THE CONSTITUTIONAL DEVELOPMENT OF THE EUROPEAN UNION

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I. INTRODUCTION

In the spring of 2005, something dramatic happened in the European Union (EU): on May 29, the French voters said "Non" to French ratification of a treaty entitled "Treaty Establishing a Constitution for Europe" and aimed at providing the EU with a new legal basis (54.9% against on a turnout of 69.7%).[1] On June 1, in a consultative referendum, and the first referendum ever in the Netherlands, 61.6% of Dutch voters (on a turnout of 62.8%) also said "No."[2] By that time, Spain and Luxembourg had already held referenda, which had authorized ratification, and Lithuania, Hungary, Slovenia, Italy, Greece, Slovakia, Austria and Germany had ratified the treaty following parliamentary approval of the same.[3]

The negative votes in France and the Netherlands immediately threw the EU into turmoil: several states postponed their approval procedures. The United Kingdom, Denmark, Ireland, Portugal, and Poland postponed their referenda indefinitely.[4] The Czech Republic cancelled its referendum and opted for a purely parliamentary procedure instead, and that procedure has been put on hold.[5] Sweden postponed its parliamentary procedure indefinitely.[6]

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1. Vaughne Miller, *The Future of the European Constitution* 7 (Int'l Affairs & Def. Section, Research Paper No. 05/45, 2005), *available at* http://www/parliament.uk/commons/lib/research/rp2005/rp05-045.pdf.

2. *Id.*

3. *Id.* Whether the treaty can be ratified after a parliamentary procedure only, or whether it needs to be submitted to the people, is regulated by national constitutions. Some states, for political reasons, may choose to organize consultative referenda, as the Netherlands did. Politically, it would be near-to impossible for parliaments to ignore the result of such referenda, even if, as a matter of law, parliaments could still go ahead and approve the treaty.

4. BBC News, EU Constitution: Where Member States Stand, http://news.bbc.co.uk/1/hi/world/europe/3954327.stm (last visited June 22, 2007).

5. *Id.*

6. *Id.*

Other states have gone ahead and approved the treaty after parliamentary procedures: Latvia (June 2, 2005), Cyprus (June 30, 2005), Malta (July 6, 2005), Belgium (February 8, 2006), Estonia (May 9, 2006), and Finland (May 12, 2006).[7]

How did this happen? Why did the French and the Dutch say "No"? Was it because they rejected the thought of a federal Europe, a "United States of Europe?" Would the Treaty Establishing a Constitution for Europe really have established this? And what happens now?

In order to answer these questions, it is necessary, in particular for an audience, which is probably not very familiar with the EU, to say something about the EU as it presently is and the achievements so far.

II. THE INSTITUTIONAL SET-UP OF THE EUROPEAN UNION

A. THE ORIGINAL MODEL: THE COAL AND STEEL COMMUNITY

What today is known as the "European Union," started out in 1952 as the "European Coal and Steel Community" between France, (West) Germany, Italy, the Netherlands, Belgium, and Luxembourg.[8] The Treaty subjected the coal and steel industries of those nations to a common, independent authority (simply called "the High Authority") in order to increase the efficiency of those industries.[9] However, the establishment of an independent authority also removed the industries from national control. Since coal was the main source of energy and steel was the main industrial product both for the peaceful re-building of Europe after the war, as well as for any future war, this made sense: It would speed up the reconstruction effort and at the same time make war in the future much more difficult, as national governments no longer controlled the industries which would be vital for any war effort. The treaty also established an internal market for coal and steel: customs tariffs and discriminatory measures were abolished between the six states, state subsidies were prohibited and anti-trust rules were introduced.[10]

The High Authority exercised extensive direct control of the undertakings: it had the power to issue regulatory measures which were directly binding upon the undertakings, much in the same way as federal law within

7. *Id.*

8. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951 (not published in O.J.) [hereinafter European Coal and Steel Treaty].

9. *Id.* preamble and art. 2.

10. European Coal and Steel Treaty, arts. 4, 60-67.

a federal state.[11] The High Authority also acted as enforcer of the anti-trust rules directly vis-à-vis the undertakings. The Authority's nine members were to exercise their authority in complete independence of the states.[12] They acted by simple majority.[13]

In addition to the High Authority, the treaty also established a Council,[14] consisting of government representatives, and a Parliamentary Assembly, as well as a Court of Justice. The Council had a rather limited role, mostly with the power to block or authorize the High Authority's actions in certain cases,[15] rather than making decisions of its own.[16] It acted by simple majority, qualified majority, or unanimity as specified in the treaty. The Parliamentary Assembly, with members appointed by national Parliaments,[17] had the power to force the resignation of the High Authority through a vote of no confidence,[18] but it did not act as a legislature in the normal sense. The Court was charged with judicial control of the High Authority as well as with adjudicating disputes between the Member States and between a Member State and the High Authority, with the High Authority in this case acting as a kind of prosecution service charged with detecting treaty infringements by the Member States.[19]

B. THE EUROPEAN (ECONOMIC) COMMUNITY

Today, the Coal and Steel Community is history. According to its own text, the treaty lapsed after fifty years, in 2002.[20] However, the main traits of its institutional structure are still visible in what is presently called the European Union. Because of the success of the Coal and Steel Community, a new community was set up on January 1, 1958. This is the European Economic Community (EEC). From November 1, 1993, the Community became known as simply the European Community (EC) as the scope of application of the Treaty was extended into cultural and other non-economic matters. The EC is still the backbone of the European Union.

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11. European Coal and Steel Treaty, arts. 50, 53, 58, 59, 61, 64, 66.
12. *Id*. art. 9.
13. *Id*. art. 13.
14. *Id*. art. 26-28.
15. *Cf. id*. arts. 53(b) (requiring the Council's concurrence for the establishment of any financial mechanism); 58(1) (requiring the Council's concurrence for the establishment of a system of procution quotas); 61 (requiring consultation with the Council for the imposition of minimum or maximum prices).
16. *See id*. art. 59(2) (providing an example of the Council being the principal decision-maker).
17. *Id*. art. 21.
18. *Id*. art. 24.
19. Id. arts. 33-38, 88-89.
20. *Id*. art. 97.

Today, it also encompasses coal and steel. (There is also a European Atomic Energy Community, also dating from 1958, which still exists. However, this article will not deal with that community.)

Basically, the goal of the EEC was to establish a common market (today the term "internal market" is more widely used) for all economic activities not covered by the two other treaties: A common market for industrial and agricultural products (including fish) as well as for services, a free labor market and free flow of direct and portfolio investments in the form of right to cross-border establishment, and free movement of capital. The free movement of goods, services, persons,[21] and capital is often referred to as the "four freedoms" in European legal literature.[22]

The European common market was not established overnight. Already, the treaty itself laid down long transitional periods.[23] After the end of the transition periods, economic and political problems throughout the 1970s stifled development, mainly in the form of the Member States being unable to agree on the many detailed rules, which were needed, in particular to do away with the technical barriers of trade created by non-harmonized legislation in the Member States. It was not until the mid-1980s that the conditions were ripe for what was termed the establishment of an "internal market" by 1992.

