1907).

¹² Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, 1015 U.N.T.S. 163.

¹³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, 1342 UNTS 137.

¹⁴ Amendment of Article 1 of the CCW Convention, adopted at the Second Review Conference of the States Parties to the CCW Convention, 21 December 2001, Doc. CCW/CONF.II/2.

¹⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 UNTS 45.

¹⁶ Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, and its Annex: Regulations concerning the Laws and Customs of War on Land, 2 AJIL Supplement 90-117 (1908).

¹⁷ The acronym SIrUS stands for “Superfluous Injuries and Unnecessary Suffering”.

espionage in defense industry matters, there were worries about the degree of compliance with that duty. In any event, it was the SIRUS project that had helped to make the rules laid down in Art. 36 of Additional Protocol I to be generally known today.

Under the heading "International Humanitarian Law, Terrorism and New Mindsets - The Protocol Question", Harvey Rishikof, Professor of Law and National Security Studies at the National War College in Washington, looked at recent developments of international humanitarian law from an US perspective. Rishikof observed that US foreign policy had taken a remarkable turn. While in the past the United States used to be one of the driving forces behind the development and promotion of public international law, in recent years the will to join international development processes had become more and more reluctant.

Most recently, the US refusal to ratify the Kyoto Protocol and the Rome Statute of the International Criminal Court gave rise to worldwide discussions. With regard to the respect for international humanitarian law it had to be noted that until the present day the United States refused to ratify the Additional Protocols, so that binding obligations only resulted from the four Geneva Conventions as well as from other relevant agreements such as the Hague Convention for the Protection of Cultural Property In the Event of Armed Conflict.

At present, especially the determination of the status of combatants and the related question of direct participation in hostilities poses problems, which, however, had to be resolved on a case-by-case basis. Rishikof underlined that all military measures had to follow the rule of proportionality and the rule of military necessity, for example regarding attacks against military objects shielded by civilians or in the case of so-called "targeted killings".

In the context of "War on Terrorism", particularly the "privatization of the battlefield" posed new challenges. Private military contractors who were increasingly being employed by the United States gave rise to the question of identifying which duties existed for those private entities and which legal means could be adopted in case of misbehavior. Legal instruments applicable in this regard included the US Military Extraterritorial Jurisdiction Act and the War Crimes Act of 1996. Beyond that, the determination of the legal status of illegal combatants caused difficulties. In this respect, Rishikof referred to the Military Commissions Act of 2006 which could be understood as a reaction to the decision of the Supreme Court of the United States in the matter of *Hamdan v. Rumsfeld*.¹⁸

¹⁸ 548 U.S. 557 (2006).

D. Conclusion

Emphasizing that during the past 30 years the Additional Protocols had considerably expanded the scope of protection of international humanitarian law, however, both the presentations and discussions were far from delivering nicely wrapped birthday presents. New kinds of conflicts, steadily evolving methods of warfare, international terrorism and non-state actors involved in hostilities only represent a selection of the variety of legal questions currently discussed by politicians, practitioners and academics alike. Even though the Additional Protocols cannot provide definite answers to all questions ahead, they constitute an elementary and reliable set of codified rules which have found widespread acceptance in the international legal society. Additional instruments such as the ICRC's Customary Law Study as well as new emerging treaty law concerning, on the one hand, specific weapon systems and, on the other, rules of international criminal law functioning as a catalyst for humanitarian law rules provide valuable sources in a world that faces new emerging political difficulties in finding solutions between political blocks which were already believed to have been overcome for years. Therefore, this somewhat sectoral approach which can currently be identified in international humanitarian law may serve as a promising means to further develop the system which is needed to find answers for the challenges ahead.

DEVELOPMENTS

Book Review - Building a Polity, Creating a Memory? Europe's Constitutionalization and Europe's Past:

A Review of Georges Mink and Laure Neumayer, eds., *L'Europe et ses passés douloureux* (2007) and Christian Joerges, Matthias Mahlmann and Ulrich K. Preuß, eds., *"Schmerzliche Erfahrungen der Vergangenheit" und der Prozess der Konstitutionalisierung Europas* (2008)

*By Stefan Seidendorf**

[Georges Mink, Laure Neumayer, eds., *L'Europe et ses passés douloureux*, (2007) La Découverte: Paris, ISBN 978-2-7071-5197-1, pp. 268]

[Christian Joerges, Matthias Mahlmann, Ulrich K. Preuß, eds., *'Schmerzliche Erfahrungen der Vergangenheit' und der Prozess der Konstitutionalisierung Europas* (2008), VS-Verlag: Wiesbaden, ISBN 978-3531154145, pp. 353]

By a (perhaps not so) amazing coincidence, within hardly half a year's time, three books on the relationship between the process of European integration and the different modes of commemorating Europe's 'painful pasts' have been published. Two of these books are reviewed here, with a focus on the social 'puzzle' behind this apparent conjuncture¹.