The EC has the same basic institutional structure as the Coal and Steel Community: There is a "High Authority" in the form of a "Commission" consisting of—now—twenty-seven Members, one for each Member State, who act independently of their home states.[24] There is a Council consisting

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21. The concept of "free movement of persons" is usually understood to cover both free movement of workers and right of establishment for individual businessmen and for legal persons (direct investments as opposed to portfolio investments, the latter being covered by the rules on free movement of capital) although it would seem that the Court of Justice of the European Communities, of which more later, would usually treat all kinds of currency restrictions as a matter of free movement of capital even when the currency movement was linked to a direct investment. Today, there are no currency restrictions inside the EU, even between Member States not belonging to the EURO-area.

22. CATHERINE BARNARD: THE SUBSTANTIVE LAW OF THE EU—THE FOUR FREEDOMS 3 (Oxford Univ. Press 2004).

23. Most of the provisions on transitional periods were removed as part of the revisions made to the EC Treaty through the Treaty of Amsterdam (signed on October 2, 1997, and entered into force May 1, 1999). In the original Treaty, provisions on transitional periods could be found in what were then articles 8, 14, 23, 33, just to mention a few.

24. The following twenty-seven States are now Member States of the EU: Austria (since 1995), Belgium (since 1958), Bulgaria (since 2007), Czech Republic (since 2005), Cyprus (since 2005) Denmark (since 1973), Estonia (since 2005), Finland (since 1995), France (since 1958), Germany (since 1958 with regard to West Germany (Federal Republic of Germany)); East Germany ((German Democratic Republic) joined the Federal Republic in 1990 and was then automatically also absorbed into the EU), Greece (since 1981), Hungary (since 2005), Ireland (since 1973), Italy (since 1958), Latvia (since 2005), Lithuania (since 2005), Luxembourg (since 1958), Malta (since 2005), the Netherlands (since 1958), Poland (since 2005), Portugal (since

of government ministers, who act by simple majority, qualified majority or unanimity (although mostly by qualified majority in matters pertaining to the internal market). There is a European Parliament, which by now is directly elected and has mushroomed to 785 members, and there is a Court of Justice, which, since 1988, has a Court of First Instance attached to it, and since December 2005, a special tribunal for personnel matters (The Civil Service Tribunal).[25]

However, since the EC encompasses so much more than coal and steel, the powers of the institutions in relation to each other and in relation to the Member States are not the same as under the Coal and Steel Community: It would be unacceptable for reasons of sovereignty, and totally impractical, to hand to the Commission all the power which the High Authority enjoyed with regard to the coal and steel sectors. The power to regulate trade and industry as well as the labor market and the capital market basically rests with the Member States themselves.[26] However, the Commission still has significant powers: it can intervene directly vis-à-vis undertakings in anti-trust matters (although the competition authorities of the Member States, for capacity reasons, now handle most of the cases),[27] and all state aid schemes in Member States need authorization from the Commission before they can be implemented.[28] More importantly, even though the main legislative powers lie with the Council and the Parliament, those bodies can only act upon a proposal from the Commission.[29] Furthermore, the Council in most

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1986), Romania (since 2007), Slovenia (since 2005), Slovakia (since 2005), Spain (since 1986), Sweden (since 1995) and the United Kingdom (since 1973).

25. The legal basis for The Court of Justice and the Court of First Instance as well as for the establishment of "special panels," of which the Civil Service Tribunal is the only so far, is article 220 EC, as amended by the Treaty of Nice, which will be discussed in Section 4.3 *infra*. The Civil Service Tribunal was established by a Council Decision of November 2, 2004. Cases in which private parties (usually undertakings trying to overturn Commission decisions in state aid and anti-trust matters) act as applicants start before The Court of First Instance. Its judgments may be appealed on points of law to the Court of Justice.

26. *See* Case C-491/01, Q v. Secretary of State for Health *ex parte* British American Tobacco (Investments) Ltd. & Imperial Tobacco Ltd., 2002 E.C.R. I-11453, para. 179 (referring to EC Treaty art. 95).

27. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty] art. 85; Council Regulation 1/2003, 2003 (L 1) 1.

28. EC Treaty art. 88.

29. This follows from the wording of the treaty provisions attributing power to legislate to the Council (in most cases today together with the European Parliament): they usually specify a "proposal from the Commission" as a necessary precondition for acting. There are some exceptions to this rule, but they are of minor importance in the field of the internal market. For instance, the Council only needs the opinion of the Commission, not a proposal, in order to organize expert committees under the Council. EC Treaty art. 209. With regard to new areas of competence which have been added under the Maastricht Treaty, discussed in sec. IV.B *infra*, such as foreign and security policy and police and judicial cooperation, the Council may act without a proposal from the Commission. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter EU Treaty], arts. 13-15, 34.

cases needs to be unanimous in order to opt for other solutions than those proposed by the Commission.[30] This means that the Commission plays a vital political role in setting the agenda. This also explains why the smaller Member States so far have insisted that all Member States be able to nominate at least one commissioner each: The commissioners may be independent, but one may assume that a person coming from a certain country—usually the commissioners are former high-ranking politicians—may have a better understanding of the political priorities and sensibilities of that country than others.

C. THE "DEMOCRATIC DEFICIT"

The Commission also has some legislative powers but mostly in the form of subordinate legislation based on enabling clauses in legislation enacted by the two bodies, which, in the EC set-up, are the main legislative bodies: The Council and the European Parliament.[31] A basic question throughout the history of the EC has been the distribution of powers between the Council and the Parliament. This discussion is often referred to as the discussion of the "demographic deficit" within the EC. This notion already presupposes that there is something wrong with the system as it is, and that it should be remedied by giving more power to the European Parliament and less to the Council.

The Council represents the governments of the Member States. National governments depend on being elected by a popular majority in national parliaments, so one cannot say that the Council is without democratic legitimacy. However, this legitimacy is undoubtedly more indirect than that of the European Parliament, where the members are directly elected,[32] and where they group according to political affiliation (Conservative, Social Democrats, etc.) rather than as national delegations. On the other hand, elections for the European Parliament tend to produce very low

30. EC Treaty, arts. 250, 251(3), 252 (c)-(e).

31. Perhaps the most important enabling clause for the Commission is article 86(3) in the Treaty Establishing The European Community, which enables it to some extent to regulate in particular national monopolies. As an example on legislative powers based on enabling clauses in legislation passed by the Council and the European Parliament could be mentioned article 19(10) in the European Parliament and Council Directive 2004/39, on markets in financial instruments, according to which the Commission shall lay down implementing measures with regard to the conduct of business obligations for investment firms laid down in more general form in Article 19(1)–(9). European Parliament and Council Directive 2004/39, art. 19(10), 2004 O.J. (L 145) 18.

32. This process is in place since 1979; before that time national MPs were elected by the national parliaments as members also of the European Parliament.

turn-outs, much lower than in national elections, so the democratic legitimacy of the Parliament may also be called into question.[33]

Traditionally, the Council enjoyed dominance over the Parliament. Originally, the role of Parliament in legislative matters was simply consultative.[34] In 1987, as part of the reforms to introduce the "internal market" by 1992, Parliament was given a new role through the so-called "cooperation procedure."[35] From that time forward, this procedure had to be used in most cases concerning new legislation on the internal market. The cooperation procedure meant that each new proposal from the Commission had to go through two readings both in the Council and in Parliament, and that the Council would have to be unanimous in order to overrule the Parliament's position if that position was supported by the Commission (which risked a vote of no confidence if it did not). However, the last word remained with the Council.

Needless to say, this did not satisfy the Parliament. In 1993, as part of the so-called Maastricht Treaty (discussed in part IV.B.), the "co-decision procedure" was introduced, also mainly in the area of the internal market, where it, to a large extent, replaced the "cooperation procedure."[36] This procedure meant that the Parliament finally gained the power to stop the Council: under the co-decision procedure, there will be no decision at all if Council and Parliament after two readings in each institution, and failed attempts in a common Conciliation Committee, still cannot agree. The conciliation procedure is not unlike the Conference Committee procedure used in the U.S. Congress when the House of Representatives and the Senate cannot agree on the specifics of legislation. In other words, when the Council interacts with Parliament through the co-decision procedure, it acts more or less like a second chamber, a senate, to the "first chamber" of the European Parliament.

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33. The average turnout dropped from 56.6% in 1994 to 49.7% in 1999. PAUL CRAIG AND GRÁINNE DE BURCA: EU LAW—TEXT, CASES AND MATERIALS 78 (3d ed. Oxford 2003). During the last elections in 2004 the turnout was 45.5% for the EU as a whole. EurActiv.com, http://www.euractiv.com/en/elections/european-parliament-elections-2004-results/article-117482 (last visited September 11, 2007). This is considerably lower than for national elections in most Member States. It is often argued that if only the European Parliament would become more powerful, the participation in the elections would increase.

34. *See* EC Treaty art. 94 ("The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament . . . .").

35. After the renumbering of the EC Treaty as part of its amendment through the so-called Amsterdam Treaty, the cooperation procedure is laid down in article 252 of the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts. 1997 O.J. (C 340) 1 [hereinafter Amsterdam Treaty]. Originally, the procedure was laid down in art. 149(2), and then moved to (the previously numbered) EC Treaty art. 189c.

36. EC Treaty art. 189b (now article 251).

However, the Council is not a purely legislative body. It has powers which are definitely of a non-legislative nature.[37]

The Commission also cannot very well be compared to a national (or federal) executive branch: It does not have the wide-ranging powers that national governments have. In fact, one has to accept that the EC—and, as we shall see, the EU—simply cannot be easily compared to a state, not even a federal state, even within those areas where the Member States have ceded sovereign powers to the organization.

The allocation of powers between Council and Parliament goes to the heart of the debate of what the end goal should be: If it is some kind of federal state, then obviously the legislative powers would rest ultimately with a parliament. (Although it may be a two-chamber body, with a first chamber in which representation is based on "all citizens are equal" and a second chamber in which representation is based on "all states are equal," just like the United States House of Representatives and Senate). However, if one thinks that the EU should remain first and foremost a body through which sovereign nation states cooperate in areas of common interest, it is natural to let the Council, which represents the states and their democratic institutions, remain not only a separate institution but also the most powerful institution, even in legislative matters. This is the normal solution in international cooperation: the main decision-making body consists of representatives of the governments of the member states (for example, the Security Council of the United Nations).

Because the Council has so much power, it is not surprising that the voting system within the Council has also been controversial among the Member States.[38] As most decisions other than procedural decisions require a qualified majority (unless unanimity is called for), this discussion has centered on how to constitute that qualified majority. Until now, each state has been assigned a certain number of votes which reflects the relative size, population-wise, of the state. However, the smaller states have more voting power than their size indicates. For instance, Germany, France, the United Kingdom and Italy (between 83 million and 57 million inhabitants)

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37. The Council shall, *inter alia,* "ensure coordination of the general economic policies of the Member States." EC Treaty art. 202. In particular with regard to foreign and security policy and police and judicial cooperation, which are areas of cooperation introduced by the Maastricht Treaty, (discussed in section IV.B. *infra*), the Council may decide to initiate "tasks of combat forces in crisis management, including peacemaking" and "operational cooperation between the competent authorities including the police." Amsterdam Treaty, *supra* note 35, arts. 17(2), 30(1)(a).

38. *See infra* note 41 and accompanying text on the "Luxembourg Compromise." The voting system in the Council was also one of the most difficult questions during the negotiations for the EU "Constitutional Treaty." *See* section V *infra* (discussing the controversies surrounding the voting system in the Council).

all have twenty-nine votes each, whereas Malta (400,000 inhabitants) has three votes. All together, the Member States have a total of 345 votes between them. A qualified majority requires 255 votes in favor. A Member State in the minority can, however, require this majority to represent at least sixty-two percent of the total population of the European Union.[39] If not, the proposal does not carry.

On the other hand, it is seldom that a qualified majority within the Council actually votes down the minority. Usually, the Council attempts to find a compromise solution which is acceptable to all. However, when ministers representing their States in the Council know that other ministers with a different view hold between them a qualified majority, the former will be more susceptible to compromise than otherwise.[40]

The EC has exclusive legislative powers only in very few areas.[41] Mostly, the legislative power is shared between the EC and the national parliaments of Member States. This means that the Member States are free to regulate at the national level, even with regard to cross-border trade with other Member States, as long as they keep within general treaty rules and those EC rules which may exist for that particular area. As the legislative activity of the EC increased from the mid-1980s as part of the internal market program, there has been less freedom of action for national parliaments.

D. THE COURT OF JUSTICE: A "JUDICIAL ACTIVIST"?

When the EC exercises its legislative power, the exact effects of that legislation in the internal law of the Member States have to be defined. It follows already from the EC Treaty that a certain form of EC legislation, the so-called "regulations," are directly applicable in the Member States.[42] For all practical purposes, they are akin to "federal law." With regard to the other main form of EC legislation, the so-called "directives," the treaty text may seem to indicate that they, in contrast to the regulations, shall not have

39. EC Treaty art. 205 as amended due to the accession of Bulgaria and Romania to the EU.

40. There has been a tradition, however, called the "Luxembourg Compromise," of respecting a *de facto* veto right for individual Member States in matters subject to decision by qualified majority: If one Member State stated its absolute opposition to a proposal, claiming that vital national interests were at stake, the Council would not proceed to a vote. However, this "veto right" will only be respected as long as it is not abused, and it seems to be invoked less frequently now than a generation ago.

41. The legislative powers include jurisdiction over marine resources management, external trade relations, anti-trust and currency policy for those Member States belonging to the EURO zone, and even in some of these areas competence has to a certain extent been "leased back" to the Member States, most recently in the enforcement of anti-trust rules.

42. EC Treaty art. 249(2).

any direct effect in the Member States: the directives are "binding, as to the result to be achieved," upon the Member States, but they "shall leave to the national authorities the choice of form and method" of implementation in national law.[43] Furthermore, the treaty is silent on the legal effects of the treaty itself. The treaty is also silent on what shall take precedence before national courts if national courts have to decide on a case in which national law, seen in isolation, leads to a different result than applicable EC rules.