The two studies take different approaches. For Joerges, Mahlmann and Preuß, the debate on Europe's painful experiences in the past turned virulent as a result of the ongoing process of 'constitutionalization' in Europe. The creation of a polity and

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¹ The third one, *L'EUROPE ET SES REPRESENTATIONS DU PASSE - LES TOURMENTS DE LA MEMOIRE* (Marie-Claude Maurel & Françoise Mayer eds., 2008) could not be included in this review.

democratic decisions within a common framework require some common understanding of basic norms and values. To claim normative 'legitimacy', such an enterprise requires the support of the citizens, recognizing each other as members 'equal of rights' of the polity. This of course seems hardly the case if they continue to maintain a hostile or antagonistic relationship towards each other, reconfirmed by suppressed collective traumata, exploited in nationalist or extremist narratives of politicians who are all-too-quick to confer to (imagined and real) 'others' their own incompetency to deal with ever more complex situations. Politicians and scholars have pointed out time and again that constitutionalizing the European Union (EU) goes along with the existence of a "community environment"² or of a 'community of values and norms'. It seems less sure that the same politicians (and scholars) always understand the inherent consequences of such a claim.³ The authors in Joerges, Mahlmann and Preuß accordingly deplore a marked absence of political debate around, let alone critical analysis of, the importance of Europe's historical burden for today's EU. Yet, this burden will have to be addressed if Europe transforms from a 'regulatory state' into a political project. Tackling this *problématique*, Joerges et al. build on an interdisciplinary approach, bringing together lawyers, historians and social scientists from eight European countries, from the United States and Australia. Whilst all of them are renowned scholars in their respective disciplines, the reader follows their struggle to find a common language and a common ground that allow them to 'measure' the different social dimensions of the acclaimed 'historical burden' for the European integration project. Throughout the study, the ambivalence and at times inconsistencies that characterize Europe's relationship with its past(s) become clear – and more than once, the perplexity of the authors confronted with these findings emerges.

Instead of imposing new homogenizing narratives, doomed to fail in the presence of the continuing strong appeal of national narratives, especially in Eastern Europe, the authors recommend alternative strategies to legitimize Europe's political order. Bo Stråth in "Die politische Ambivalenz des Sozialen"⁴, for example, points to the potential social consequences if the identitarian ('we against them') way of dealing

² DIE EUROPÄISCHE UNION AUF DEM WEG IN DEN VERFASSUNGSSTAAT (Berthold Rittberger & Frank Schimmelfennig eds., 2006). THE CONSTITUTIONALIZATION OF THE EUROPEAN UNION (Berthold Rittberger & Frank Schimmelfennig eds., 2007).

³ Stefan Seidendorf, *Geschichtlichkeit und Gemeinschaftsumwelt – Was strukturiert den Konstitutionalisierungsprozess?*, in DIE EUROPÄISCHE UNION AUF DEM WEG IN DEN VERFASSUNGSSTAAT, 101 (Berthold Rittberger & Frank Schimmelfennig eds., 2006).

⁴ Bo Stråth, *Die politische Ambivalenz des Sozialen*, in "SCHMERZLICHE ERFAHRUNGEN" DER VERGANGENHEIT UND DER PROZESS DER KONSTITUTIONALISIERUNG EUROPAS, 128 (Christian Joerges, Matthias Mahlmann, Ulrich K Preuss eds., 2007).

with the past, that allowed for social peace and identification with the nation domestically, but created a dangerous potential for conflict *amongst* European nations, is no longer acceptable: replacing the 'identitarian way' would not only require new ways of 'coming to terms' with the European past, but would also require a EU-ropean answer to the *social* question. While the study obviously cannot answer this question, its approach in dealing with Europe's historical burden is shared by the authors of the second book under review. Against the attempts to create an "aseptic" European memory⁵, the authors forward a mutual acceptance of differing narratives of the past. Habermas' "inclusion of the other"⁶ should encompass the individual's memories and traumata – while insisting on their individual, not national rootedness, in order to find 'unity in diversity'.