This is where the Court of Justice comes in. As under the Coal and Steel Treaty, it has jurisdiction under the EC Treaty to adjudicate in infringements proceedings brought by the Commission against a Member State, or—much more seldom—between Member States.[44] It also exercises judicial control over the decisions of the Commission in the area of anti-trust and state aid (although for capacity reasons a Court of First Instance has since 1989 heard these cases at first instance when private parties, not the Member States, act as applicants).[45] In addition, it also delivers so-called "preliminary rulings" on requests by national courts which are seized with a matter in which the interpretation of an EC rule may have a decisive influence on the outcome of the case. The national court may then ask the EC Court of Justice to clarify the interpretation for the purposes of the case, and the national court is bound to apply the interpretation given by the Court to the case at hand. In fact, national courts whose decisions may not be appealed are under an obligation to submit requests for preliminary rulings if the interpretation is not clear from the text of the EC provision in question or from previous case law from the EC Court of Justice.[46] This has generated a large volume of cases for the EC Court of Justice. The particular system of preliminary rulings must be seen on the background of the EC lacking any court system of its own. Thus, EC law is mostly applied by national authorities and national courts, which due to differences in legal tradition may well end up interpreting EC law differently in different countries.

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43. EC Treaty art. 249 EC (3).

44. EC Treaty arts. 226, 227.

45. EC Treaty art. 230. The Court also has jurisdiction in certain other cases, such as tort claims against the EC.

46. *Cf.* EC Treaty art. 234. *See* Joined Case 28-30/62, Da Costa en Schaake v. Nederlandse Belastingsadministratie, 1963 E.C.R. 31, *and* Case 283/81 CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (discussing the criteria for when national courts of last instance are obliged to request a preliminary ruling). Also, the question of validity of an EC act may be presented to the Court for a preliminary ruling, and no national court, even courts whose decisions may be appealed, can base its judgment on the invalidity of an EC act without having obtained a ruling on this from the Court. Under the Treaty Establishing the Coal and Steel Community, national courts only had to submit the question of validity of decisions of the High Authority to the Court to be decided in a preliminary ruling. *Cf.* European Coal and Steel Treaty art. 41.

In several landmark cases starting already in the 1960s, the Court has held that the rules of the Treaty itself have direct effect in the legal order of the Member States provided that the rules, in the words of the Court, are "unconditional" and "sufficiently precise."[47] The Court practices the conditions of "unconditional" and "sufficiently precise" with some laxity. It has even extended the direct effect to provisions of directives which, in an unconditional and sufficiently precise manner, confer rights on individuals vis-à-vis national public authorities.[48] The rationale for this has been that Member States should not be able to rely on their own failure to correctly implement the directive as a successful argument against the citizens.[49]

The Court has also ruled that when directly applicable EC rules collide with national law, the EC rules prevail, in principle even over national constitutional law.[50] Both the principle of direct effect and the principle of primacy have largely been accepted by national judiciaries, although one may still inquire as to what extent EC primacy over national constitutions will be accepted. On the other hand, the EC Court of Justice has been criticized by some commentators, and also by politicians, for being judicial activists in the vein of the U.S. Supreme Court.[51]

III. THE INTERNAL MARKET

The Court has also played a vital role in developing the substantive content of EC law relating to the internal market. From the 1970s onwards, when the Council was at its most ineffective, the Court interpreted the widely and vaguely formulated general rules on free movement of goods, services and persons and direct investments[52] in such a way that the Court to a certain extent made up for the paralysis in the Council and pushed the

47. *See* Case 26/62 Van Gend & Loos v. Nederlands Administratie de Belastingen, 1963 E.C.R. 1; *see also* Case 43/75 Defrenne v. Sabena, 1976 E.C.R. 455 (regarding direct effect even for the purposes of regulating rights and obligations between private parties).

48. *See* Case 41/74 Van Duyn v. Home Office, 1974 E.C.R. 1337; *see also* Case 91/92 Faccini Dori v. Recreb, 1994 E.C.R. I-3325.

49. *See* Case 148/78 Pubblico Ministero v. Ratti, 1979 E.C.R. 1626.

50. *See* Case 6/64 Costa (Flaminio) v. ENEL, 1964 E.C.R. 585; *see also* Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratsselle Getreide, 1970 E.C.R. 1125.

51. Among academics, one of the most outspoken commentators is Hjalte Rasmussen, professor at the University of Copenhagen. He is the author of *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht 1986).

52. The treaty rules on free movement of capital foresaw a more gradual liberalization than the rules on free movement of goods, persons and services. For that reason, portfolio investments were only completely liberalized in 1990. For goods, persons and services the transitional periods ended on December 31, 1969.

development of the common market further. Naturally, this behavior added fuel to the fire for arguments about the Court's so-called judicial activism.[53]

Starting with goods and later moving on to services and persons and direct investments, the Court went beyond a mere principle of non-discrimination, a principle which is clearly laid down in the Treaty itself. Also, rules which applied equally to domestic and imported goods, services etc. alike, became subject to the Court's censorship. Such rules—often by chance—differ from one country to the next and for that reason present a problem for those who have adapted themselves to the rules in one market but who want to export to another market with other rules. Under the doctrine developed by the Court, the importing state (with regard to services and persons, the concept of "host state" is mostly used) has to prove that a rule which it wants to apply to imported goods or services (or workers from other Member States), even though it is stricter than the corresponding rule of the exporting state ("home state"), does not go beyond what is necessary in order to protect a societal interest which the Treaty, as interpreted by the Court, allows to prevail over the interest of the internal market. [54] This may be compared to the levels of scrutiny that the United States Supreme Court places upon state laws or regulations that potentially conflict with federal law or the Constitution.

When these rules were combined with the principles of direct effect and primacy, undertakings and professionals, even private citizens, could go to national courts and effectively challenge national rules which restricted, but not necessarily outright prevented, cross-border economic activity.

To the extent a non-discriminatory rule cannot be applied with regard to cross-border activity, the result will often be that the rule is abolished also with regard to internal economic activity in the state in question. Since internal economic operators will often compete in their own national market with economic operators from other Member States, it usually makes little sense for the national legislature to subject the former to stricter, and therefore more costly, rules than the latter.

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53. Recently, the Austrian Chancellor (Head of Government) lashed out against the Court after it had handed down a judgment against Austria in a case concerning the rights of students from other EU countries at Austrian universities.

54. *See* Case 120/78 Rewe-Zentral v. Bundesmonopolverwaltung, 1979 E.C.R. 649—usually referred to as "Cassis de Dijon" (the Court has later modified its position somewhat in Joined Case 267 & 268/91, French Penal Authority v. Keck & Mithouard, 1993 E.C.R. I-6097 (regarding goods); Case C-76/90, Säger v. Dennemeyer & Co. Ltd., 1991 E.C.R. I-4221 (regarding services); *see also* Case C-55/94, Gebhard v. Consiglio D'Ordine, 1995 E.C.R. I-4165, *and* Case C-415/93, Union Royale Belge des Societes de Football ASBL v. Bosman, [1995] ECR I-4921 (regarding persons). There are also many other cases in which the Court restates and clarifies its position, but judgments mentioned here are among the best-known in this field.

Admittedly, the Court has been quite liberal in accepting social interests which are allowed to prevail over the interest of establishing a common (internal) market, and it has also allowed the Member States quite some leeway in setting the level of protection accorded to those interests—for instance, the level of environmental protection from a certain pollutant. This has meant that many, if not most, national rules which in fact function as restrictions on trade between Member States are left standing. This is why there is still quite a lot of legislative activity in the EU in order to either harmonize national rules (in which case the trade restriction consisting in rules being different disappears by itself),[55] or introduce a principle of mutual recognition which forces the Member States to accept goods and services in a certain field as long as they are lawful in their country of origin, with no possibility to apply their own more stringent rules to imported goods or services.[56]

However, many national rules have also been set aside simply through the application of general treaty rules. The EC Court of Justice can be quite detailed in examining whether it is necessary to apply fully the national rules which restrict trade. To the extent national courts perform this examination without asking for a preliminary ruling from the EC Court of Justice, they are bound to apply the same level of scrutiny. With regard to consumer protection, which is often at issue, the EC Court of Justice has also insisted that with regard to rules on product description, labeling and the like, it is sufficient to protect an "average consumer who is reasonably well-informed and reasonably observant and circumspect."[57] Member States cannot introduce rules to also protect those who are less than "reasonably observant and circumspect."

As the EC (EU) has been enlarged, existing Member States have been nervous that these rules will become a threat to employment, as cheaper goods and services flood in from new Member States with a lower living standard and, consequently, cost level. The EC/EU has usually introduced transitional periods for the free movement of workers, but not for goods and

55. Technical requirements for motor vehicles are one example of EU-wide harmonization.

56. One example is Directive 2000/31 on electronic commerce, which in effect bars Member States from enforcing their own rules relating to electronic commerce on providers of electronic services who are established in other Member States, but in return obliges all Member States to apply their own rules on the electronic service providers established in their territory, even with regard to services which are marketed or supplied in other Member States. European Parliament and Council Directive 2001/31, art. 3, 2000 O.J. (L 178) 9 (EC). However, the directive also lays down several significant exceptions to this principle of mutual recognition. *Id.*

57. *See* Case C-210/96, Tusky v. Overkreisdirektor Steinfurt, 1998 E.C.R. I-4657.

services.[58] In this context, it is important to note that workers who come from one Member States to work in another on behalf of their employer in their home state, falls under the rules on free movement of services: This is seen as the employer is supplying a service, for instance constructing a new building, by using his own work force in another Member State. The rules on free movement of workers only apply to those who come to work for a new employer in another Member State. Supplying a service means a stay of limited duration, with the workers' families remaining in the home state. This means that the employees are usually only offered the same pay as they would get at home, which is considerably less in Poland than in, for instance, France. As EC legislation has introduced mutual recognition of professional qualifications, the host states are also for the most part prevented from insisting on the use of skilled workers with education from their own vocational schools—which, of course, would have made it more difficult for service suppliers from other states to use their own work force. Under EC legislation, there is, however, a possibility to insist that foreign workers be paid the minimum wage of the host country, but the skilled workers of that country may often earn much more than the minimum wage and, furthermore, such rules may be politically difficult to introduce because those who benefit from cheap imported labor are not without political influence.

Fear of what this may bring probably was one reason why the electorates in France and the Netherlands voted against the new Constitution. The Constitution itself introduced nothing in this regard; the rules would have remained the same as they are presently. But a referendum is still a good chance for the electorate of a Member State "to send a signal" on matters which are only indirectly related to those which are formally at issue. The concept of the "Polish Plumber" putting French plumbers out of work played an important role in the French popular debate leading up to the referendum. It did not help that the Commission, using its monopoly on proposing new EC legislation, had recently presented a draft directive on free movement of services which was seen, wrongly to quite some extent, to liberalize even further this possibility of sending in low-paid workers from other Member States.

In the background of all this also looms the prospect of a future Turkish membership, which Turkey has been seeking for years and which the political leaders of the EU have accepted as a possibility in principle. However, the EU has been dragging its feet on the issue pointing, quite

58. With a limited exception for services with regard to Germany and Austria at the enlargements in 2005 and 2007.

rightly, to human rights abuses and shortcomings in the way the Turkish economy works, as reasons for postponing real negotiations. The electorate in the existing Member States seems to be very skeptical. The French President even went so far as to promise the French electorate a referendum on whether France should accept any future accession treaty for Turkey, in order to defuse the issue before the referendum on the Constitution.[59]

IV. CONSTITUTIONAL DEVELOPMENT UP TO THE CONSTITUTION

A. THE SINGLE EUROPEAN ACT: MARGARET THATCHER'S "BIGGEST MISTAKE"

All enlargements of the EC/EU mean amendments to the basic treaties. For instance, new Member States must be allotted votes in the Council and seats in the Parliament. In addition, there have been several other revisions of the basic treaty. A couple of them need to be mentioned, in order to understand better what the Constitutional Treaty was about.

As already mentioned, in 1987 the "cooperation procedure" between the Council and the Parliament was introduced as part of a treaty reform called the "Single European Act."[60] The reform also meant that decision-making by qualified majority was introduced in the Council in quite a few areas which until then had required unanimity. The British prime minister at the time, Margaret Thatcher, who was generally very skeptical towards European integration, accepted this because she thought the reform would make it possible to force through market-friendly reforms in spite of opposition from countries such as France. What she did not appreciate at the time, was that although this legislation may force open an internal market within the EC, it may nevertheless mean a step backwards in terms of liberalized markets, compared to the internal situation in Britain. She later reportedly characterized her support for the Single European Act as her single biggest mistake as prime minister.

59. This was done at news conferences and in interviews with French TV and other media from October 2004 onwards.

60. The Treaty entitled "Single European Act" was, for some reason, signed twice, in Luxembourg on February 17, 1986 and in The Hague on February 28, 1986. It entered into force on July 1, 1987.

B. THE MAASTRICHT TREATY AND THE ESTABLISHMENT OF A "EUROPEAN UNION"

The so-called Maastricht Treaty was signed on February 7, 1992, but only came into force on November 1, 1993. As already mentioned, this treaty revised the existing Treaty on the European Economic Community, inter alia by removing the word "economic" from the title, and by introducing the "co-decision procedure" between the Council and the Parliament. It also introduced into the EC Treaty the rules on Economic and Monetary Union, which is to say a common currency in the form of the EURO. (However, it is only since January 1, 2002, that the EURO exists as legal tender in the form of coins and bills, and new Member States do not immediately join this part of the cooperation. They first have to fulfill several economic criteria with regard to minimizing budget deficits, etc. Of the ten new Member States which joined in 2005, Slovenia is the first to adopt the EURO as its currency from January 1, 2007.)