Mink and Neumayer's book, resulting from a collective research project on "Les grammaires internationales de la réconciliation" ("the international grammar of reconciliation") and bringing together researchers working in six European countries, starts out by establishing an analytical framework that enables them to scrutinize the European (and international) variances of dealing with "painful" past(s). This allows for a systematic approach and the study enormously benefits from Georges Mink's masterly drawn synthesis on "L'Europe et ses passés 'douloureux': stratégies historicisantes et usages de l'Europe" ("Europe and its 'painful' pasts: historicizing strategies and utilization of Europe").

The concept outlined by Mink and applied by most of the authors demonstrates that the interpretation and re-interpretation of the past is a *political act* with consequences relevant to the present day. It is in politically 'salient' moments that an apparently settled memory of a traumatic past can resurge and develop political impact. A striking example of this are the debates around the Turkish mass-murder of Armenians in the early 20th century: Whereas a strenuous Armenian diaspora had to struggle for a long time in order to remind the world of this forgotten tragedy, it is only recently that their campaign can claim some success (e.g. recognition as 'genocide' by parliamentary acts in France and Switzerland). For the French researchers, the answer to the puzzling question of *why* the Armenian community finally succeeded in its quest for recognition lies in the debates that developed around the question of a Turkish entry into the European Union. This has created a politically salient situation where the emotional potential contained in

⁵ Valérie Rosoux, *Mémoire(s) européenne(s)? Des limites d'un passé aseptisé et figé*, in *L'EUROPE ET SES PASSES DOULOUREUX*, 222 (Georges Mink, Laure Neumayer eds., 2007).

⁶ JÜRGEN HABERMAS, *DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE* (1996).

the Armenians' painful past turns out to be an interesting (discursive) resource for the opponents of Turkey's EU-entry – be they Armenian or not.

With this social mechanism in mind, reading the following empirical chapters becomes an enlightening experience, as it so often is in French sociological and political analysis. The case-studies span from Southern Europe (France and Algeria, Spain, Italy) to Central and Eastern Europe, with Germany obviously occupying a central place. Confirming Joerges et al., the authors of the French study settle the current debates within the process of enlargement and constitutionalization of the EU. Whereas, accepting the EU-uropean corpus of law, the *acquis communautaire* has been a precondition for entering the EU, it turns out that amongst the 'old' member states something like an "*acquis communautaire historique*"⁷ has come into existence, recognition of which seems a further pre-condition for entering EU-rope not only *de jure*, but politically.

Yet, the existence of this *acquis communautaire historique* does not translate into the existence of a unique EU-uropean meta-narrative that could be imposed on the new member states. It rather describes a certain *façon* of narrating the past, notably built on a reflective stance that allows for the existence of different alternatives next to the national master narrative(s). The underlying norms of the *acquis communautaire historique* define three main areas of East-West contention, translating into a range of historical debates that take place between 'old' and 'new', but also amongst the 'new' member states. They can be found both in Joerges et al. and in Mink and Neumayer's study:

- (1) All Central and Eastern European countries are experiencing an at times painful re-appropriation of their own embroilment into the Holocaust. Whilst their self-understanding is, understandably, first and foremost that of 'victims' of the German aggression, they discover that more than one 'perpetrator' lived amongst them, keen to exploit the criminal facilities opened up by the German occupants' exterminatory anti-Semitism. Struggling with the resurgence of these painful remembrances, the new member states learn that within the western world's attempts to seize the all-encompassing monstrosity of the *Shoah*, a non-negotiable sensitivity for the particular Jewish suffering during World War II has developed. Non-negotiable for the 'old' member states, acceptance of the particular Jewish

⁷ Fabrice Larat, *Vergegenwärtigung von Geschichte und Interpretation der Vergangenheit. Zur Legitimation der Europäischen Integration*, in REICHWEITEN DER VERSTÄNDIGUNG. INTELLEKTUELLENDISKURSE ZWISCHEN NATION UND EUROPA, 240 (Matthias Schöning, Stefan Seidendorf eds., 2006).

suffering becomes a pre-condition for entering the *acquis communautaire historique*.

- (2) As the second area of contention, the new member-states have to learn, sometimes the hard way, about Western Europe's (alleged) way of dealing with minorities. These debates are of particular vivacity when they meet – as in the German-Polish and German-Czech case – the attempts of the (German) 'perpetrator-victim's' to de-contextualize the historical conditions of the Second World War and to re-write parts of the European history. Especially, the analytical frame developed by Mink and Neumayer allows focusing on the political 'salience' of these attempts and their impact on the German-Polish and German-Czech relations.
- (3) The third area of contention highlights the fact that a democratic political debate in historical-normative dimensions cannot be a one-way process. In applying the newly interiorized norms, the new member states can oblige their Western European *Lehrmeister* (instructors) to respect the common normative environment of the *acquis communautaire historique*. This implies that the 'old' member-states have to re-examine their 'western' understanding of the past. An illustration of this is the meaning of the communist dictatorships for EU-rope. In Eastern European memory, soviet style communism equals with a 'second totalitarian experience', after the first one of Nazi occupation. By applying the underlying norm of the EU-ropean *acquis communautaire historique* ('no more totalitarianism in Europe'), they can oblige the 'old' member states to integrate *this* representation of the past into their memories: While an equalization of the 'two dictatorships' (national socialism and communism), and notably the assimilation of the Nazi Holocaust with Soviet occupation of Eastern Europe, meets with Western incomprehension, the Eastern European claim to delimitate EU-rope from the totalitarian Communist past seems to have every chance to be integrated into the common *acquis communautaire historique*. Especially, the study on Latvia⁸ in Mink and Neumayer reveals this point.

⁸ Pascal Bonnard & Markus Meckl, *La gestion du double passé nazi et soviétique en Lettonie. Impasses et dépassements de la concurrence entre mémoires du Goulag et d'Auschwitz*, in *L'EUROPE ET SES PASSES DOULOUREUX*, 169 (Georges Mink, Laure Neumayer eds., 2007).

Yet, reading the two books not only highlights European divergences. The two books are also classic examples of the existence of a common European political and scholarly debate. The great number of European topics, the participation of different academic disciplines and the European background of the authors make both books worth reading. Experiencing the intellectual richness of these studies translates into a passionate journey into Europe's past that can be highly recommended to anyone who has the linguistic means that are necessary for the comprehension of the at times abstract French and German academic prose.

THE GENOCIDE CONVENTION: INTERNATIONAL CONFERENCE COMMEMORATING ITS 60TH ANNIVERSARY

4th – 6th December 2008

Philipps-University Marburg, Germany
International Research and Documentation Center for War Crimes Trials

On 8th December 1948 the General Assembly of the UN adopted a Convention establishing the crime of "Genocide". It has taken fifty years until this crime was prosecuted before an international criminal tribunal in the Akayesu Case at the ICTR. Even if the crime of genocide is perceived of as the worst of all international crimes, its application is anything but clear. In addition there is a certain conflict between genocide as a criminal offence and the prohibition of genocide as an obligation under public international law.

The 60th Anniversary of the Genocide Convention is a very fitting occasion to reflect on the origins of the Convention, its present difficulties and its future. The International Research and Documentation Center for War Crimes Trials (ICWC) at the University of Marburg has thus organized an international conference from 4th to 6th December 2008 in Marburg and Frankfurt (Germany) to discuss the relevant issues concerning the Genocide Convention.

On the first day of the Conference the focus will be on the history of the Genocide Convention. A panel chaired by Michael Kelly will discuss the development of the term „genocide“ before 1948 (William Schabas), the drafting history (Jost Dülfer) and the importance of the holocaust (Herbert Reginbogin) as well as the Nuremberg Trial (John Barrett) for the developing of the crime of genocide. As special guests we will welcome Gabriel Bach, former Prosecutor in the Eichmann trial in Jerusalem, and Whitney Harris, former US prosecutor at the Nürnberg Trail.

A further panel, chaired by Eckart Conze will address the importance of the Genocide Convention after 1948. The speakers will be Theo Schiller, Lawrence Douglas, Moshe Zimmermann and Annette Weinke. Finally, a third panel, moderated by Morten Bergsmo, will examine the challenges faced at international genocide trials, with particular reference to the British genocide trials (Wolfgang Form), the Rwandan situation (Judge Inés Weinberg de Roca, ICTR), the situation in the former Yugoslavia (Matthias Schuster, ICTY) and the Cambodian genocide (Jürgen Assmann, ECCC) .