The Maastricht Treaty also introduced the concept of the "European Union."[61] Contrary to popular belief, this concept did not replace the old name of "EC." Formally speaking, the EU is simply the common name of three forms of cooperation, of which the EC is still one. In EU parlance, one talks of the "three pillars" which make up the EU, with the "European Community," the EC, being the first pillar. The second pillar is the so-called "Common Foreign and Security Policy" and the third pillar is cooperation in police and judicial matters. The European Community is still the only entity which has the status of an international organization, with competence to enter into treaties with states and other organizations. All this was a concession to those, like the British and the Danish, who were, and remain, wary of any attempt to make the EC/EU into some kind of a federal state: They agreed to the concept of a European "Union," but did not accept the "Union" as an international organization. This subtle distinction has never played any important role in public debate. Even most lawyers prefer to speak of the EU, when they only address issues within the EC—which is not wrong, because after all, EC is part of the EU.

Decisions made in the second and third pillar do not have direct effect or primacy in the internal legal order of the Member States, and the Court of Justice has little or no jurisdiction. Furthermore, decisions are, with minor exceptions, only made by unanimity. This does, of course, mean that

61. Formally, the name of the treaty is "Treaty on European Union," but it is just as often, and particular with regard to those parts which are in fact amendments to the other Treaties, referred to as the "Maastricht Treaty" since it was signed in the Dutch city of Maastricht.

as long as the Member States disagree on a matter, like for instance the Iraq war, there will be no common foreign or security policy on that matter.

Needless to say, there are no EU armed forces or EU police force. There is some cooperation in military matters, but mostly with regard to humanitarian intervention abroad, and the armed forces involved still ultimately answer to their respective states, not to the EU, just like in NATO. There is also a bureau called "Europol," but it is mainly a center for analysis of intelligence provided by the Member States on international crime. Europol does not have any powers to arrest or prosecute on their own—and there is no EU Criminal Code.

The need for some kind of formalized cooperation in foreign and security policy and police and judicial matters grew out of the development of the EC. The EC always meant a common policy with regard to external trade. In the General Agreement on Tariffs and Trade (GATT) and later in the World Trade Organization (WTO), it is for the most part the EC, not the Member States, which acts, also as the formal treaty partner. As it is increasingly difficult to distinguish between trade policy and other aspects of foreign policy, and the EC Member States, in any case, have many common interests in foreign and security policy, they soon found themselves cooperating informally with regard to foreign and security policy in general.

The development of the internal market, with free movement of goods, services, persons and capital, also meant that there was a need to cooperate not only with regard to fighting cross-border crime, but also with regard to civil matters like jurisdiction in commercial disputes and family matters, etc.

The Maastricht Treaty also wrote into treaty text the existence of summit meetings of heads of state and government which takes place regularly twice a year and which decides on general policy issues. This is now called the "European Council," not to be confused with the "Council" of the EU—nor with the "Council of Europe," which is a separate international organization.

C. THE AMSTERDAM AND NICE TREATIES

The Maastricht treaty left nobody fully satisfied. Some thought it went too far, others had wanted more. This led to two further treaty revisions: the Amsterdam Treaty (signed on October 2, 1997, and in force since May 1, 1999), and the Nice Treaty (signed on February 26, 2001, and in force since February 1, 2003). The Amsterdam Treaty incorporated into the EC Treaty the so-called "Schengen Cooperation," which some of the Member States had started some years earlier and which abolished passport control at the internal borders in exchange for further harmonization and

cooperation with regard to external border control and police matters in general.[62] However, some states, like the United Kingdom, reserved the right not to take part (and new Member States are not automatically admitted from Day One). The Nice Treaty is perhaps best known for an instrument which did not become part of the treaties, but remains a "Charter" on fundamental rights which were only politically binding.[63] Several Member States were nervous about the effect of the instrument, which contained many broad and vague principles inspired by the European Convention on Human Rights,[64] fundamental rights as enshrined in the constitutions of the Member States and also by some of the provisions of the EC Treaty itself, should it become legally binding and subject to the jurisdiction of the EC Court of Justice, which in the view of many Member States can be too much of a judicial activist. Accordingly, the instrument did not become a binding part of the Nice Treaty.

V. THE CONSTITUTION

By now, the treaty system of the EU/EC had grown into a jungle: several treaties, some with several hundred articles, establishing a plethora of different procedures and overlapping enabling clauses. The growing number of Member States, in particular bringing in the many small and medium-size countries of Central and Eastern Europe, would also, in particular according to the bigger states, make the existing decision-making procedures in the Council even more cumbersome. This was seen not only as a technical problem, but also as something which alienated the citizens of Europe from the EU. Already with the Maastricht Treaty, there had been problems in getting the electorate in certain states to accept the new treaty. France's referendum produced a tiny majority in favor, and Denmark had a "No" in its referendum, then obtained some concessions through

62. *See* EC Treaty arts. 4(2), 61–64; *see also* Protocol 2 to the Amsterdam Treaty. Also some provisions concerning cooperation in police and judicial matters in the Treaty on European Union serve as legal basis for decisions pertaining to what is still often referred to as the "Schengen Cooperation." These provisions were already so broadly formulated that there was no need to amend them in order to accommodate "Schengen" decisions.

63. The Charter was solemnly signed and proclaimed by heads of State and Government of the Member States, the Commission and the European Parliament on December 2, 2000 in Nice.

64. The Convention was signed in Rome on November 4, 1950, with further amendments. It is the main achievement of the organization called the "Council of Europe." All EU Member States are also members of the Council of Europe, along with most other European States, including, since 1996, Russia. The Council of Europe has established its own European Court of Human Rights. Individuals who consider that their rights under the Human Rights Convention have been violated may launch a complaint with the Court, which may then render a binding judgment against the State in question and award damages. It is often confused by the general public with the EC Court of Justice, since they are both often referred to as "the European Court."

renegotiations and organized a second referendum with a majority in favor. Consequently, tidying up the text and streamlining the procedures, consolidating everything into one treaty was seen as useful, not only from a technical point of view but also in making the EU more relevant to the citizens of Europe.

Out of this, the Constitution was born, not really as a means of restructuring the EU in any fundamental way. It was not at all clear from the beginning that the new treaty should be called a "constitution," and it might be said that the name is something of a compromise. It is still a "treaty," and the concept of "Constitution for Europe" (not "Constitution of the European Union") in all its grandeur, also indicates certain vagueness in what this is all about.

So, what's new? First, one has done away with the "three pillar structure." The "EC" is to become history—everything is now to become the "European Union," which will be an international organization with its own legal personality.[65] However, as indicated above, most people probably believe that this happened already with the Maastricht Treaty.

More importantly, decision-making in police and judicial cooperation mainly follows the same rules as the internal market, with qualified majority in the Council and participation by the European Parliament through the co-decision procedure (renamed the "ordinary legislative procedure," with the cooperation procedure being eliminated). This leads to direct effect and primacy also in this field, just as for the internal market rules. But the scope of application of the rules on police and judicial cooperation remains largely the same, and there is still no EU police force that can act independently of national police forces.

As to foreign and security policy, unanimity and the pre-eminence of the Council over the Parliament remains the main rule. Foreign and security policy remains a separate "pillar" for all practical purposes.