The second day will begin with a discussion of the legal difficulties encountered in the

application of the Genocide Convention. Chaired by Florian Jessberger, participants Antonio Cassese, Stefan Kirsch, Henning Radtke and Christoph Safferling will analyse individual aspects of the crime of genocide. A further panel, moderated by Claus Kress, will address the discrepancies between criminal law and public international law. Panel participants Paola Gaeta, Leila Sadat and Andreas Zimmermann will discuss the ICJ Decision on Genocide and the General Responsibility to Protect under International Law. The final session of the day will address the future of the Genocide Convention from various angles. Chaired by the Legal Adviser, Director-General for Legal Affairs of the German Federal Foreign Office, Georg Witschel, the sociological (Ulrich Wagner) and psychological (Harald Welzer) aspects of the prohibition of genocide will be addressed. The role of the ICC and the future of international prosecution of the crime of genocide will be presented by Judge Hans-Peter Kaul, ICC, and Serge Brammertz, ICTY.

The venue of the final conference day will be Frankfurt/Main, at the place where the notorious Auschwitz-Trial was heard in 1963 at the Regional Court. The significance of this trial to the German people is comparable to that of the Eichmann-Trial in Jerusalem for Israel and the USA, as it brought the horrors of the holocaust to attention of the German general public. The day will thus start with a lecture on the importance of this trial for the prohibition of genocide by Heinz Düx, who acted as pre-trial judge in this case. The main lecture will be held by Judge Bruno Simma, ICJ: Sanctioning Genocide – International Law under the influence of the Genocide Convention. Closing remarks will be given by Günter Nooke, Federal Government Commissioner for Human Rights Policy and Humanitarian Aid at the Federal Foreign Office.

Further information: www.genocide-convention2008.de

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TILT Conference

Tilting Perspectives on Regulating Technologies

Date December 10 & 11, 2008

Location Tilburg University, Tilburg, The Netherlands

Organised by TILT – The Tilburg Institute for Law, Technology, and Society

THEME

Innovative technologies like ICT, biotechnology, nanotechnologies, have a huge impact on society. Regulating these technologies is a complex effort. This conference aims at bringing academic knowledge and policy approaches about regulating technology a step forward by looking at issues from a multidisciplinary angle. Regulating technologies involves different regulatory approaches giving rise to fundamental questions. More than 20 renowned speakers from different countries and from distinct disciplines – including law, ethics, politics, sociology, biotechnology, and information security – will provide plenary key-notes, or present papers in parallel sessions. Furthermore, submitted papers will be presented in the parallel sessions.

THE SPEAKERS INCLUDE

Roger Brownsword - University of Sheffield, the United Kingdom

Dan Burk - Stanford University, USA

Ybo Buruma - University of Nijmegen, The Netherlands

Christian Joerges - European University Institute Florence, Italy

Charles Raab - University of Edinburgh, the United Kingdom

Joel Reidenberg - Fordham University School of Law, USA

Andy Stirling - University of Sussex, the United Kingdom

Geertrui Van Overwalle - Katholieke Universiteit Leuven, Belgium

Kevin Warwick - University of Reading, the United Kingdom

For information on the program and registration, please visit our website: <http://www.tilburguniversity.nl/tilting>

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Second Call for Contributions

for a Symposium Issue of the **German Law Journal** & the **Maastricht Journal for European and Comparative Law**

“Following the Call of the Wild: The Promises and Perils of Transnationalizing Legal Education”

The Editors of the German Law Journal – www.germanlawjournal.com - invite all interested legal scholars to submit manuscripts for a Symposium Issue dedicated to a critical assessment of the ongoing, transnational debate on Legal Education Reform. The German Law Journal, an anonymously refereed legal periodical, published monthly with a global distribution to over 9.000 scholars and legal practitioners, has been a longstanding forum for a critical debate around the questions of internationalization, foundation fields and practice orientation in law school curriculum reform. The Symposium Issue aims at bringing together voices from around the world concerning the differently experienced and formulated challenges in legal education in order to initiate a continuing global level thought exchange based on specific aspects of legal education that it has identified.

Requirements: 300 word **abstracts** should be submitted to the editorial board submissionsglj@osgoode.yorku.ca via email as word documents or PDF files, along with current contact information and C.V. by **November 1st 2008**. **Please include your name within the name of files that you are attaching and also state in the abstract the specific area of the special issue your paper will address.** No late submissions will be accepted. Accepted authors will be **notified by November 14th, 2008**, along with full submission guidelines. **Full papers** are due **January 31st, 2009**.

Background: Karl Llewellyn, as early as 1935, in his article entitled *On What's Wrong with So-Called Legal Education* questioned whether the law school in fact knew what it was training students for. His article raises the surprisingly current issues of the interrelationship between legal professionalism and legal scholarship, the development of practice oriented legal skills and the integration of legal context into every course. In order to delve into these dilemmas on both a comparative and more critical level, the editorial board of the GERMAN LAW JOURNAL invites contributions for a special symposium issue entitled *The Scientific Parameters of Legal Scholarship and Legal Education*, planned in conjunction with the MAASTRICHT JOURNAL OF EUROPEAN & COMPARATIVE LAW based in the Netherlands.

In its past, the GLJ has published engaging scholarly work on the topic of legal education, such as “*The Einheitsjurist - A German Phenomenon*” by Annette Keilmann ([Vol. 7, Issue 3](#)), “*Living with the Bologna Process: Recommendations to the German Legal Education Community from a U.S. Perspective*” by Laurel S. Terry ([Vol. 7, Issue 11](#)) and “*Review Essay: Langdell's Prodigal*”

Grandsons: On Duncan Kennedy's Critique of American Legal Education" by Viktor Winkler ([Vol. 7, Issue 8](#)). The special issue will build on this work by gathering thoughtful articles that explore the changing landscape of legal education and legal scholarship.

In addition to furthering this meaningful discussion in the journal, the GLJ and MAASTRICHT JOURNAL are hoping to conduct a subsequent Conference on the same theme in 2009 at the University of Maastricht. While this conference has not been finalized, it is our sincere hope that contributors to the special issue will consider presenting their article at the conference to engage in fruitful dialogue with other scholars on this topic.

We welcome submissions that would address **one or more of the five areas** of the special issue:

1. **'Same ol', same ol'?' Reflecting on Curricular reform:** What are the drivers of the current reform wave? Are these reforms spurred by bodies external to law school program committees, such as the potential revision of accreditation standards by the American Bar Association or the Bologna Process in Europe, which continues to transform legal education? What are the impacts of economic pressures on the minutia of curricular reform, such as mandatory versus optional courses or upper year versus first year requirements? How are the changes in entrance requirements impacting the democratic promise of law and legal education?
2. **'Geared Toward Practice?' Assessing the Current Law School Race to Legal Skills-Building:** What are the specific ways in which law schools have so far sought to bridge the perennial divide between teaching 'law as trade' and engaging in the law as 'academic/critical exercise'? What is the role of the adjunct professor in providing first hand exposure to practice? What are the effects of Clinical Education Programs? On the continent, do the two to three years of bar training, which provide legal skills but are not shaped by the law school at all, invite a critical examination of the relevance of legal education as a whole? How large is the law school room to manoeuvre when straddling the divide between theory and practice on the one hand and competitive pressure brought about by transnational law programs and student mobility on the other?
3. **'Inside-Out?' Towards a Transnational Legal Education?:** What is the capacity of legal education, traditionally defined by jurisdictional boundaries, to meet the needs of an increasingly transnational law student body? What are the conceptual foundations of programs that cater to internationalization, such as regional development programs, international clinical education programs or exchange programs? How do 'global law school' programs compare to regional ones, as exemplified in the recent bid in Ontario for a law school in the North? How deep is the comparative, historical and local teaching mandate of the global law school?
4. **'Learning to think and act like a Lawyer' – The Challenge of Professionalism in the Profession: Legal Ethics:** Is the spread of the practical, fact-driven study of legal ethics merely a North American phenomenon? Are there European apples that can be compared to these North American oranges? What is the role of the decline of what Llewellyn calls "sustained work... on the wherewithal for judging and shaping policy intelligently?" Are

the traditions of Legal Sociology and Legal Philosophy serving the same purpose of contextualizing law and what is the effect of their decline?

5. **‘Is More More?’ Thinking about Student Organization, Government, Community:** What is the value of student run organizations, such as student edited law reviews or legal associations that cater to particular subject matters? What is the effect of the proliferation of such organizations? What is the impact of sharing the governance of the law school with the student body itself and is this a practice that should/could be transplanted to other jurisdictions? With expectations of high student involvement, how many years are enough? How many is too many?

We would be more than happy to provide you with further information regarding the symposium issue. While we are not in a position to offer a fee or stipend for your submission of manuscripts to the journal, you can be assured of a captive audience of both legal scholars and law students interested in learning more about your work around the world. Inquiries should be sent to: glj@osgoode.yorku.ca

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