With regard to the internal market, the "ordinary legislative procedure" is set to apply to some areas, which today are not subject to the co-decision procedure, such as the common transport policy. On the other hand, indirect and direct taxation in the Member States,[66] the own sources of

65. Treaty Establishing a Constitution for Europe, art. I–7, 16 Dec. 2004, 2004 O.J. (C 310) 1 [hereinafter Constitution for Europe].

66. *See id.* art. III–171, corresponding to EC Treaty art. 93 (regarding indirect taxation) *and* Constitution for Europe, art. III–173, corresponding to EC Treaty art. 94 and which generally covers 'approximation of such laws . . . as directly affect the establishment and functioning of the internal market'. This also covers direct taxation to the extent the tax rules in question "directly affect the establishment and functioning of the internal market." Presumably, also the "flexibility clause" in Constitution for Europe art. I–18, corresponding to EC Treaty art. 308, authorizing "appropriate measures" to "attain one of the objectives set out in the Constitution . . . within the

income for the EU[67] and harmonization of labor market rules[68] remain subject to unanimity in the Council. This means that each Member State can veto the increase in power for the EU which would go with an increase in available economic resources for the EU.

There is also a new role for national parliaments in the legislative process of the EU. They are to be informed of new proposals for legislation to be passed by the Council and the European Parliament, and would have the opportunity to state their opposition to the issue at hand being regulated at a European level rather than at a national level.[69] From one perspective, this may seem to be a step backwards for integration. On the other hand, it is an interesting departure from normal practice in international relations to give national parliaments their own role on the international arena. Normally, states are always represented by their governments with parliaments having to exert their influence by way of instructing the government. In this perspective, this new mechanism may be seen as a step in the direction of further integration, although not in the direction of a traditional federal state.

Perhaps the most difficult issues during the negotiations were the voting system in the Council and the size of the Commission. The bigger states wanted both a voting system which would increase their weight in the Council, and a Commission with fewer members than there are Member States. With regard to the first issue, they saw this both as a question of making decision-making more efficient—less possibility for a minority to block decisions—and as a question of democracy: getting nearer to the ideal of one citizen, one vote. They wanted a system of "double majority:" A

framework of the policies defined in Part III [the internal market]" could be used as a legal basis for harmonization of direct taxation. All articles call for unanimity in the Council and attribute only the role of a consultative body to the European Parliament. On the other hand, Constitution for Europe art. III–172, corresponding to EC Treaty art. 95, which authorizes the use of qualified majority for legal acts "which have as their object the establishment and functioning of the internal market," in paragraph 2 specifically excludes "fiscal provisions" from its scope of application, thus preventing this article from being used as a legal basis for harmonizing tax matters.

67. Constitution for Europe article I–54, corresponding to EC Treaty art. 269.

68. Constitution for Europe art. III–210(3).

69. *Id*. art. I–11. According to the Protocol on the Role of National Parliaments in the European Union, draft European legislative acts shall be forwarded to national Parliaments and the Council, and the European Parliament may not place a draft act on the agenda for adoption or the adoption of a position until six weeks after the draft act was made available to the national parliaments. Moreover, according to the Protocol on the Application of the Principles of Subsidiary and Proportionality, each national Parliament has two votes, with one vote for each chamber in two-chamber Parliaments. If one third of the total number of votes (or one fourth with regard to legislation in the field of "freedom, security and peace," such as police cooperation) stands behind the view that this should not be regulated at the EU level, the draft must be reviewed by the initiator, which in most cases will be the Commission, for possible amendments or full withdrawal.

majority of the Member States representing a majority of the population of the EU. The compromise solution was a qualified majority consisting of fifty-five percent of the Member States representing sixty-five percent of the population, but also a proviso that a blocking minority must consist of at least four Member States (since three of the biggest could have more than thirty-five percent of the population between them).[70] Compared to the present system, the difference is not all that big in real terms.

The smaller states were also opposed to a Commission consisting of less than one member per Member State. As set out above, even though the commissioners are to act in complete independence of their home states, the Member States still consider it essential that "one of their own" be present when decisions are made. Probably with good reason, the smaller states were afraid that the biggest states would always be able to nominate a commissioner, leaving the smaller states to take turns "out in the cold." Again, a compromise was reached: The number of commissioners shall be two-thirds of the number of Member States, but with a provision to guarantee that the bigger Member States shall not enjoy any privileges, and that the composition shall reflect the demographic and geographic range of the union.[71]

Another controversial issue was that of presidency in the Council and the European Council. Today, all Member States take turns, on an equal footing and for half a year each, in presiding over all meetings in the European Council, the Council—and not least all the sub-committees within the Council structure. This can be quite a task even for the bigger states, which complain that the smaller states simply do not have the necessary resources to do it properly.

According to the new treaty, the European Council is to have a permanent president, elected for periods of two and a half years.[72] He or she would probably be a former prime minister, or somebody of that stature, and the new president's influence to set the agenda and move things forward would probably, to a large degree, depend on the personal qualities of that person. In the Council of Ministers, however, the old system of rotation between the Member States is set to continue,[73] but in the form of

70. Constitution for Europe art. I–25. The population of the EU is currently approximately 495 million. Thirty-five percent of that number is circa 173 million. The three biggest, Germany, France and the United Kingdom, have a combined population of approximately 206 million. Also other combinations of three of the larger States, such as France, the United Kingdom and Italy, or Germany, the United Kingdom and Spain, would suffice for a blocking minority without this rule.

71. Constitution for Europe art. I–26.

72. *Id*. art. I–22. The term of office will be renewable once.

73. *Id*. art. I–24(7).

troikas of countries which will take turn in chairing meetings, but which would assist each other, for instance so that the country which formally has the right to chair all meetings in a certain six months period may ask one of the others to chair certain committees. By mixing small and big states in the troikas, the hope is probably to ease the burden for all, and in particular for the smaller states.[74]

There is however one exception to this: Meetings in the Council concerning foreign policy is to be headed by a new EU "foreign minister" elected by the Member States by qualified majority and also approved by the President of the Commission.[75] This new foreign minister shall at the same time also be a vice-president of the Commission and be responsible for foreign relations in the Commission. As a matter of principle, this may seem like an odd solution: The Council and the Commission are different bodies which often have conflicting interests. However, it may be practical in foreign affairs. Today, it is a problem that the Commission is responsible for external trade relations and EU aid to developing countries, which means that Council's foreign affairs representative (there is such a figure already today) lacks control of the main means through which the EU can actually influence the behavior of other countries. The EU will still not have its own armed forces or other traditional means of exerting influence on the international arena. The Member States will retain their own foreign ministers and their own diplomatic services, and they will not cede more sovereign powers in the field of foreign policy to the EU and its new Foreign Minister.

With regard to the substantive content of the new treaty, in particular provisions which concern the citizens directly, the main news is the incorporation of the Charter on Fundamental Rights, agreed upon in Nice, into the treaty as a legally binding text. The Chapter is to become Part II of the treaty. The Member States have obviously been nervous about the effects of this, because they have tried to circumscribe the ability of the Court of Justice to interpret the charter provisions in an expansive way.[76] For instance, they have introduced an obligation for the Court to "pay due regard to" an explanatory report drawn up by the Member States, in interpreting the often quite vague rules of the Charter.

The drafters did not succeed in making the new text much shorter than the existing texts. The new treaty still has some 450 Articles, and in

74. The troika system is not laid down in the Treaty itself but is outlined in a declaration entitled "draft decision of the European Council on the Exercise of the Presidency of the Council," which is attached to the Final Act of the Treaty.

75. Constitution for Europe art. I–28.

76. *Id*. art. II–112(7).

addition there are more than 300 pages of protocols. The drafters have tried to make up for this by introducing a Part I of about sixty articles which give the main principles both with regard to the institutional set-up and the powers of the EU vis-à-vis the Member States. Here we find for the first time enshrined in treaty text the principle of primacy of EU (or, rather, as of now, EC) law, and a comprehensive list of areas of exclusive competence for the EU.[77] For those familiar with the case law of the EC Court of Justice, this is nothing new.

Neither is there anything substantially new in the rules on how to amend the treaty. Except for a possibility to move from a requirement of unanimity to qualified majority in the areas of the environment, labor relations and family relations, which already exists, all amendments are subject to constitutional procedures in all Member States. In all cases, even for the move to qualified majority with regard to the environment etc., unanimity is required. The requirement of unanimity stands in contrast to the United States Constitution's amendment procedures, which require two thirds of both the House and Senate, and then ratification of three fourths of the States.

In contrast to the existing treaties which are silent on the issue, the Constitution has a provision on the right of Member States to withdraw from the Union.[78] On the other hand, it is doubtful that the other Member States, even without any express provision, would try to prevent a Member State from withdrawing. Trying to keep on board a Member State which is bent on withdrawing would create more problems for the others than it would solve, and from a legal point of view the absence of a provision on withdrawal is not necessarily the same as a prohibition against withdrawal.

There are also other interesting changes. However, they are of lesser importance with regard to the overall issue of whether the Constitution would make the EU into something completely new, some kind of a federal state.

To me, this means that the fundamental nature of the EU would not have been changed by the "Constitution;" it would not have transformed the EU into a new federal state. Most would have remained the same as the present, and many of the changes are either of symbolic nature or, with regard to for instance the new foreign minister or the new voting system in the Council, can be described as tinkering with the present system without really changing it fundamentally. In many ways, the Maastricht Treaty

77. *Id*. arts. I-6 (primacy), I-13 (areas of exclusive competence).
78. *Id*. art. I–60.

entailed much more fundamental changes to the EC/EU than does the Constitution.

So why then the negative outcomes in France and the Netherlands? I think that the main reason is that the new treaty was presented to the people as a document that appeared to change more than it actually would. When something is called a "Constitution" and a referendum is organized—which at least in the Netherlands was not constitutionally needed—on whether to accept it, one should not be surprised to find out that people actually believe that this is a watershed decision.

In addition, the drafters had done a good job, from a pedagogical point of view, in setting out in clear language in the treaty itself existing principles such as primacy and exclusive competence, which today mainly follow from case law, or may only be inferred from the treaty text itself. The problem was however that many who for the first time realized that these principles already were part of EC law, reacted against them. Saying "No" to the Constitution would not change the legal situation, but it was a natural way of venting one's opposition.

The same could be said about frustration with the way the internal market was already working. This is where the "Polish Plumber" comes in: Many were obviously afraid of the consequences for their own jobs of the internal market being extended to low-cost countries in Central and Eastern Europe. Many probably also wanted to send a warning signal with regard to Turkish membership.

General discontent with the government of the day may also explain why many voted "No" to something which they did not consider to be a vital importance for the future of Europe. "Non" in France could have been a "non" to President Chirac and his government as much as a "non" to the treaty.

On the other hand, if one takes a broader, political view instead of the purely legal, and perhaps short-term, view presented above on what the Constitution would change, it may be argued that the adoption of a "Constitution for Europe" actually would be a watershed decision: even if European law would not change dramatically as a direct consequence of the Constitution, its adoption may lead to a change in the way politicians and the electorate alike think about Europe and its political and economic future. This could lead to a more intensive political and economic integration than otherwise would be the case, even if that development formally would have been possible already under existing rules. In turn, this may lead to a different Europe than would otherwise be the case, including future amendments to the Constitution which would bring the EU closer to a real federal state.

But then again, this might not have happened even if the Constitution were adopted.

VI. WHAT NOW?

As mentioned earlier, the referenda in France and the Netherlands immediately caused several countries to postpone their own ratification procedures. Many thought that this was the end of it, and that the Constitution, for all practical purposes, was now dead. However, no political leader in office dared to say so out loud, for fear of being branded as the one who killed the project. This applied also to the United Kingdom and Denmark, where the politicians had every reason to fear a negative outcome of a referendum, with possible disastrous effects for their own political lives. Even French and Dutch political leaders refused to say that there was now no chance that their countries would ratify, without really offering any ideas on how it could now happen.

The reason for this is to be found in the fact that almost all Member States want most of the institutional reforms that were included in the Constitution. This is so even for Member States which may not have been very keen on the concept of a "constitution."

On the other hand, it has not been lost on the politicians that many voters are uneasy about the effects of the internal market with regard to their job security. The proposal for a new services directive, mentioned above, was considerably watered down before it was passed—so much so that one may ask whether it really adds much to the existing legal situation. On the national level, there has also been a revival of protectionism, in the form of what the then French Prime Minister Dominique de Villepin termed "economic patriotism"[79] and which has taken the form of trying to block cross-border mergers—not necessarily successful, though. In Luxembourg, which is home to the headquarter of one of the world's largest steel producers, Arcelor, a merger finally took place between Arcelor and Mittal Steel, an even bigger steel producer which is incorporated in the Netherlands but which is controlled by an Indian-born British citizen. This happened despite frantic efforts both by the French and the Luxembourg governments to try to block the merger. This demonstrates that the internal market is standing firm, although the future development may slow down.

At the meeting of the European Council on June 21–22, 2007, Germany, holding the Presidency of the EU in the first half of 2007, managed to get an agreement on the basic principles of a "Reform Treaty"

79. Used in a televised address on January 31, 2006.

amending the existing treaties.[80] The Portuguese Presidency for the second half of 2007 has already produced a draft of the treaty.[81] The new text keeps most of the institutional reforms envisaged in the Constitutional Treaty, but within the framework of the existing treaties. The word "Constitution" is conspicuously absent. In the coming months, Member States will negotiate hard to agree on a finalized text. No doubt, some Member States will try to obtain more favorable solutions, for instance on voting power in the Council, than they got during the negotiations for the Constitutional Treaty. Time will tell whether a new treaty will make it through the ratification process in all Member States. In some Member States, governments may find it hard, for political reasons, to avoid a referendum even if they manage to avoid clauses in the new treaty, which would trigger a referendum for constitutional reasons. If so, one should not take it for granted that the national electorates would accept the new treaty. It is often said that the European Union only develops through crises. This would seem to be true also this time.

80. General Secretariat of the Council, Council of the European Union, *ICG 2007 Mandate* 2, No. 11218/07 of 26 June 2007, *available at* register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf.

81. Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 1/07, 23 July 2007, *available at* http://www.ciginfo.net/demain/en/default.htm.